Early on the morning of November 4, 2021, the White House announced the long-awaited Emergency Temporary Standard (ETS) rule on vaccine mandates, requiring employers with 100 or more employees to ensure each of their workers is fully vaccinated or tests negative for COVID at least once a week. While you may have heard that there is a mandatory vaccination option without the testing alternative, that only applies to healthcare facilities. According to a Senior Administration Official, there will be exemptions available for medical and religious reasons, with the responsibility falling on each facility to have in place a plan to comply with the exemption parameters.

The deadline for employees to be fully vaccinated is now January 4, 2022. Standard penalties for non-compliance will be up to around $14,000 for a single violation, with multiple penalties assessed for further violations.

In California, there is already a state OSHA program with its own COVID-related ETS in place. Under the preemption authority asserted by the federal government, each state with its own OSHA program will be required to update its state plan to be “at least as effective” as the federal requirement. So we should expect that California OSHA requirements will be updated to incorporate—and perhaps surpass—the newly announced federal standard.

These new ETS requirements establish minimum requirements for employers, and nothing in this rule prohibits employers from taking further steps to incentivize or require vaccinations, testing, or other safety measures. Bear in mind, however, that other state and federal rules will remain applicable and may conflict with efforts of individual employers to take further actions.

For those persons that choose not to get vaccinated or who get a medical/religious exemption, there is a weekly testing option. This is not required for employees who do not report to the workplace (*e.g.,* work remotely away from customers or coworkers). However, if the employee is required to come to the workplace intermittently the employee must comply. Testing cannot be required for employees who have recovered from COVID within the past 90 days.

OSHA has released an initial set of Frequently Asked Questions, which is available at <https://www.osha.gov/coronavirus/ets2/faqs>. Some highlights include

* The 100-employee threshold is based on the total number of individuals employed by the entity, regardless of whether they work at a single location, multiple locations, or even remotely from homes or customer locations. Initially, employers must consider the number of employees on the effective date of the ETS (November 5, 2021); those with 100 or more employees at that time will be covered for the ETS for as long as it remains in effect. Moreover, employers who are currently below 100 employees but hire additional workers in the future to meet or exceed the 100-employee threshold while the ETS remains in place will also become subject to the standards. Once covered, these employers, too, will be subject to the standard as long as the ETS remains in place.
* There are three types of exemptions available: (a) employees for whom a vaccine is medically contraindicated; (b) those for whom medical necessity requires a delay in vaccination; or (c) legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.
* There is no exemption from vaccination requirements for employees based on “natural immunity” or antibodies present from previous infections.
* Booster shots that may be available are not (yet) required under the definition of “fully vaccinated” as applied by the ETS. Thus, employers are not required to obtain from employees vaccination-related information regarding boosters.
* Each employer is required to obtain proof of vaccination status, the list of which includes (a) health care provider records; (b) copy of the Vaccination Record Card; (c) copy of medical records documenting vaccination; (d) copy of public health/state/tribal immunization system records; or (e) any other “official” documentation that identifies the type and date of vaccine administered, and the name of the provider/site administering the vaccine. Where vaccination records are not available, the ETS permits an employee to provide a signed and dated statement that must: (1) attest to their vaccination status (fully vaccinated or partially vaccinated); (2) attest that they have lost or are otherwise unable to produce proof required by this section; and (3) include the following language: “I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.” The statement must also include, to the best of the employee’s recollection, the type of vaccine, date of administration, and name of the provider/site where the vaccine was obtained.
* Employers are required to support vaccination by providing reasonable time to each employee during work hours for primary vaccination doses (not including boosters), up to four hours of paid time per dose. This cannot be counted as vacation, PTO, sick, or other preexisting leave. Employees who choose to vaccinate outside of work hours will not receive paid time for the vaccination.

Employees with vaccine-triggered side effects may be required to use available sick leave (or PTO) for such time off. However, employees may not be required to borrow from future accrued sick leave for time off for vaccine side effects.

* What about testing costs? The ETS does not require that employers cover the cost of periodic testing as an alternative to vaccination. This is deliberate, as the intention of the rule is to foster increased vaccination, not increased testing. But employers should be aware that other requirements (State or local rules) may require employers to provide the cost of testing. In particularly, existing California ETS requirements obligate employers to provide testing in many circumstances.
* Employers are required to maintain copies of test results, consistent with the protection of such confidential information (e*.g.,* separate, secured medical files).

We should expect a flurry of comments and criticisms regarding the new ETS standard and how it must be implemented by employers. There is also already civil litigation challenging the new ETS. The rules were just announced, and with them, a 30-day public comment period that will follow publication of the rules in the Federal Register. This may or may not lead to modifications at the federal level, but employers should absolutely expect State and Local officials to respond to the new requirements. California, in particular, has a history of setting higher standards for Golden State workers.

Of course, HR Hotlink will work with Fine, Boggs & Perkins LLP to produce automated gathering of data, documentation and storage to comply with the new rule.

All employers are encouraged to continue to monitor developments in this area. If you have questions regarding these new ETS requirements or other COVID-related concerns, you are invited to contact Fine, Boggs & Perkins llp as follows:

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