

**Alert | Health Emergency Preparedness Task Force:
Business Continuity Amid COVID-19**



September 2021

President Biden Issues COVID-19 Vaccine Mandate for Certain Workers: Unanswered Questions for Employers Remain

On Sept. 9, 2021, President Biden announced that he had asked the federal Occupational Safety and Health Administration (OSHA) to promulgate an Emergency Temporary Standard (ETS) that will require employers with more than 100 employees to take steps to ensure that their employees are either vaccinated or show a negative test result for COVID-19 each week. [See Sept. 10 GT Alert](#). Some observers believe this is the most significant and important action OSHA has undertaken since the inception of the Occupational Safety and Health Act of 1970 (OSH Act). Complicating OSHA's efforts is certain elected officials' denouncement of President Biden's directive, claiming that the authority to mandate vaccinations belongs to each state.

There is also the question of whether the OSH Act authorizes OSHA to promulgate such a standard in the first place. The OSH Act authorizes OSHA to issue an "emergency temporary standard" if "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful," and says that such a standard must be "necessary to protect employees from such danger." Some of the issues OSHA may face if the ETS is challenged include whether an "emergency" exists and whether employees are exposed to a "grave danger." OSHA may have to be ready to explain why there is not an "emergency" regarding employers with less than 100 employees and why those employees are not in "grave danger."

Aside from the potential legal challenges to the ETS, there are many other issues that OSHA will need to address in promulgating and enforcing the ETS:

- It is anticipated that the 100 employees will be interpreted broadly, but it remains to be seen exactly how the 100 employees will be counted.
- Will the ETS apply to employees who work exclusively at home and/or who telework and thus do not interact live with other employees?
- Will the ETS apply to independent contractors of employers?
- Will employers be required to maintain a copy of employee vaccination cards or other proof of vaccination, or will a self-attestation from an employee attesting that they are fully vaccinated be sufficient?
- Will employers have to track and maintain a log or database of every employee's vaccination status and COVID-19 test results?
- What happens if employees refuse to get vaccinated or take a weekly COVID-19 test? Will the ETS require employers to terminate these employees?
- Will the ETS require employers with more than 100 employees to annually submit records of employee vaccination status and/or testing results to OSHA, like some employers must do with injury and illness data?
- How will OSHA enforce the ETS given that OSHA is underfunded and already has a shortage of OSHA enforcement personnel?
- Will OSHA issue a National Emphasis Program, i.e., a temporary program that focuses OSHA's resources on particular hazards and high-hazard industries?
- Will monetary fines for non-compliance with the ETS be based on a workplace as a whole or per-employee?
 - For example, if a workplace has 150 employees and 100 are vaccinated and/or agree to submit to weekly testing, but 50 employees refuse to do either, will OSHA consider this one instance of non-compliance or 50 instances? If 50 instances, the employer could face a monetary penalty of more than \$700,000.
- What impact will the ETS have on the existing ETS that applies to health care settings? Will this ETS also apply to health care settings?
- Will states with their own OSH Act merely adopt federal OSHA's ETS, or will those states enact a more stringent ETS regarding vaccinations by, e.g., making the ETS apply to all employers regardless of the number of their employees?
- Will State Plan states receive pressure from elected officials who do not favor this ETS from enforcing it?

While employers await the ETS and answers to the above questions, employers with more than 100 employees should begin to think about how they will implement this requirement. This includes, among other things, (1) determining what percentage of their employees are already fully vaccinated; (2) developing a system to track and log employees' vaccination status and the results of weekly COVID-19 testing for employees who do not want to get vaccinated; (3) establishing a policy and system to address

reasonable accommodation requests, if any; and (4) establishing a policy or practice regarding how to handle employees who refuse to get vaccinated or submit to weekly testing.

For more information and updates on the developing situation, visit GT's [Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#) and [Business Continuity Amid COVID-19](#) page.

Authors

This GT Alert was prepared by:

- [Michael T. Taylor ‡](#) | +1 703.749.1387 | taylormt@gtlaw.com
- [Adam Roseman](#) | +1 215.988.7826 | rosemana@gtlaw.com

‡ Admitted in the District of Columbia. Not admitted in Virginia. Practice in Virginia limited to federal OSHA and proceedings before federal agencies.

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