



## CLIENT ADVISORY

### OVERVIEW OF PRESIDENT BIDEN'S DEPARTMENT OF LABOR EMERGENCY TEMPORARY STANDARD FOR COVID-19 VACCINATION

#### Overview

On Sept. 9, 2021, President Biden announced that the [Occupational Safety and Health Administration](#) (OSHA) will soon issue an **Emergency Temporary Standard (ETS)** requiring private-sector employers with 100 or more employees to ensure their workforce is fully vaccinated or produces a negative COVID-19 test each week before coming to work. The Biden administration's stated goal is to ensure the estimated 80 million private-sector workers are vaccinated or undergoing weekly testing to prevent the further spread of COVID-19 in the workplace.

No time frame has yet been provided for the ETS rollout or its implementation. However, it is anticipated OSHA will work quickly over the next several weeks to issue the ETS with enforcement to begin 60 to 90 days following. Significant fines could result if employers, and their employees, do not comply with the rule, with OSHA currently issuing penalties of up to \$13,653 per violation per day for failure to remedy non-compliance with other OSHA rules once a citation is issued.

#### Implications of the ETS

While every employer's situation is unique and needs to be looked at individually, there are a number of considerations all employers should be mindful of as the OSHA ETS and its enforcement gets underway. Decisions around how to implement compliant policies and enforcement procedures can impact a host of risk factors around workers' compensation, general liability and in certain circumstances employment practices liability. Considerations include:

- **Whether to implement a vaccinate-or-test program, as is expected to be required by the ETS, or imposing a full vaccination mandate. Employers choosing to implement a blanket mandate will need a plan to address medical and religious-based exemption requests.**
- **An employee suffering an adverse reaction from an employer mandated vaccine could be a compensable workers' compensation claim. Each state has different laws governing workers' compensation, but potential outcomes could be the payment of medical benefits to deal with an adverse side effect as well as wage reimbursement for time away from work.**
- **Implications and extensions of potential employer liability associated with contractors and temporary or staffing employees included in a workplace COVID-19 vaccination plan or claims brought by family members, guests, or vendors alleging injury of a COVID-19 occurrence stemming from an employer's workplace or employees could create a liability incident. Any incidents should be reported to employers liability, general liability and/or excess liability insurers.**
- **A vaccination mandate program and, in particular, pre-screening questionnaires implemented by employers in connection with vaccination mandate programs, can create employment practice liability exposure to businesses for claims of harassment, discrimination, and retaliation. Claims in this arena may arise, not only from employees, but also outside third-parties.**

## Start Planning

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In anticipation of the OSHA ETS coming soon, employers should start to plan for it by focusing on communication to keep employees informed about the importance and safety of COVID-19 vaccinations and reiterating and continuing to implement best practices for mitigating COVID-19 as recommended by the [Centers for Disease Control and Prevention](#) (CDC). Per the CDC, employers should also encourage unvaccinated employees to get vaccinated and provide resources to assist employees in obtaining the vaccine.

Start developing a plan now for how your organization will comply with the ETS once issued, including how to track vaccination status and accommodate exemption requests for unvaccinated employees. At a baseline, employers will need to determine whether they will require the vaccine or allow for weekly testing for those employees that do not wish to be vaccinated. Employers accommodating a negative testing option, particularly those with a high number of employees that are not willing to get vaccinated, should also start identifying testing locations to ensure the weekly testing requirement of the new ETS can be met.

On the enforcement front, also start to prepare for potential OSHA inspections, which can (and likely will) be conducted without notice to enforce the ETS. In addition to many of the CDC recommendations and existing OSHA requirements around face masks, social distancing, proper sanitation, OSHA may review employers COVID-19 response plans, vaccination and training records. While the details are yet to be determined, it is anticipated that OSHA will not accept vaccination attestations from employees as a substitute for collection and verification of vaccination status. Employers should ensure they have a plan in place to track vaccination status and train their staff on proper administration, record keeping and exemption protocols.

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## Additional Questions

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Throughout the COVID-19 pandemic, the only thing that continues to be consistent is the sheer number of unknowns and unanswered questions. OSHA's new ETS is sure to produce the same result. Some unanswered questions include:

**Q:** Will there be legal challenges to the ETS?

**A:** Likely yes. Governors in many states have communicated their plans to contest the ETS mandate. The burden will be placed on OSHA to establish if there is "grave danger" for organizations with large workforces and it remains unknown whether the ETS will ultimately be upheld.

**Q:** Will employers be required to pay for testing?

**A:** This has not been specified yet. Employers may be responsible for paying for the testing of unvaccinated employees.

**Q:** What is OSHA's stance on remote employees?

**A:** It is not immediately clear whether the ETS will apply to all employees or only those who work onsite at company offices or facilities.

## How Risk Strategies Can Assist

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Over the past few months, Risk Strategies has been working in partnership with our health care clients to assist with compliance on OSHA's COVID-19 Health Care ETS which was published June 21, 2021. This is a similar ETS implemented by OSHA to address the dangers of COVID-19 in health care settings and includes items such as hospital employee screening protocols, health care worksite checklists and employee job hazard analysis. The same experience and resources we gained from the Health Care ETS will now be available to share with other clients in assisting them to comply with the newly anticipated OSHA ETS COVID-19 Vaccination.

In addition to other resources and guidance provided to clients, Risk Strategies has a portal available for clients, [KPA-Risk Management Center](#), to assist in providing COVID-19 training for employees and managers, access to OSHA compliant posters and notifications, and an audit mechanism for assuring adherence to the employer policies.

For additional information and or guidance, please reach out to your Risk Strategies client team member or visit our COVID-19 Resource Center on our [website](#).

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