

OSHA ISSUES COVID-19 VACCINATION AND TESTING EMERGENCY RULES, WHICH FACE IMMEDIATE COURT CHALLENGES

OSHA published its Emergency Temporary Standard (ETS) regarding COVID-19 vaccination and testing on November 5, 2021. On Nov. 6, 2021, the U.S. Fifth Circuit Court of Appeals stayed enforcement of the ETS pending expedited judicial review. The U.S. Sixth, Eighth and Eleventh Circuit Courts of Appeals are also considering similar emergency motions or petitions.

Because California has its own occupational safety program, Cal/OSHA, California is not covered directly by this ETS. However, California will be required to implement similar rules that are least as effective as the ETS within 30 days (assuming the ETS is allowed to go into effect). With the expectation that California's rule will be very similar to the ETS, and that the ETS will eventually be deemed enforceable, we summarize it's key provisions below.

The ETS applies to employers with 100 or more employees; but smaller employers may choose to comply voluntarily. Some employers already covered by other specific COVID-19 standards, such as healthcare employers, are not required to comply with the ETS.

The thrust of the ETS is its requirement that employers have a COVID-19 policy that requires either mandatory employee vaccination or weekly COVID-19 testing and face coverings at the workplace for unvaccinated employees. The ETS does not require employers to pay for testing, although they may elect to do so.

To comply with the ETS, employers must determine and maintain records regarding the vaccination status of each employee. Employees must be given reasonable time (up to four hours paid time) to get vaccinated and employers must allow use of paid sick time for side effects following vaccination. Employees must promptly inform their employer if they test positive for COVID-19 and employers must remove those employees from the workforce and keep them away until they meet specified criteria for returning.

Employers must provide information to employees about workplace policies to implement the ETS, including the CDC document "Key Things to Know About COVID-19 Vaccines," protections from retaliation and discrimination, and criminal penalties for knowingly supplying false statements or documentation. Employers must also allow employees to review and copy the vaccination documentation the employer maintains on that employee.

The ETS requires that any work-related COVID-19 fatalities be reported to OSHA within eight hours, and any work-related COVID-19 hospitalizations be reported to OSHA within 24 hours, of the employer learning of them.

We are closely monitoring this dynamic situation and are available to assist clients seeking to navigate this critical workplace safety issue.