

– CLIENT ALERT –

**OSHA COVID-19 Emergency Temporary Standards Issued Regarding
Vaccination, Testing, and Face Coverings**

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) released a long-anticipated Emergency Temporary Standard (ETS)** regarding COVID-19 vaccinations, testing, and masking. The ETS implements the announcement made by the White House in September 2021 on the same topics. The COVID-19 Vaccination ETS is expected to be published in the Federal Register on November 5, 2021, and it will take effect then.

The new ETS rule applies to employers with 100 or more employees. By January 4, 2022, covered employers must have policies that require either:

- 1) employees are fully vaccinated against COVID-19, or**
 - 2) all unvaccinated employees test negative for COVID-19 at least once a week.**
- Employees who are unvaccinated will also be required to wear masks.**

Vaccination Requirements

The covered employer policy must have a policy requiring all employees to be fully vaccinated, except for those employees for whom the vaccine is medically contraindicated, medical necessity delays a vaccination, or are legally entitled to reasonable accommodation under federal civil rights laws.

Being “fully vaccinated” means that the employees must have received both doses of the Pfizer or Moderna vaccines, or one dose of the Johnson & Johnson vaccine.

Covered employers are also required to determine the vaccination status of each employee with acceptable proof of vaccination status. Covered employers must maintain a record of each employee’s vaccination status and store these records in accordance with requirements for storing employee medical records. Employees unable to provide acceptable proof must be treated as unvaccinated.

Time Off for Vaccination

Covered employers must pay employees for the time it takes to get vaccinated (up to four hours per dose) and provide reasonable paid sick leave for employees to recover from any side effects they encounter from the vaccine. The requirement to provide paid time off begins on December 5, 2021.

*** For background about Emergency Temporary Standards, OSHA is authorized to issue an ETS when employees are subject to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards. The ETS is also being considered as a pending final rule open for public comment prior to being adopted as a final federal regulation.*

Unvaccinated Employees

The covered employer policy must require all unvaccinated employees to be tested at least once every seven (7) days. Employees who are unvaccinated must be required to wear masks (and the type of mask worn must meet OSHA specifications). Covered employers must also keep an unvaccinated and untested employee removed from the workplace until the employee provides a test result.

Employers must maintain a record of each test result and store these records in accordance with requirements for storing employee medical records. Covered employers are *not* required to provide — or pay for — the testing of unvaccinated workers. COVID-19 tests approved by the ETS do not include those tests that are both self-administered and self-read. Note, however, that covered employers subject to a collective bargaining agreement may have an obligation to pay for testing if the agreement requires it. Also, Employers may be required to pay for such testing under State law.

Employees who are Positive for COVID-19

Regardless of vaccination status, the covered employer policy must also require each employee to notify their employer when they receive a positive COVID-19 diagnosis. Covered employers are required to immediately remove from the workplace any employee who receives a positive COVID-19 test result or diagnosis, until the employee receives a negative confirmatory result, meets CDC return to work criteria, or receives a recommendation to work to work from a healthcare provider.

Recordkeeping Issues

Covered employers are required to report to OSHA work-related COVID-19 fatalities within eight hours of learning of the fatality, and report any work-related in-patient hospitalization within 24 hours of learning of the hospitalization. Covered employers also must be able to make COVID-19 vaccine documentation available for inspection or copying by the next business day.

Applicability to Certain Healthcare Settings and Federal Contractors

The requirements of the ETS do not apply to healthcare settings subjected to vaccination requirements by the CMS emergency standard also released on November 4, 2021; or to federal contractor employers who are already subject to vaccination requirements under the Executive Order 13042 “Requiring Coronavirus 2019 Vaccination for Federal Contractors.” The deadline for compliance with those requirements has also been moved to January 4, 2022.

Enforcement and Looking Ahead

Fines for OSHA violations are steep at \$13,653 per serious violation, or \$136,000 per each willful or repeated violation.

We anticipate some issues will arise regarding enforcement, including legal challenges by companies affected by the mandate. These challenges will be in addition to questions about whether OSHA has the size or resources to effectively enforce the mandate. Illinois is among

several states with “State Plan” standards and rules, which means that Illinois OSHA has adopted federal standards and that the state agency can also enforce those standards. As with any OSHA issue, on-site inspections and employee complaints will drive a sizable amount of the enforcement. Employers should further note that employees who complain about violations of OSHA standards are protected from retaliation.

Contact Information

The guidance in this area is brand new, and we all know how dynamic the COVID-19 pandemic has been. Please be sure to contact your employment counsel at AGHL Law with any questions or guidance on how to best comply with this new requirement.

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