

Legal Considerations for the Emergency Temporary Standard issued by the Occupational Safety and Health Administration (OSHA) requiring vaccine mandates for large employers effective November 5, 2021

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We at Fox Smith, LLC, wanted to reach out to our clients and friends to help them understand some of the legal implications of the Covid-related Emergency Temporary Standard (ETS) issued by the Occupational Safety and Health Administration. The ETS requires *certain* large employers to enforce a mandatory vaccination policy for employees or, in the alternative, require unvaccinated employees to undergo regular Covid-19 testing and wear a facemask. The ETS is intended to preempt state and local laws, and as a result applies regardless of what laws a state may pass to contradict this rule.

The ETS applies to employers with 100 or more employees at any time the ETS is in effect, with few exceptions. The ETS does not apply to employers who are already subject to existing executive orders or requirements, such as hospitals or federal contractors. Further, the ETS does not apply to employees who do not report to a workplace where coworkers or customers are present, employees while they work from home, or employees who work exclusively outdoors. There is no exception for employees who have previously been infected with COVID.

Most importantly, OSHA has not ruled out the possibility that similar restrictions may be eventually placed on smaller employers as well.

For applicable employers, their employees must be fully vaccinated by **January 4th, 2022**. However, by **December 5th, 2021**

employers must comply with the other portions of the law including:

- Develop, implement and enforce a mandatory COVID-19 vaccination policy, or a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a facemask in the workplace
- Determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status
- Provide employees up to four hours of paid time to receive each vaccination dose, and reasonable time and paid sick leave to recover from side effects after a dose
- Ensure weekly testing for employees who are in the workplace once a week, or within 7 days of a return to the workplace. Employers are not required to pay for testing, unless otherwise collectively bargained.
- Immediately remove any employee with a positive test regardless of vaccination status. Employees must promptly provide notice of a positive Covid test or diagnosis to their employer.

- Keep removed employees out of the workplace until they meet the criteria to return to work
- Ensure that employees who are not fully vaccinated wear a face covering when indoors and in a vehicle with another person with limited exceptions
- Not prevent any employee from wearing a face covering, unless it creates a workplace hazard
- Provide employees information related to: (1) the ETS requirements; (2) CDC literature about Covid vaccines; (3) protections against retaliation and discrimination; and (4) laws providing for criminal penalties for false statement and information
- Report work-related Covid-19 fatalities (8 hours) and hospitalizations (24 hours) within the specific time frames to OSHA
- Make available for examination an employee's COVID-19 vaccine document and test results to that employee or anyone with a written authorization.
- Make available to an employee or their agent, the total number of vaccinated employees and the total number of employees

If an employer chooses to implement a mandatory vaccination policy, the policy must include exceptions for employees where (1) a vaccine is medically contraindicated, (2) a medical necessity requires a delay in vaccination, or (3) there is a disability or a sincerely-held religious belief that conflicts with the vaccination requirement.

The situation with COVID-19 is ever changing and includes many unknown factors. Further, legal challenges to this rule are expected, particularly in Missouri. The ETS also specifically mentions that OSHA is still considering formulating a mandate for smaller employers. For these reasons, we recommend clients who are covered by the mandate adopt policies and procedures consistent with the mandate. Further, we believe clients are not specifically covered by the mandate should put the wheels in motion to prepare for another ETS which applies to them

For any questions about general issues or to discuss specific individual situations, please contact the Pete Cosgrove at Fox Smith, LLC at www.foxsmithlaw.com or (314) 588-7000.

For additional information:

[OSHA Covid-19 Vaccination and Testing ETS](#)

[White House Fact Sheet on Major Vaccination Policies](#)

[Federal Register Notice](#)