



# MANCHEL BRENNAN

COUNSELLORS AT LAW

## EMPLOYMENT LAW ALERT (NOVEMBER 8, 2021)

### IMPLEMENTING OSHA'S NEW COVID-19 VACCINATION REQUIREMENT

OSHA has finally published its rule on the mandatory COVID-19 vaccination program that must be implemented by employers with 100 or more employees. Although the rule is designated as an “Emergency Temporary Standard” (or “ETS”), OSHA’s intention is that the ETS will become permanent after an applicable comment period. So what do employers need to do now?

- Does your organization have 100 or more employees and, therefore, must comply with the ETS? If not, make sure you consider whether your organization is covered under the separate requirements that apply to federal contractors and subcontractors or to certain health care providers.
- Start drafting the mandatory policy that must be in effect by December 6, 2021 (see below regarding litigation challenging the ETS). Your organization needs to choose one of two options: (1) all employees must be vaccinated (this is the approach recommended by OSHA); or (2) employees may choose between being vaccinated or undergoing weekly testing and wearing required face coverings. Although OSHA has published a model policy for each approach, the model policies require significant tailoring and editing in order to comply with federal and state laws, and have omitted certain information requirements (see below). The employer’s written policy must address a number of issues regarding the vaccination program implemented by the employer, including:
  - That the policy does not cover employees who: do not report to a workplace where other individuals are present; work from home; or work exclusively outdoors.
  - If the policy requires all employees to be vaccinated, it must provide for a process to consider exemption requests for employees: for whom vaccination is medically contraindicated; for whom medical necessity requires a delay in vaccination; or who are legally entitled to a reasonable accommodation under applicable law because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement. Also, all policies should provide a process to consider exemption requests from the testing and/or face covering requirements for any employee who is legally entitled to a reasonable accommodation under applicable law because they have a disability or sincerely held religious beliefs, practices or observances that conflict with the testing and/or face covering requirement(s).
  - The ETS requires employers to provide up to four hours of paid time off, including travel time, for employees to get vaccinated. However, some state and local laws require employers to provide a more generous benefit, and any such requirement should be incorporated into the policy. For example, employees in Massachusetts currently are entitled to up to one week of paid COVID-19 sick leave to use for a variety of reasons, including to receive the vaccination (and the pay is capped at \$850 per week).
  - The ETS requires that employers provide “reasonable time and paid sick leave” for employees to recover from side effects following vaccination. The ETS does *not* define “reasonable time” and does not establish a minimum or maximum amount of “sick leave.” The regulatory notes to the ETS indicate that an employer may require employees to use accrued paid time off, such as sick or PTO time, for this purpose. However, as stated above, some state and local laws require employers to provide a more generous benefit, and any such requirement should be incorporated into the policy.

- The ETS does not require employers to pay for employee COVID-19 testing or time off from work for that purpose, but there remains uncertainty whether an employee could argue that such testing and/or time spent in obtaining tests should be paid for by the employer. In fact, the ETS notes that, “employer payment for testing may be required by other laws, regulations or collective bargaining agreements or other collectively negotiated agreements.” The policy should, therefore, address whether the employer will pay for such testing and/or time.
- The policy should require employees to promptly notify the employer when they receive a positive COVID-19 test or are diagnosed with COVID-19 by a licensed healthcare provider. An employee who is COVID positive must immediately be removed from the workplace until the employee receives a negative test, meets the CDC’s return to work criteria, or receives a recommendation to return to work from a licensed healthcare provider.
- Prepare forms to use for employees who request medical or religious exemptions. In an unusual move, the EEOC has published, as a model, [the form](#) that it uses internally for religious exemption requests by its own employees.
- Learn the process and applicable law that must be followed when considering any requests for exemptions, including reviewing Sections K and L of [the EEOC’s published guidance](#).
- Establish a process to determine each employee’s vaccination status, which is required by the ETS. Each vaccinated employee must provide acceptable proof of vaccination status; the ETS defines what is considered “acceptable proof.” The employer must create and maintain an employee roster which identifies the vaccination status of each employee. This roster must be maintained as confidential employee medical information. Upon request by an employee, the employer must provide the aggregate number of fully vaccinated employees at the workplace along with the total number of employees at that workplace.
- If your organization elected to allow employees to choose weekly testing and face coverings in lieu of vaccination, establish a process to track and retain such results. The results must be maintained as confidential employee medical information.
- Provide the following to all employees, as required by the ETS: (1) information regarding the requirements of the ETS and the employer’s policy and procedures implementing the ETS; (2) the CDC’s publication titled: [“Key Things to Know About COVID-19 Vaccines”](#); (3) information regarding the anti-retaliation provisions of the Occupational Safety and Health Act, 29 CFR § 1904.35(b)(1)(iv); and (4) information regarding the criminal penalties associated with knowingly supplying false statements or documentation (presumably as they pertain to the vaccination and other requirements of the ETS). Although items (1), (3), and (4) could easily be incorporated into the employer’s COVID-19 vaccination policy, the OSHA sample policies do *not* address items (3) and (4). Therefore, employers should consider adding them to their policy, and remember to distribute item (2) above with their policy.

Many legal challenges have been filed since the ETS was published last week. In one such case, the Fifth Circuit Court of Appeals has issued a stay, temporarily halting implementation of the ETS. That court is expected to hear argument and issue a final ruling shortly (which undoubtedly will be appealed to the U.S. Supreme Court). Although no one can predict the outcome of any litigation, given the deadlines for employers to implement the vaccination program required by the ETS (December 6, 2021 for the policy, and January 4, 2021 for the vaccination requirement), employers should proceed with planning to implement the ETS.

Please feel free to contact us if we can be of any assistance.

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