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On November 4, 2021, the Occupational Safety and Health Administration (OSHA), issued an Emergency Temporary Standard (ETS) requiring all employers with 100 or more employees to make sure their employees are fully vaccinated against COVID-19 or commence weekly testing. Employers covered by this mandate must implement many of the requirements by December 5, 2021 and required weekly testing must start by January 4, 2022. The basic premise of the mandate is that employers must comply by: (1) requiring all employees show proof of full vaccination unless the employees qualify for a medical or religious exemption (employees granted exemption must comply with weekly testing and wear masks in the workplace); or (2) provide employees with the option of either showing they are fully vaccinated or participating in weekly testing and wearing of masks. Although there are already legal challenges to this mandate which will be addressed by the courts, all employers should determine now whether they are covered by this mandate and have a plan in place to implement the requirements by the above dates.

What employers are covered?

The ETS applies to all employers that have 100 or more employees company-wide regardless of location, except workplaces covered by the Safer Federal Workforce Task Force COVID-19 (federal contractors or subcontractors) or workplaces covered by the Emergency Temporary Standard for healthcare employers. The ETS requirements do not apply to employees:

- who do not report to a work location where they have no contact with any coworkers or clients;
- who work exclusively from home; or
- who work exclusively outdoors (being in a vehicle with others is not exclusively outdoors.)

What do I do if I am a covered employer?

Under the ETS, employers covered by this mandate must put in place a written policy which requires covered employees to either be fully vaccinated or commence weekly testing by January 4, 2022. Fully vaccinated means two weeks after an employee's second dose with a two-dose vaccine (Pfizer or Moderna) or two weeks after a single dose (J&J). The policy must allow for accommodations for employees that cannot be vaccinated due to a valid medical or religious exemption. The policy must inform employees of the employer's requirements for mandatory vaccination or weekly testing, other potential precautions (for example, an employer may but is not required to offer 100% work from home) and must advise employees of OSHA's prohibition of retaliation and whistleblower protections.

What are the deadlines?

The ETS requires covered employees to either be vaccinated or commence weekly tests by January 4, 2022. The deadline for creation and notification to employees of the employer's policy, including compliance with all requirements other than full vaccinations or weekly testing, is presently December 5, 2021. As noted above, these mandates are already being challenged in court and these deadlines may be

suspended or lifted by court order on short notice so compliance by the stated deadlines should be the goal.

How do I verify vaccination status of employees?

The ETS authorizes employers to verify vaccination status by obtaining:

- a record of vaccination from a healthcare provider or pharmacy;
- a copy of the COVID-19 Vaccination Record Card;
- a copy of medical records showing vaccination received;
- a copy of vaccination record from a public health, state, or tribal information system; or
- a copy of any other official document showing vaccination was received which shows date administered, type of vaccine, and name of the place where vaccine was administered.

In rare cases when the employee has lost or cannot prove vaccination status, the employer may provide a signed and dated attestation of vaccination status, that they have lost or otherwise unable to produce proof of vaccination but provide as best they can the date of vaccination, type of vaccine, and name of provider or site when administered.

Employers must maintain a record of each employee's vaccination status in a roster format and keep proof of such vaccination status as described above. These documents should be maintained securely and confidentially. When the employer has already obtained vaccination status of employees prior to the commencement of the ETS, the employer does not have to re-verify status of employees who have been

verified as fully vaccinated. The employer should also keep a record of exemption status and all weekly tests. These should be considered medical records, should not be kept in an employee's personnel file, and must be preserved only while the ETS is in effect.

What about weekly testing?

Employees who are not fully vaccinated must receive a COVID-19 test weekly if they are present in the workplace or within seven days before they return to work if they have been away from the workplace for seven days or longer. Employees who are not fully vaccinated and do not submit to weekly testing must be removed from the workplace until a negative test is received. Regardless of vaccination status, employees with a positive COVID-19 test or who are diagnosed with COVID-19 must be removed from the workplace until they meet certain return-to-work criteria. OSHA has specific requirements for the type of weekly COVID-19 test that must be administered to meet the weekly testing requirements. OSHA provides that employers may require employees to bear the cost of testing except where testing is offered as an accommodation or state law requires the employer to pay for the test. The Fair Labor Standards Act and state law will also impact whether non-exempt employees must be paid for the time spent obtaining the weekly test and further guidance is expected from the state and federal DOL on this issue in the coming weeks.

Are there any paid time off requirements for vaccine and testing time?

Employers must provide up to four hours of paid time off, inclusive of travel time, at the employee's regular rate of pay for an employee to be vaccinated, if during work hours. In addition, the employer must provide a "reasonable" time and paid sick leave to

allow employees to recover from any side effects or sickness post-vaccination. The ETS does not include any guidance on what this “reasonable” time should be but does allow the employer to cap the amount of time. The ETS states that paid time off for side effects or illness may run concurrently with existing paid sick time (or paid time off already provided by the employer to cover sickness).

What other requirements apply?

In addition to mandatory vaccination and/or testing, the ETS requires employers make sure that unvaccinated employees wear masks in the workplace even if it is outdoors. Employers must also continue to report work-related COVID-19 hospitalizations or deaths. Employees are not required to wear masks alone in a closed office, for a limited time while eating or drinking, to identify themselves, or if required to wear a respirator type face covering as part of their job. The ETS has specific notification requirements that must be issued to all employees informing them of these rules and incorporates penalties for noncompliance by the employer which will be enforced by OSHA.

Final Thoughts?

Compliance with this mandate only increases the burden on employers already managing the challenges of the pandemic. If you have any questions or need legal advice on how to respond to this mandate or its requirements, please contact one of the employment attorneys at Halloran Sage:

Kevin J. Greene
(greene@halloransage.com)

Duncan Forsyth
(dforsyth@halloransage.com)

Robert L. Dambrov
(dambrov@halloransage.com)

Jennifer Pedevillano
(pedevillano@halloransage.com)