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The Federal Vaccine Mandates Are Finally Here - What Employers Need to Know

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Practice Area: Labor and Employment

PLEASE NOTE: Following the issuance of this *Legal Update* the 5th Circuit Court of Appeals issued an Order to Stay the enforcement of the Occupational Safety and Health Administration's November 5, 2021 Emergency Temporary Standard.

On November 4, 2021, the Occupational Safety and Health Administration ("OSHA") and the Center for Medicare & Medicaid Services ("CMS") issued regulations requiring covered employers to implement and enforce mandatory vaccination policies as a part of President Biden's COVID-19 action plan. This *Legal Update* will provide a high-level overview of the new OSHA Emergency Temporary Standard ("ETS") and the CMS interim final rule with comment period ("IFR").

OSHA ETS - Applies to Private Sector Employers with 100 or More Employees
Covered employers must implement and enforce a mandatory COVID-19 vaccination policy under which employees may either become vaccinated, or undergo regular COVID-19 testing and wear a face covering. Exceptions for medical and sincerely held religious beliefs continue to apply.

Covered employers are defined as private sector employers with 100 or more employees at any time the ETS is in effect. Employers must count all employees, including part-time workers, remote workers, minors, and temporary employees in determining its threshold compliance responsibility, regardless of location. Workers from staffing agencies are not considered employees of the company at which they are placed. Independent contractors are also not counted. The determination of "employees of the employer" considers all employees in the employer's workforce, not the number of employees at any one location.

Applicability of the OSHA ETS to public sector employers will be addressed in a separate *Legal Update* by our Government Law Group.

According to the OSHA ETS, an employer's vaccination policy must include a number of components, such as:

Paid Time Off ("PTO") to Receive the Vaccine:
Employees are entitled to PTO for the time necessary to receive the COVID-19 vaccine. The amount of vaccine PTO available is defined as a "reasonable" amount of time, not to exceed 4 hours. This time is also available for recovery time due to side effects if needed after receipt of the vaccine.

The OSHA ETS also provides that PTO may be used for recovery time due to side effects from the COVID-19 vaccination. OSHA ETS instructs that employers may *not* force employees to use *vacation* pay to cover an absence period arising due to side effects from the receipt of the vaccine.

Weekly Testing for Unvaccinated Employees:
The OSHA ETS does provide a "soft" compliance option that employers may adopt for unvaccinated employees in lieu of mandatory vaccination. Under this approach, unvaccinated employees must provide the employer with a negative test result every 7 days for continuing access to the workplace and continue to mask. The ETS and ETS-related OSHA guidance confirms that employers adopting the "soft" mandate approach are not *required* to pay for the cost of weekly COVID-19 testing. However, OSHA reminds employers, "…payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements."

For example, Wis. Stat. § 103.37(2m) provides:

(2m) No employer may require any employee or applicant for employment to pay the cost of a medical examination required by the employer as a condition of employment.

Employers that choose to implement the "soft" mandate approach under the ETS, permitting employees who are not fully vaccinated, and who are not otherwise exempt from testing, to test weekly for COVID-19 in lieu of vaccination, may be viewed as requiring "medical examinations" as a condition of continued employment under the statute. We anticipate that employees, and employee representatives, will invoke Wis. Stat. § 103.37(2m) in an effort to shift the cost of weekly COVID-19 testing to employers. Unfortunately, the precise meaning and scope of Wis. Stat. § 103.37(2m) is unsettled so this will be a developing discussion where employers, employees and unions may seek clarification from courts and administrative agencies.

Finally, the OSHA ETS states that employers must keep all testing records on file and these files should be considered employee medical files.

Removal and Reporting Requirements
If an employee tests positive for COVID-19, then the employer must ensure that the employee stays away from the workplace until they receive a negative COVID-19 test. If there is a fatality or an inpatient hospitalization, the employer must notify OSHA. The employers must do so within 8 hours of learning of an employee fatality due to COVID-19 and within 24 hours of learning that an employee was hospitalized due to COVID-19. In terms of providing information to employees regarding COVID-19 efficacy, employers must provide their employees with the CDC's document titled, "Key Things to Know About COVID-19 Vaccines." The employer need not provide any additional information on the benefits or efficacy of getting vaccinated.

Effective Dates
Enforcement under the OSHA ETS starts December 5, 2021 (30 days from the date that the ETS was published in the federal register (November 5, 2021)). Testing compliance begins January 5, 2022 (60 days from the November 5, 2021 publication date).

Penalties
If an employer does not comply with the OSHA ETS, OSHA can penalize employers for each violation. Failure to comply with the new OSHA ETS could lead to fines of up to $14,000 per violation. OSHA intends to penalize employers for each employee that is negatively impacted by the employer's failure to comply and each instance of failing to protect its employees. OSHA anticipates that the penalties will be large in order to achieve a deterrent effect.

CMS Interim Final Rule ("IFR")
Under the CMS IFR, Medicare and Medicaid-certified providers must take steps to assure that covered employees are vaccinated against COVID-19. While the IFR rules apply to all applicable providers regardless of employer size, the IFR and OSHA ETS do work hand in hand to define exemption compliance processes and the verification of workplace/resident safety.

Coverage
Only facilities subject to CMS regulation are subject to the IFR. While facilities with 100 or more employees are also subject to the OSHA ETS, there does not appear to be a contradiction in coverage or scope of compliance. The IFR is applicable to ambulatory surgical services, hospices, psychiatric residential treatment facilities, programs of all-inclusive care for the elderly, hospitals, long term care facilities, intermediate care facilities for individuals with intellectual disabilities, home health agencies, comprehensive outpatient rehabilitation facilities, critical access hospitals, clinics, rehabilitation agencies, and public health agencies that provide outpatient physical therapy and speech-language pathology services, community mental health centers, home infusion therapy suppliers, rural health clinics, federally qualified health centers, and end-stage renal disease facilities.

Compliance
The IFR provides that covered employers require all employees within the coverage of the guidance to be vaccinated or, alternatively, to qualify for an exemption from the vaccination requirement (due to qualifying medical or religious reasons). Unlike the OSHA ETS, employers are not permitted to select an alternative compliance format (i.e., testing and masking in lieu of vaccination) in the absence of qualifying for the exemption for which an accommodation is required. Employers must safeguard the workplace from COVID-19 exposure and illness. While the CMS guidance does not reflect a testing option for unvaccinated employees, the obligation to establish procedures or standards to provide workplace safety, minimize exposure and accommodate the individual as legally required may result in testing as an option in compliance.

Effective Dates
The IFR has two phases. Phase 1 is effective December 5, 2021 (30 days after this IFR's publication date.) Phase 1 mandates that all employees in a covered facility have received at least their first dose of the COVID-19 vaccine (or if administered in a single dose format, the single dose COVID-19 vaccine) or have been granted an exemption, and the facility has implemented policies and procedures required under the IFR. These policies and procedures include: 1) a system for ensuring that all employees are fully vaccinated (except those who received an exemption) prior to providing any service at their center, 2) a system for keeping track of employees who are vaccinated and who have received a booster, 3) a process for implementing precautions that should mitigate the spread of COVID-19, 4) a process for how and when an employee can request an exemption from the required COVID-19 vaccination policy, 5) a process for ensuring that all documentation related to exemption has been dated and signed by a licensed practitioner who is not the employee seeking the exemption, and 6) a system to verify that employees who say they are vaccinated, are in fact vaccinated.

Phase 2 is effective January 5, 2022 (60 days after this IFR's publication date). Phase 2 mandates that all employees in a covered facility be fully vaccinated against COVID-19 by the effective date, excluding those who have received an exemption or who must delay getting the COVID-19 vaccine due to clinical precautions. A person is considered fully vaccinated 14 days after receiving their final dose. However, under this IFR, employees who have received the second dose by the Phase 2 effective date will be considered fully vaccinated.

Monitoring
CMS plans to have State surveyors monitor whether facilities are complying with this IFR. Failure to comply may result in enforcement remedies which CMS would impose.

Best Practices for OSHA and CMS Compliance
As we venture into the COVID compliance obligations imposed under federal direction, we encourage employers to:

1. Review the rules and, if necessary, consult with counsel to determine applicability of ETS and/or IFR to the employer (including who the "employer" is for rule compliance)
2. Develop a COVID policy that reflects mandate and alternative compliance responsibilities where an exemption from vaccination is sought by an employee
3. Institute a recordkeeping process for vaccination verifications and alternative compliance methodologies
4. Develop exemption request forms to document necessary information for medical and religious exemption and communicate alternative compliance obligations (including the consideration of "undue hardship" defenses)
5. Meet with applicable employee representatives for any effects discussions required for policy implementation, including cost of testing, time away from work and pay obligations
6. Communicate with employees the policy and compliance obligations; Be clear on the compliance deadlines and documentary expectations (for vaccination or exemption)
7. Monitor for interpretations and compliance responsibilities in the future

Employers should confer with experienced labor and employment counsel in order to maximize compliance and reduce the potential for legal exposure. Please contact any member of the von Briesen Labor and Employment Section for additional information.

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