SEPTEMBER 21, 2021 | LEGISLATIVE & STANDARDS BOARD UPDATES

Federal OSHA to Issue Another COVID-19 Emergency Temporary Standard Setting a "Soft" Vaccine-Mandate

*By **Conn Maciel Carey's COVID-19 Taskforce***

On September 9, 2021, President Biden charged federal OSHA with developing a second emergency temporary standard (ETS) requiring all but small employers in all industries but healthcare to implement "soft" vaccine mandates, i.e., to require employees to either be fully vaccinated or get weekly COVID-19 testing. The President directed OSHA to include in this new ETS a requirement that these employers provide paid time for employees to get vaccinated and recover from the vaccine. The President also issued executive orders mandating federal contractors and healthcare employers implement "hard" vaccine mandates.



The push now for a broader COVID-19 ETS applicable beyond just healthcare is a step for which we have been bracing for a while now. In June, when OSHA issued its **COVID-19 ETS that was limited only to the healthcare industry**, the vast majority of employers dodged the bullet, but since the explosion of new cases because of the Delta variant, we began to see that bullet more as a boomerang, likely to come back around for the rest of industry. Here are five signals we picked up that OSHA was likely to revisit its decision in June to limit its COVID-19 ETS to only healthcare employers:

1. The rate of community transmission and COVID-19 deaths around the country has returned to the level we were experiencing in the Spring of this year when OSHA delivered to OMB a proposed ETS that was written to cover *all* industries. To the extent the decline in cases and deaths was a major factor in OSHA's decision to limit the ETS to just healthcare, that factor no longer cuts in favor of a healthcare-only rule.
2. Between the time OSHA delivered the broad proposed ETS and the time it issued the narrow healthcare-only ETS, the **CDC released groundbreaking guidance relaxing COVID-19 protocols for vaccinated individuals**. OSHA's decision to limit the ETS to just healthcare only a month later had to be influenced by that seismic shift. But since that time, in July, **CDC backtracked on its guidance for vaccinated workers**, causing OSHA to adjust its own guidance in that regard.
3. Since issuing the ETS for healthcare, OSHA has been under pressure from national unions and worker advocacy groups to expand the ETS to all industries, both in the form of written comments during the ETS's post-issuance comment period and a lawsuit filed by AFL-CIO challenging OSHA's decision to limit the ETS to just healthcare.
4. There has been a growing tension between the Biden Administration and certain Republican governors, particular DeSantis in Florida and Abbott in Texas, around mask and vaccine mandates. The Biden Administration could resolve that tension by issuing a specific federal OSHA regulation setting requirements for masking and vaccinations, which would likely preempt conflicting state laws.
5. The White House has changed its tune about strict COVID-19 protocols and vaccine mandates dramatically since the OSHA ETS was issued. The Administration's decision to limit the ETS to healthcare only was likely at least partially politically-motivated; i.e., a broad ETS was too unpopular due to the massive decline in COVID-19 cases and deaths. However, we have started to see President Biden take politically risky moves around vaccinations; e.g., reinstituting mask recommendations for vaccinated individuals and setting a "soft" mandate for federal workers and contractors and encouraging industry to set similar mandates. If the politics of aggressive COVID-19 requirements influenced OSHA's decision to issue a narrow rule in June, it appears the Administration has changed its political calculation in the face of the spread of the Delta variant surge.

Those ***were*** the main signals we saw that kept us up at night worried OSHA would deliver to OMB a new or amended COVID-19 ETS that would apply to all industries. But President Biden's announcements yesterday sent the strongest signal yet that we will soon see further regulatory action from federal OSHA on the COVID-19 front. A lot of questions remain, and we expect those to be answered in time as the new rules take effect, but we wanted to share with you what we know so far, as well as our preliminary thoughts/speculation about some of those questions.

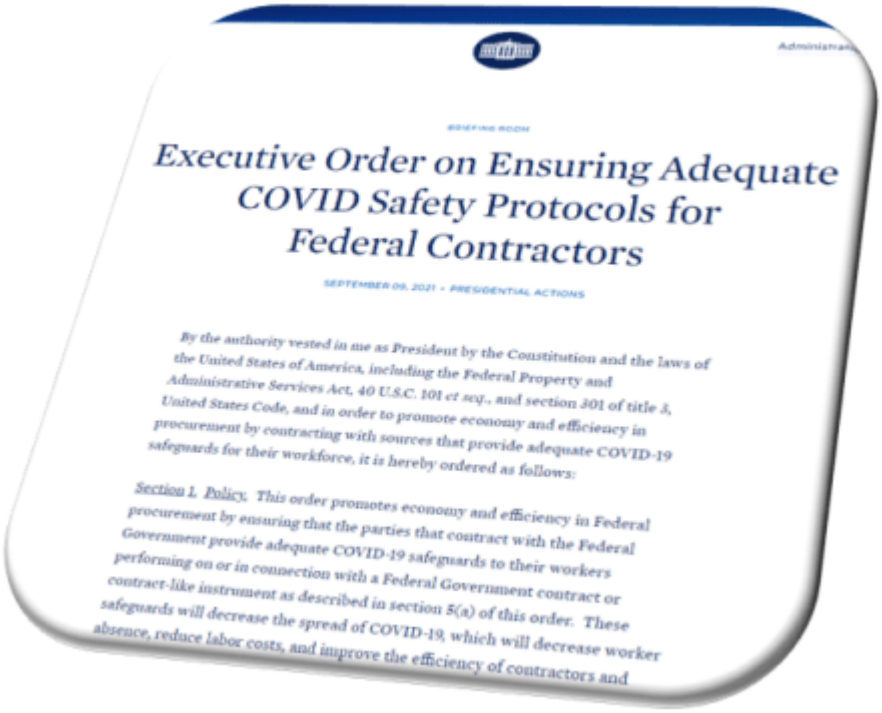
What Happened Yesterday?

Let's start with the President's "**Path Out of the Pandemic: POTUS COVID-19 Action Plan**."

After describing how the Administration facilitated getting more than 175 million Americans fully vaccinated against COVID-19, the Action Plan addresses the new, more challenging enemy in the fight against the virus – the Delta variant. The COVID-19 Action Plan then sets forth President Biden's six-pronged plan to combat COVID-19 this Fall:

1. Vaccinating the Unvaccinated
2. Furthering Protection for the Vaccinated

3. Keeping Schools Safely Open
4. Increasing Testing and Requiring Masking
5. Protecting Our Economic Recovery
6. Improving Care for Those with COVID-19



Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors

SEPTEMBER 09, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., and section 301 of title 3, United States Code, and in order to promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce, it is hereby ordered as follows:

Section 1. Policy. This order promotes economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument as described in section 5(a) of this order. These safeguards will decrease the spread of COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and

This summary focuses on the first prong – vaccinating the unvaccinated. Under this prong of the Administration's Action Plan, there are five goals the President seeks to achieve. First, President Biden signed an Executive Order requiring all government employees to be vaccinated against COVID-19, with no option to opt out in favor of regular testing. Biden issued an accompanying **EO directing the same standard be applied to employees of contractors** that do business with the federal government. The EO for federal contractors appears to apply to any ***new contract*** or contract-like instrument; new solicitation for a contract or contract-like instrument, extensions, renewals, or the exercise of an option on an existing contract or contract-like instrument. The Order specifically states that it does not apply to grants; contracts with Indian Tribes; low-value contracts; work performed outside the US; or subcontracts solely for the provision of products. Additional guidance from the FAR is expected before September 24, 2021.

Second, President Biden announced that he will require the 17 million healthcare workers at facilities receiving reimbursements from Medicare or Medicaid to be fully vaccinated, expanding an existing vaccinate-mandate for nursing care facilities now to include hospitals, homecare facilities and dialysis centers around the country.

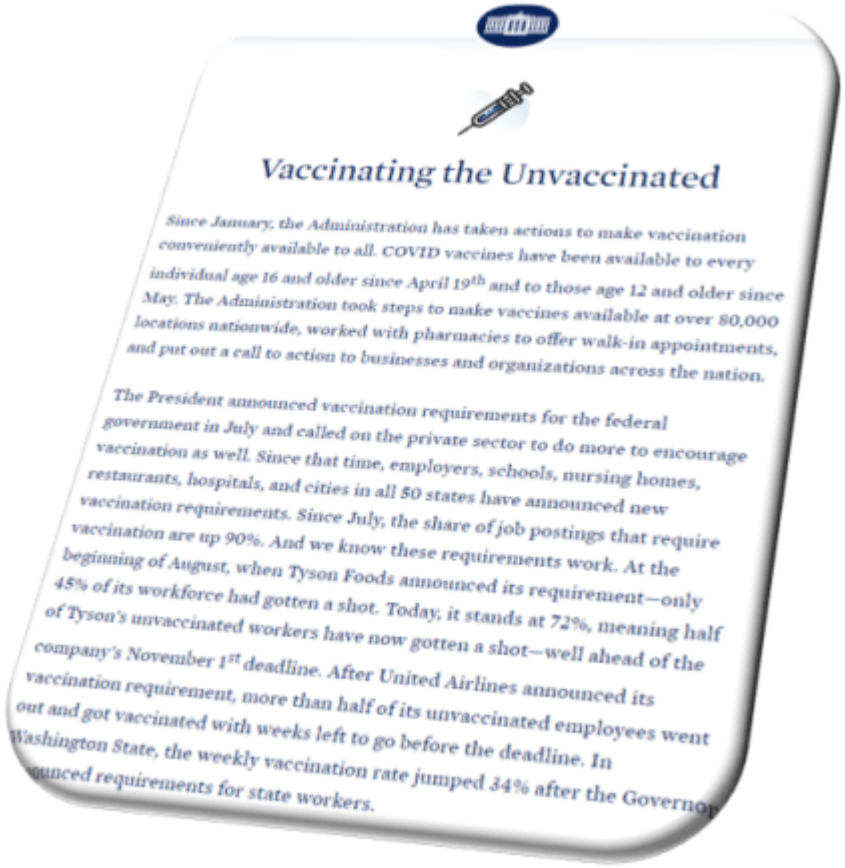
Third, President Biden announced that he is calling on entertainment venues like sports arenas, concert halls, and other venues where large groups of people gather to require patrons to be vaccinated or show a negative test for entry. Additionally, although it is mentioned in the third prong of President Biden's six-prong plan – Keeping Schools Safely Open – President Biden announced that the 300,000 educators in federal Head Start programs must be vaccinated and called on state governors to require vaccinations for school teachers and staff.

Last but not least, the biggest development for our purposes, at the center of President Biden's new COVID-19 Action Plan is a directive to federal OSHA to require all businesses with 100 or more employees to ensure their workers are either vaccinated or tested once a week, and to provide paid time off to allow employees to get

vaccinated and recover from any adverse reactions. Per the President's COVID-19 Action Plan, these requirements will be imposed through a new OSHA Emergency Temporary Standard to be issued "in the coming weeks." These new requirements could apply to as many as 100 million Americans – close to two-thirds of the American workforce.

What Will OSHA's New COVID-19 ETS Require?

Based on President Biden's announcement and the COVID-19 Action Plan the White House released yesterday, we know two things:



Vaccinating the Unvaccinated

Since January, the Administration has taken actions to make vaccination conveniently available to all. COVID vaccines have been available to every individual age 16 and older since April 19th and to those age 12 and older since May. The Administration took steps to make vaccines available at over 80,000 locations nationwide, worked with pharmacies to offer walk-in appointments, and put out a call to action to businesses and organizations across the nation.

The President announced vaccination requirements for the federal government in July and called on the private sector to do more to encourage vaccination as well. Since that time, employers, schools, nursing homes, restaurants, hospitals, and cities in all 50 states have announced new vaccination requirements. Since July, the share of job postings that require vaccination are up 90%. And we know these requirements work. At the beginning of August, when Tyson Foods announced its requirement—only 45% of its workforce had gotten a shot. Today, it stands at 72%, meaning half of Tyson's unvaccinated workers have now gotten a shot—well ahead of the company's November 1st deadline. After United Airlines announced its vaccination requirement, more than half of its unvaccinated employees went out and got vaccinated with weeks left to go before the deadline. In Washington State, the weekly vaccination rate jumped 34% after the Governor nounced requirements for state workers.

1. OSHA's new ETS will require covered employers to mandate that their employees either be fully vaccinated or get weekly COVID-19 testing; and
2. The ETS will require employers to provide paid time off for employees to get vaccinated and to recover from any ill effects of the vaccine.

However, it is possible OSHA could use this new directive from the White House to do much more than just address vaccinations. This could present an opportunity for OSHA to revisit its decision from earlier this Summer to limit the more comprehensive ETS to just healthcare employers. That is, OSHA could issue this new ETS as a broader rule that also addresses requirements for written programs, masking, training, ventilation, recordkeeping and reporting, etc.

While it is possible OSHA will go comprehensive with this emergency rulemaking, or it could run a parallel rulemaking process, we anticipate OSHA's response to President Biden's directive will be a narrow vaccination-related ETS because of the urgency to get it issued. We understand the career folks at OSHA did not know this announcement was coming, and so the agency is starting from scratch as of last night. It took OSHA approx. 16 weeks to prepare the more comprehensive ETS earlier this year, and the White House will expect this round of rulemaking to be done much quicker. For that reason, we expect the rule will be simple – define the scope, define key terms, set the vaccination-related requirements, and get it to OMB.

What Employers Will be Covered by the New ETS?

Based on the Administration's Action Plan, the new ETS will cover all businesses with 100 or more employees, unless the business is in an industry covered by a separate, more stringent requirement (e.g., the hard vaccine mandates for federal employers and contractors as well as healthcare workers set by the new Executive Orders).

We are left to speculate whether the agency will use the number of employees at each individual establishment or an enterprise-wide employee count for the 100+ employee threshold. If we look at this as a traditional workplace safety and health regulation, with an intention to limit COVID-19 outbreaks in the workplace, and significant outbreaks can only occur where there is a significant number of people present, it is possible OSHA would look to establishment size (as opposed to company size) as the applicable employee count to trigger coverage. Likewise, OSHA is mindful of the risk that employees will balk at both the vaccine and regular testing, and understands that larger workplaces can better absorb the resignation of a few employees than smaller ones.

One other clue we have to help with an informed guess is OSHA's most recent regulation that set requirements based on employee count – the electronic recordkeeping rule. As crafted by the Obama/Biden Administration's OSHA, the E-Recordkeeping Rule set different requirements based on the number of employees – employers with 20-249 employees submit summary data and with 250+ employees submit more detailed data. In that context, employers look at peak employment during the year *at each individual establishment*, and count employees the employer supervises on a day-to-day basis, which may include temporary workers, seasonal workers, and some contractors. That is the criterion that I would guess (and will advocate that) OSHA will use for this ETS.

However, this move by the Biden Administration appears to be more of a public health initiative than a true workplace safety regulation, so looking to the gross number of employees company-wide would make more sense in that context; i.e., counting all employees company-wide will sweep more employers into this regulation, and that is the point. It also is not without precedent that gross employee count company-wide is considered for coverage by an OSHA regulation — OSHA's injury and illness recordkeeping rule exclude small employers (fewer than 10 employees company-wide).

Considering the overall purpose of the rule, our best guess is the ETS that OSHA proposes will be triggered by 100+ total employees company-wide. But that is an important point that industry could try to address through pre-rule advocacy.

Will this ETS Affect Workplaces in State-Plan States?

According to **OSHA's policies on emergency standards**, "State Plans are required to have an ETS that is at least

as effective as an ETS issued by federal OSHA 30 days following publication." Indeed, OSHA explicitly required the State OSH Plans to adopt a substantially similar version of the COVID-19 ETS for healthcare within 30 days of when fed OSHA adopted that rule earlier this Summer. Expect to see an identical provision in this vaccination-related ETS. However, while that is a requirement under the OSH Act, State Plans have their own legal/regulatory processes that they must follow to adopt new regulations under their respective state laws, so it is not always realistic that they can issue a new regulation in a month. Most of the States did adopt healthcare ETSs (mostly verbatim versions of fed OSHA's ETS) around the one-month mark, and we can expect to see the same with this new ETS. Accordingly, businesses in State Plan States should generally start making efforts to comply with the new ETS when the final regulatory text is revealed.

Will the New ETS Require Employers or Employees to Pay for COVID-19 Testing?

We know based on yesterday's announcement and the Administration's Action Plan that employers will be required to pay employees' for their time spent getting vaccinated as well as recovering from ill effects of the vaccine. The Action Plan states: "*OSHA is developing a rule that will require [covered] employers to provide paid time off for the time it takes for workers to get vaccinated or to recover if they are under the weather post-vaccination....*" The announcement, however, was silent as to who, the employer or the employee, will be responsible for paying for the weekly COVID-19 testing of employees who refuse the vaccine.

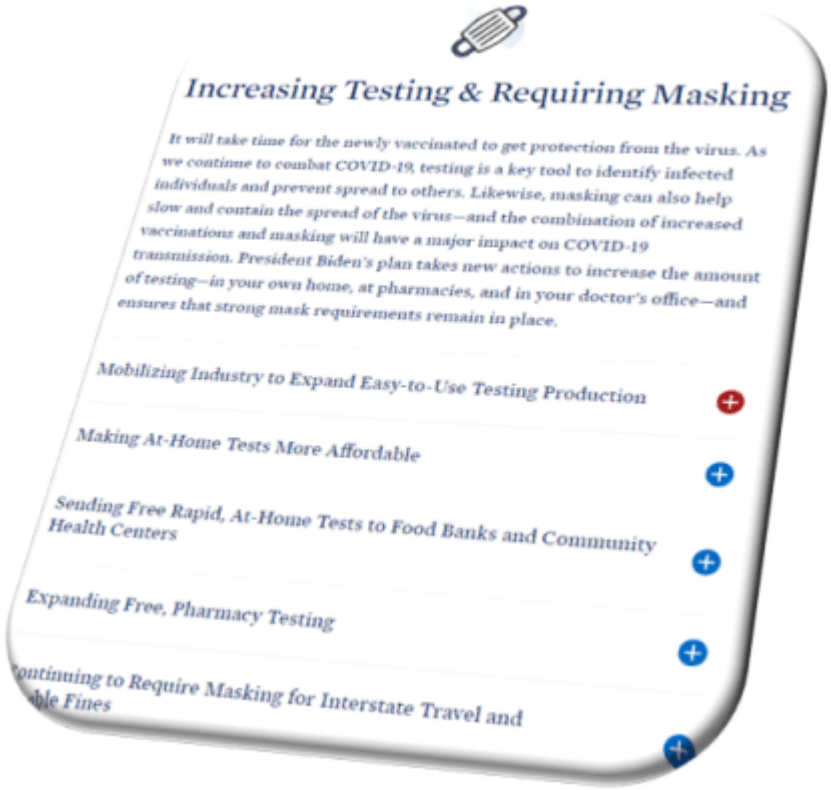
There are some subtle signals in the language of the Action Plan that may indicate the Administrations intentions. Specifically, the Action Plan states that unvaccinated workers need to "*produce a negative test result on at least a weekly basis before coming to work*." The other requirements discussed in the Action Plan consistently state an affirmative duty by employers; e.g., "to provide paid time off," but with regard to testing, it talks about an employee's action of producing a negative test result. The Action Plan could easily have talked about employers "conducting testing," "ensuring testing," "providing testing," or any other language indicating this is the employer's affirmative duty vs. a duty of the voluntary unvaccinated worker. By way of example, Cal/OSHA's COVID-19 ETS includes a provision requiring employers to pay for COVID-19 testing under certain circumstances, and the regulation uses wording like "employers shall make COVID-19 testing available" at no cost. We would have expected more explicit language from the White House yesterday if it was set on having employers pay for the cost of COVID-19 testing and the time to get tested.

We could also sense in President Biden's tone that he was pretty well fed up with non-vaccinated individuals. In his speech yesterday he said:

"My message to unvaccinated Americans is this: What more is there to wait for? What more do you need to see? We've made vaccinations free, safe and convenient. The vaccine is FDA approved. Over 200 million Americans have gotten at least one shot. We've been patient, but our patience is wearing thin. And your refusal has cost all of us."

There's pretty direct blame cast at unvaccinated individuals, so it would follow that the intent is to apply a little pain to their decision to remain unvaccinated. It would also seem to just undermine the purpose of this rule – to get more people vaccinated – to provide employees who have been unwilling to get vaccinated such an easy off-ramp from getting vaccinated now; i.e., I still don't want to get vaccinated and my alternative is a testing program that costs me nothing, and in fact gets paid for my time spent doing something other than working.

Another reason to think it is the Administration's intent that employees pay for their own testing (or should be), is that Biden's Action Plan talks a lot about the White House's initiatives to make testing cheaper and more accessible to everyone.



For example, to make testing more accessible, President Biden announced that certain retailers will start selling at-home rapid tests for no profit for the next three months, resulting in a 35% price cut by the end of the week. The strongest argument against making employees pay for the testing is the cost is too great for an individual vs. a company, but these measures ameliorate some of that concern.

On the other side of that scale, however, as OSHA crafts the ETS, the Department of Labor may face pressure from its most sacred constituency – national unions – to not force employees to bear any cost (or consequence) from refusing to be vaccinated. It certainly aligns with OSHA's natural instinct to not place a personal burden on workers.

Another reason to think OSHA may put the cost of testing on employers' shoulders is the possibility that many employers will just not provide the testing option if the employer has to pay for it. Just because the ETS will provide a vaccine option AND a testing option does not mean employers have to provide both. EEOC, OSHA, and the Department of Justice, as well as multiple federal courts, have already expressed that employers may implement hard vaccine mandates in the context of this pandemic. The Biden Administration likely felt it did not have legal authority to set such a hard line mandate for private employers, but we know that is its preference (because they have set hard mandates for employees over which they do have control). Asking employers to

pay for the weekly testing (and the administrative burden of tracking to verify testing has been completed) could be a strategic ploy to encourage more employers to implement the hard vaccine mandates that the Administrative could not do on its own.

The ETS SHOULD allocate the costs of compliance in line with the incentives the ETS is trying to create. That is, employers bear the cost for the outcomes desired by the Administration – getting employees vaccinated (by paying for time getting vaccinated) – but employees have to pay for testing, which is an offshoot of the behavior the Administration is trying to discourage – refusing to get vaccinated. Essentially, the employee will be left with three choices – get paid time off to get vaccinated (and recover from any adverse side effects), pay for weekly testing, or removes themselves from the US workforce. We certainly intend to advocate for that approach.

But it is hard to envision this Department of Labor, made up of officials with very deep, personal roots in organized labor, putting a costly burden on workers. Without serious advocacy by industry, our best guess is OSHA will place the cost burden on employers.

Will There Be Exemptions Under the New ETS?

We expect that any exemptions under this ETS will be limited to only those that are required by existing law; i.e., **medical and religious exemptions**. President Biden made it clear yesterday that the way out of this pandemic is through vaccination, and vaccinated America was growing "frustrated" with the 80 million people who have not received shots and are fueling the spread of the virus. He added that "[t]he bottom line [is that] we're going to protect vaccinated workers from unvaccinated coworkers." So it would seem very unlikely that the ETS will expand carve-outs and exceptions to vaccination beyond the bare minimum required by Title VII and the ADA. Additionally, we do not expect any new exemptions because this is generally how other state/local vaccine mandates have been set up.

But we do expect the ETS will explicitly reference exemptions for medical and religious reasons. The exemption based on medical conditions is somewhat straightforward; based on objective medical documentation, but dealing with requests for religious-based exemptions has been much less straightforward. The law recognizes exemptions from employment policies based on sincerely held religious beliefs that do not place an undue hardship on the employer. Guidance from the EEOC states that employers should "ordinarily assume" that an employee's request for religious accommodation is based on a sincerely held religious belief, and requires an "objective basis" for questioning the sincerity of that religious belief. This creates a major disincentive for an employer to seek supporting information or from denying the religious exemption request. On the other hand, there is case law finding that an employee's opposition to vaccines was a personal belief that did not "occupy a place in his life similar to that occupied by a more traditional faith[,]" and that personal anti-vaccination positions generally will not be sufficient to establish a sincerely held religious belief in order to be exempt from a mandatory vaccination policy.

Employers, especially those located in states with vaccine-resistant populations, can expect to be inundated with exemption requests, particularly those based on supposed sincerely held religious beliefs. Our advice generally is to focus energy more on the interactive process addressing whether an unvaccinated employee's presence in the workplace poses a direct threat and what reasonable accommodations would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat. If you need assistance in evaluating your COVID-19-

related exemption requests, please reach out as we have been dealing with the ins-and-outs of such requests since the beginning of the vaccine rollout.

What Documentation Will OSHA Require Under the New ETS to Verify Vaccination Status?

Although nothing released by the Administration yesterday addresses this question specifically, we think OSHA's existing COVID-19 ETS for Healthcare provides a pretty good indicator of how OSHA is going to handle the issue of verifying vaccination status. Although the existing healthcare ETS does not set a vaccine mandate, it does provide exemptions and other relaxed requirements based on vaccination status, and accordingly, addresses how healthcare employers should verify employee vaccination status. The ETS and related guidance is pretty loose about the methods employers may use to determine vaccination status. Specifically, in the Preamble to the ETS, OSHA states:

> ***"With regard to determining employees' vaccination status, there are a number of ways employers could approach this. For example, small employers may know that all employees are already vaccinated because it was a topic of conversation as people became eligible and received the vaccine. Other employers may have required employees to be vaccinated and will have records of vaccinations because they or their agents, as permitted under other laws, administered a vaccine. Still others could, when otherwise not prohibited by law, ask employees to either provide documentation of, or attest to, their vaccination status."***

We think OSHA will take the same approach with the new vaccination-related ETS.

Another significant issue to be addressed in this rulemaking is the potential that both the vaccine requirement and the testing requirement will cause employers to take custody of a lot of "employee medical records" that could have record-retention requirements measured in decades. OSHA's employee medical record regulation sets a preservation requirement of the life of employment plus thirty years, *unless* a specific regulation sets a different retention period. Industry should advocate for issue to either designate that these records are not covered by OSHA's employee medical record regulation, or set a specific, shorter (e.g., one year) retention period for them.

When Will the New ETS Be Issued and Take Effect?

Similar to the Healthcare ETS, we expect that the new ETS will become effective immediately when it is published in the Federal Register. When that happens, however, is an open question. The President talked

about OSHA issuing the rule "in the coming weeks." Looking back at the prior COVID-19 ETS, after **President Biden's Day 1 Executive Order** directing OSHA to "consider whether any emergency temporary standards on COVID-19, including with respect to masks in the workplace, are necessary, and if such standards are determined to be necessary, issue them by March 15, 2021[,]" we now know that it took OSHA approx. 16 weeks to deliver a proposed rule to OMB. We also know that OSHA considered that to be a very quick turnaround. The ETS contemplated here, however, is quite different in complexity and scale. This will be a much shorter, simpler regulation, so we expect the process to take about half as long.



Our guess based on what we have heard – that the agency had not put pen to paper on this ETS as of yesterday – is that a proposed ETS will make its way to OMB in six to ten weeks. We also expect that the turnaround time at OMB will be much shorter than the multiple months the healthcare ETS spent there – more likely two weeks for this ETS. So that would put a final ETS issued in approx. three months (vs. the six months for the prior COVID-19 ETS).

Once we have a new ETS in place, we think it is likely that employees will have a month and a half or so to get vaccinated, to avoid weekly testing. Our prediction is based largely on various state/local vaccine mandates that were becoming more and more popular for the healthcare industry over the past month or so. For example, the Los Angeles County Department of Public Health issued a Public Health Order on August 12, 2021, requiring workers who provide services or work in various healthcare facilities to have their first dose of a one-dose vaccine regimen or their second dose of a two-dose regimen by September 30, 2021. Similarly, the Denver Department of Public Health and Environment issued a Public Health Order on August 2, 2021, requiring personnel of various healthcare entities, or types of entities, to be fully vaccinated by September 30, 2021.

Will There be Fines for Non-Compliance With the New ETS?

We are hearing from OSHA that, when enforcing the rule, OSHA will have the ability to fine non-complying businesses in the same manner it does for any other regulatory violation – up to approx. $14,000 per Serious or Other-than-Serious violation.

Has OSHA Ever Mandated Vaccines Before?

Currently, the only vaccination covered by an OSHA rule (specifically, under OSHA's Bloodborne Pathogens standard) is the mandate that employers whose workers could be exposed to blood or other potentially infectious materials ***offer*** free Hepatitis B vaccination to employees. Workers who choose not to be vaccinated for Hepatitis B are required to sign a form acknowledging that they were offered the shot and declined.

We think there will be significant differences between the vaccination requirement in OSHA's Bloodborne Pathogens standard and what we will see under this new COVID-19 vaccination-related ETS. For example, OSHA's Bloodborne Pathogens standard typically only applies to a small subset of employees who, based on the performance of the employees' duties, might have occupational exposure. The new ETS will apply broadly to all employees who work at covered facilities, with a possible carve-out for remote workers who do not report to the workplace, and therefore present no risk of transmitting the virus to co-workers. Second, there is no "either/or" mandate under the Bloodborne Pathogens standard. That is, if a covered employee declines a Hepatitis B vaccine, as long as the employer offered it for free and received a signed declination, the employer's obligations are met. With the new ETS, if an employee declines to get vaccinated, then s/he must succumb to weekly COVID-19 testing, and employers are on the hook for ensuring that this weekly testing is being conducted (either verifying it or paying for/coordinating it).

What Legal Challenges Might OSHA Face in Issuing the New ETS?

Regarding the expected legal challenges, we think OSHA might face two major hurdles:

1. To issue this as an ETS, OSHA has to determine that COVID-19 presents a grave danger to all covered workplaces, which, as we mentioned above, will generally be all workplaces with more than 100 employees. But, OSHA just evaluated that very question with respect to this exact same hazard (COVID-19 in the workplace) in developing its Healthcare ETS, and reached the opposite conclusion – that it was only workplaces providing healthcare services that faced enough of a grave danger to warrant an ETS. That decision, just a few months earlier, may impact a court's evaluation of the current ETS
2. To issue this as an ETS, OSHA needs to determine that this particular ETS is necessary. But, again, OSHA just evaluated what was needed to address this same hazard and issued a rule that did not include a vaccine mandate. Challengers will assert that this new ETS calls into question the necessity of the prior ETS, or the prior ETS demonstrates the lack of necessity of this new ETS.

It seems though the White House is fully aware. Biden Administration officials acknowledged that the requirement for large employers could be challenged in court, but said their hope was to provide cover of federal rules to businesses who want to require vaccines for employees. Indeed, officials said the new ETS is supposed to be a "minimum," and some companies may choose to go further, including by mandating the vaccine without the alternative option of testing.

What Is Next For This Rulemaking and How Can Employers Get Involved?

Because this will be an emergency rulemaking, the proposed regulatory text will not be available to the public. We expect that, like the ETS for healthcare, in the coming weeks, the Office of Information and Regulatory Affairs ("OIRA") within the Office of Management and Budget ("OMB") will host a series of meetings to hear from stakeholders regarding the proposed rule (without, of course, the benefit of having the proposed rule in front of them).

Conn Maciel Carey LLP organized the **Employers COVID-19 Prevention Coalition** to provide written comments, participate in multiple OIRA stakeholder meetings, and otherwise advocate for a more manageable ETS during the prior rulemaking, and we intend to organize another coalition to participate in this new emergency rulemaking. Please contact Eric J. Conn, Chair of CMC's national OSHA Practice if your organization is interested in participating in this rulemaking, and we will get you additional information about our new coalition.

As always, **let us know** if you have any questions about these developments, or if we can do anything to help your organization evaluate your options and compliance obligations.