

White House Announces Details of Tomorrow's OSHA Emergency Temporary Standard Requiring COVID-19 Vaccinations or Weekly Testing for Large Employers

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The draft ETS was made available on November 4, 2021, and is nearly 500 pages. The ETS will not be formally published until tomorrow, but the White House clarified the rule will be effective immediately and provided enough detail that large employers—that is, employers with 100+ employees—should immediately reach out to legal counsel and start to plan on how they will ensure compliance with its various requirements.

OSHA has announced that the ETS will serve as a proposed rule, thereby commencing the formal rulemaking procedures necessary to make the rule permanent by the time the six-month ETS expires. The ETS may also apply to state and local employers, depending on whether your state has an OSHA plan. The ETS does apply to all large private employers.

The new rule generally provides that the “ETS requires employers to implement a mandatory vaccination policy unless they adopt a policy in which employees may either be fully vaccinated or regularly tested for COVID-19 and wear a face-covering in most situations when they work near other individuals.”

Some of the key requirements and takeaways from this general rule are as follows:

1. Employees of large employers must become fully vaccinated or subject to weekly COVID-19 testing (along with other requirements, such as masking) by January 4, 2022;
2. Employers will have to provide paid time-off for employees to get vaccinated. Employees should be given up to four (4) hours for each vaccination shot and should be given “reasonable time and paid sick leave to recover from vaccination side effects”;

3. Employers will not have to pay for the costs of weekly testing for those employees who choose not to become vaccinated; provided, however, that there is no other law or collective bargaining agreement stating otherwise;
4. The new OSHA ETS rule provides that it will preempt any inconsistent state or local laws; and
5. Employers already subject to the federal contractor or Centers for Medicare & Medicaid Services (CMS) vaccination and testing rules will continue to comply with the prior published rules and guidance.

Penalties for failing to comply with the ETS are steep - \$13,653 for a single violation, and \$136,532 for “willful violations.” The ETS rule specifically states that one of its primary purposes is to provide clarity to employers in advance so that it can effectively pursue enforcement actions and penalties against employers who willfully fail to comply with it.

Stay tuned for further information and developments in this area. In the meantime, reach out to a member of our Labor & Employment Team at Sandberg Phoenix to discuss what this new ETS rule means for you and your workplace and what immediate actions you may need to take to prepare for the January 4, 2022, deadline.