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CLIENT ALERT

OSHA Issues Emergency Temporary Standard on Workplace Vaccine or Testing Mandate

By: John Vering, Mark Opara, and John Neyens

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued its much-anticipated Emergency Temporary Standard (ETS) generally requiring employers with at least 100 employees (which includes all full-time and part-time employees, company-wide) to mandate that their employees get vaccinated against COVID-19 or wear a mask at work unless working outside and undergo COVID-19 testing on a regular basis (at least weekly).

Highlights of the ETS (which will be published in the Federal Register on November 5, 2021) include the following:

- All unvaccinated workers must begin wearing masks by December 5, 2021 and provide a negative COVID-19 test on at least a weekly basis beginning January 4, 2022.
- Employers must ascertain the vaccination status of their employees and maintain this information as confidential medical information by December 5, 2021.
- Employers must develop a written policy to comply with the ETS and provide a copy of that policy to employees by December 5, 2021.
- The deadline for federal contractors to comply has been moved back to January 4, 2022.
- Employers are not required to pay for or provide the test (unless required by state or local laws or a union contract).
- Employers must pay for up to four hours of time off for employees to get vaccinated, and cannot require employees to use personal or sick leave time to get vaccinated.
- Employers are required to provide a reasonable amount of paid sick time to employees recovering from vaccination side effects, but can require use of accrued sick leave (if available) to cover time away from work recovering from the side effects of vaccination.
- There are three exceptions to the vaccine mandate: (1) those employees for whom a vaccine is medically contraindicated; (2) those for whom medical necessity requires a delay in vaccination; or (3) those legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.
- The OSHA ETS does not generally apply to employees in settings covered by the previously issued Healthcare ETS while that ETS is in effect. [Click this link to see our prior client alert on this topic.](#)

OSHA is offering robust compliance assistance to help businesses implement the standard, including a [webinar](#), [frequently asked questions](#) and other [compliance materials](#).

The ETS has numerous very detailed requirements which are beyond the scope of this Client Alert. Moreover, although the frequently asked questions state that the ETS preempts or controls over contrary state and local laws, legal challenges to the ETS have already been announced and will be forthcoming.

We are prepared to assist you with legal advice on these issues, including helping you develop policies, procedures and forms to deal with the ETS and potentially conflicting federal, state and local guidance.

Finally, note that the Centers for Medicare & Medicaid Services (CMS) has also just issued its much-anticipated interim final rule requiring employees of healthcare facilities participating in Medicare and Medicaid programs to be fully vaccinated by January 4, 2022. Unlike OSHA's ETS, there will be no option of regular COVID-19 testing instead of vaccination. This rule is also scheduled to be published on November 5, 2021. We will provide a separate Client Alert addressing this new rule applicable to our healthcare clients.

This article is general in nature and does not constitute legal advice. Please note that new guidance is being provided by authorities on a daily basis so please monitor new developments and guidance, including but not limited to our firm's [COVID-19 Resource Center](#). Readers with legal questions should consult John Vering (jvering@sb-kc.com), Mark Opara (mopara@sb-kc.com), John Neyens (jneyens@sb-kc.com), Shannon Johnson (sjohnson@sb-kc.com), Brenda Hamilton (bhamilton@sb-kc.com) or other shareholders in Seigfreid Bingham's Employment Law Group, or your regular contact at Seigfreid Bingham at 816-421-4460.