

## OSHA Issues Rule Requiring Companies With 100 Or More Employees to Mandate COVID Vaccination or Weekly Testing as Condition of Employment, November 4, 2021

Earlier today, the United States Department of Labor Occupational Safety and Health Administration ("OSHA") released an emergency temporary standard (the "ETS") that gives most employers with 100 or more employees until January 4, 2022, to implement and enforce a mandatory COVID-19 vaccination policy or subject unvaccinated employees to weekly COVID-19 testing. Some of the highlights are addressed below:

### Who is Covered?

The ETS applies to employers with 100 or more employees, with certain limited exclusions. For a single corporate entity with multiple locations, all employees at all locations are counted. Although employees working from home count towards the 100-employee minimum, the ETS itself does not require employees who work from home, exclusively outdoors, or who do not report to a workplace where other individuals (such as coworkers or customers) are present, to be vaccinated.

### What's Required?

Under the ETS, employers must establish and implement a written mandatory vaccination policy or an alternative weekly testing policy for unvaccinated employees. Employers must determine the vaccination status of each employee and can require employees to provide proof of vaccination status. Acceptable proof of vaccination status includes: the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record Card, or a copy of any other official documentation that contains pertinent details relating to the vaccination. Employers may also accept a signed and dated employee attestation in instances when an employee is unable to produce proof of vaccination.

### Who's Excluded?

Employees for whom a vaccine is medically contradicted, for whom medical necessity requires a delay in vaccination or for those 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.

Employers may opt out of implementing a mandatory vaccination policy only if the employer implements an alternative policy that requires unvaccinated workers to be regularly tested for COVID-19 (at least once per week) and wear face coverings when they work near others. In most cases, the minimum frequency of testing is seven days.

### Who Pays?

The ETS requires that employers allow "reasonable time" to each employee during work hours for each of their primary vaccination dose(s), including up to four hours of paid time, at the employee's regular rate of pay, for the purposes of vaccination. The maximum of four hours of paid time that employers must provide for the administration of each primary vaccination dose cannot be offset by any other leave that the employee has accrued, such as sick leave or vacation leave. An employer is not obligated to pay for costs associated with the regular testing of unvaccinated workers for COVID-19 or for face coverings. Further, employers are not required to reimburse employees for transportation costs incurred to receive the vaccination. However, employers may require employees to use accrued paid sick leave when recovering from vaccine side effects. But state and local laws governing sick leave must be considered.

### Violations

The language of the ETS makes clear that much of the enforcement of its requirements will fall to the employers. OSHA only employs one compliance officer for every seventy thousand workers in the U.S. and will not be performing independent inspections regarding compliance. Violations may be reported to OSHA by covered employees. Currently, each violation can result in an almost \$15,000.00 fine per violation. This, alone, makes it advantageous for employers to ensure compliance with the ETS at all times.

#### What's Next?

States will likely challenge the legality of the ETS on the grounds that OSHA is exceeding its rulemaking authority, among others. The ETS allows any person "adversely affected" by the standard to file a petition challenging that standard in federal appeals court within sixty days. The ETS does not include a termination date. OSHA will "update the ETS should the agency find a grave danger no longer exists for the covered workforce."

KD will continue to follow this development as it further unfolds. There will be many, many questions to answer in the days and weeks ahead. At a minimum, employers should prepare now for compliance and begin self-enforcement. As the Department of Labor (DOL) has announced, "the nation's unvaccinated workers face grave danger from workplace exposure to coronavirus, and immediate action is necessary to protect them."

#### KD IS ALWAYS HERE TO HELP

If you have questions about these developments, please contact one of KD's experienced Labor & Employment Law attorneys. Keith Gutstein Co-Managing Partner, Co-Chair, Labor & Employment Practice, Philip Voluck, Managing Partner, Blue Bell, PA and Co-Chair, Labor & Employment Practice, Aaron Solomon, Partner, Woodbury, NY, Caitlyn O'Neill, Attorney, Woodbury, NY