

Publications

New OSHA Vaccination Requirement: What We Know and What We Don't

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CLIENT ALERT | 9.10.2021

On September 9, 2021, President Biden announced that the Occupational Safety and Health Administration (OSHA) is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any unvaccinated employees to produce a weekly negative test in order to come to work.

Here is what we currently know:

OSHA is in the process of drafting the rule as an Emergency Temporary Standard (ETS), which allows it to bypass the normal notice and comment rulemaking process. An ETS remains in effect for six months or until superseded by a permanent standard. To withstand likely legal challenges, OSHA will need to show that the ETS is necessary to protect workers from "grave danger."

As for the content of the ETS, it will likely state that all employers with 100 or more employees must test their employees for COVID-19 on a weekly basis, unless an employee is fully vaccinated. The ETS is also expected to require those same employers to provide paid time off for their employees to get vaccinated or to recover from post-vaccination illness.

It has been reported that companies who violate the ETS could face fines of up to \$14,000 per violation.

Here is what we currently don't know:

Because OSHA has not yet issued the ETS, many important questions remain. For example:

- What does it mean to be an employer with 100 or more employees (100 employees per facility/location or overall)?
- What steps will an employer need to take to validate an employee's vaccination status?
- How will the ETS address employees who claim a disability or religious exemption to vaccination?

- How will the required testing occur (i.e. home test, rapid test, PCR) and will the employer be required to pay for the tests?

The White House has indicated that the ETS will be issued “in the coming weeks.” Once the ETS is issued, it will almost certainly be challenged in court by multiple parties. Until the actual ETS language is available, it is difficult to judge the likely success of these challenges.

For now, employers should continue to focus on taking proactive steps to increase the vaccination rates of their workforces.

Vorys is closely monitoring these developments and will provide updates as additional information becomes available. In the interim, contact your Vorys attorney.

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VORYS COVID-19 TASK FORCE

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](https://www.vorys.com/coronavirus).