

Summary of OSHA Emergency Temporary Standard for Implementation of COVID-19 Vaccine & Testing Mandates

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On Nov. 4, 2021, the Occupational Safety and Health Administration (“OSHA”) issued its long-awaited Emergency Temporary Standard (“ETS”), in which private employers with at least 100 employees will be required to implement sweeping COVID-19 vaccine and/or testing mandates. Employers undoubtedly will have plenty of questions as more guidance is released, but here are some of the initial high points:

OSHA’s ETS

- Employers with more than 100 employees must require vaccinations for their employees or have employees show a negative test at least weekly.
- The requirement does not cover employees who work full-time from home.
- Employers do not have to cover the costs of tests for unvaccinated employees (although state or local laws or collective bargaining agreement requirements may apply).
- Employers must provide employees with paid time off to get vaccinated or recover from any side effects.
- Employees who are not vaccinated must wear masks while at work sites, and employers must issue a written vaccination and mask policy that complies with the ETS.
- The deadline for employees to complete their vaccine regimen is January 4, but employers must comply with the paid time off and unvaccinated worker masking and policy requirements by December 5.

The Centers for Medicare and Medicaid Services’ (“CMS”) Emergency Rule

- CMS also issued an Emergency Rule. Health care workers at hospitals, nursing homes, and other facilities that participate in Medicare and Medicaid must be fully vaccinated by January 4.
- CMS’s rule does not include the weekly testing option.

Federal Contractor Rule Pushed Back

- The federal contractor requirement that employees be vaccinated has been pushed back to January 4.

Relationship between Federal Rules

- OSHA’s ETS will not apply to workplaces covered by the stricter CMS or federal contractor rules.
- Employers must still consider requests for medical or religious exemptions from vaccinations as reasonable accommodations. Weekly testing is set up as a logical accommodation to vaccination under OSHA’s ETS.

Relationship with State and Local Laws

- The federal government stressed that its rules preempt any contradictory state or local laws.
- New Tennessee legislation, which Governor Lee is expected to sign or otherwise allow to become law, does not prohibit vaccination requirements. The law, though, would prohibit employers from requiring employees to show **proof** of vaccination. The law has a carve-out for employers that need to impose a mandate (and obtain proof of vaccination) to “conform to federally awarded or amended contracts [or] subcontracts ... as a condition to receipt of federal funds.” OSHA’s ETS requires **proof** of vaccination, bringing it directly into conflict with the Tennessee law.
- Because Tennessee has its own state OSHA (TOSHA) plan, the federal mandate will not be effective in Tennessee until TOSHA issues a corresponding plan, which we would anticipate to be 30 days or so behind the federal mandate.
- Many Republican-led States are expected to challenge the legality of the ETS. These federal-state government conflicts likely will play out in the courts in the coming weeks and months.

We Can Help

Contact Brad Harvey or any member of Miller & Martin’s [Labor & Employment](#) practice group with questions and guidance.