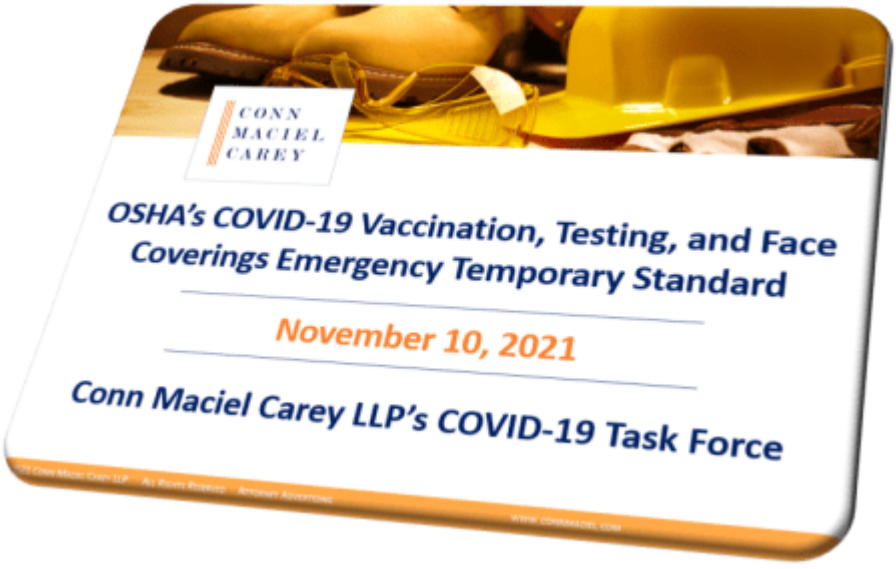
NOVEMBER 4, 2021 | LEGISLATIVE & STANDARDS BOARD UPDATES

OSHA Issues Its COVID-19 Vaccination, Testing, and Face Coverings Emergency Temporary Standard

By Conn Maciel Carey LLP's COVID-19 Task Force

At long last, OSHA has revealed its COVID-19 Vaccination and Testing emergency regulation. The Federal Register site has updated to show the pre-publication package, which is set to run officially in the Federal Register tomorrow, November 5th. The 490-page package includes the Preamble and economic analysis of the regulation, as well as the regulatory text. The regulatory text begins on PDF page 473. Also here is a Fact Sheet about the ETS issued simultaneously by the White House.

We are extremely pleased to report that the rule aligns very well with positions for which CMC's Employers COVID-19 Prevention Coalition advocated to OSHA and OMB on the most significant topics, like the responsibility for the cost of COVID-19 testing and a delayed implementation date, as well as very narrow record-preservation requirements, grandfathering of prior vaccine-verification efforts, and other elements. OSHA and the White House clearly listened to our views and the compelling rational we put forward for these positions, making the rule a much better, more effective and less burdensome one for employers.



Conn Maciel Carey's COVID-19 Task Force will be conducting a webinar about the ETS on Wednesday,

November 10th at 1:00 PM ET. Here is a link to register for that program.

In the meantime, below is a detailed summary of the rule:

What is the stated purpose of the regulation?

The ETS is "intended to establish minimum vaccination, vaccination verification, face covering, and testing requirements to address the grave danger of COVID-19 in the workplace, and to preempt inconsistent state and local requirements relating to these issues, including requirements that ban or limit employers' authority to require vaccination, face covering, or testing, regardless of the number of employees."

Who is covered?

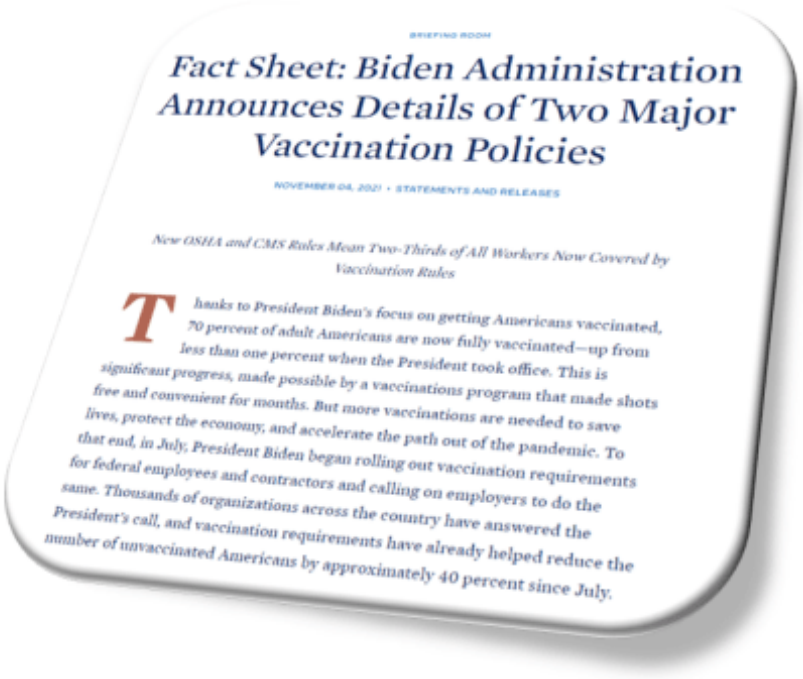
As the president signaled in his announcement and action plan from September 9, the ETS applies only to employers with 100 or more employees, and the rule does make it explicit that the way you count those employees is on a company–wide basis, not establishment-by-establishment.

Specifically, the count should be based on the number of employees at all establishments under a single corporate entity. The employee count is to include part-time employees, seasonal employees, and all employees hired directly by the employer regardless of their work location (home-based, outdoors, etc.). Temporary employees sourced through a staffing agency assigned to a host employer will NOT be calculated in the host employer's employee count, but instead will only count for the staffing agency. Independent contractors also do NOT factor into the employee count for the host site.

For multi-employer worksites, such as a construction site, each employer represented—the host employer, the general contractor, and each subcontractor—must count only their own employees to determine coverage under the ETS. Each employer's count must include all employees directly employed by the corporate entity, regardless of whether they are spread out over multiple construction sites.

The 100-employee threshold is based on the number of employees as of the effective date of the standard (November 5, 2021). However, if an employer has only 75 employees on November 5, 2021, but will be increasing their employee-count to 100 or more employees with seasonal employees over the holiday season, for example, the employer would be covered by the ETS as soon as the 100-employee threshold is met. Once the 100-employee threshold is met, the ETS applies to the employer for the duration of the ETS, even if the

employee count dips below 100 employe



BRIEFING ROOM

Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies

NOVEMBER 04, 2021 • STATEMENTS AND RELEASES

New OSHA and CMS Rules Mean Two-Thirds of All Workers Now Covered by Vaccination Rules

Thanks to President Biden's focus on getting Americans vaccinated, 70 percent of adult Americans are now fully vaccinated—up from less than one percent when the President took office. This is significant progress, made possible by a vaccinations program that made shots free and convenient for months. But more vaccinations are needed to save lives, protect the economy, and accelerate the path out of the pandemic. To that end, in July, President Biden began rolling out vaccination requirements for federal employees and contractors and calling on employers to do the same. Thousands of organizations across the country have answered the President's call, and vaccination requirements have already helped reduce the number of unvaccinated Americans by approximately 40 percent since July.

The ETS does NOT apply to:

- Workplaces covered by OSHA's earlier COVID-19 emergency temporary standard for healthcare (even though that ETS is set to expire in a few weeks
- Workplaces that are covered by the federal contractor vaccine-mandate under the Safer Federal Workforce Task Force COVID-19 Guidance for Federal Contractors and Subcontractors
- Employees who do not report to a workplace where other individuals (e.g., coworkers or customers) are present
- Employee working from home
- Employees who work exclusively outdoors

What does the rule require?

The core requirements of the ETS are:

1. **PTO for vaccination** – Up to 4 hours of paid time off, including travel time, at the employee's regular rate of pay per dose for employees to get vaccinated (only for vaccinations that occur after the effective date of the ETS);
2. **PTO to recover from vaccination** – A reasonable amount of time off and paid sick leave to recover from side effects experienced following any vaccination dose (other than booster shots) for recovering from adverse effects of the vaccines;
3. **Vaccination or testing to report to work** – A soft-vaccine mandate, under which an employee may only report to the workplace after demonstrating: Proof of being fully vaccinated; or For employees who decline to get vaccinated or decline to share their vaccination-statute, proof of a negative COVID-19 test result from within the last week.

4. **Face coverings for unvaccinated workers** – In addition to producing a negative COVID-19 test, for employees who decline vaccination, the employer must ensure they wear a face covering that fully covers the nose and mouth at all times while working indoors and when occupying a vehicle with another person for work, regardless of the levels of community transmission. Consistent with current OSHA guidance, the face covering requirement does not apply when an employee is alone in a room with floor to ceiling walls and a closed door, for brief periods while the employee is eating or drinking or for identification purposes in compliance with safety and security requirements, or where the employer can show use of a face covering is infeasible or creates a greater hazard (e.g., when it is important to see the employee's mouth for reasons related to their job duties, when the work requires the use of the employee's uncovered mouth, or when the use of a face covering presents a risk of serious injury or death to the employee). Surprisingly, the ETS does NOT require employers to pay for any costs associated with face coverings, unless required by other laws, regulations, or collective bargaining agreements.
5. **Removal from work of COVID-19 cases** – Require each employee to promptly notify the employer when they receive a positive COVID-19 test or are diagnosed with COVID-19 by a licensed healthcare provider and immediately remove such employees from the workplace and keep them removed until the employee:
    - Receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if the employee chooses to seek a NAAT test for confirmatory testing;
    - Meets the return to work criteria in CDC's "Isolation Guidance"; or
    - Receives a recommendation to return to work from a licensed healthcare provider. *Note that this notification and removal requirement does NOT include any requirement for employers to provide PTO to any employee for removal as a result of a positive COVID-19 case. However, such PTO may be required by other laws, regulations, or collective bargaining agreements.*
6. **Information to Provide to employees** – Employers must inform each employee about:
    - The requirements of the ETS as well as any employer policies and procedures established to implement the ETS;
    - COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated, by providing them a copy of this document: "Key Things to Know About COVID-19 Vaccines"
    - The requirements of 29 CFR 1904.35(b)(1)(iv), which prohibits the employer from discharging or in any manner discriminating against an employee for reporting a work-related injuries or illness, and section 11(c) of the OSH Act, which prohibits the employer from discriminating against an employee for exercising rights under, or as a result of actions that are required by, the ETS, and which protects employees from retaliation for filing a complaint with OSHA, reporting a work-related injury or illness, or otherwise exercising any rights afforded by the OSH Act;
    - The prohibitions of 18 U.S.C. 1001 and of section 17(g) of the OSH Act, which provide for criminal penalties associated with knowingly supplying false statements or documentation.

For the testing component of the rule, an employee who reports to a workplace where other individuals such as coworkers or customers are present, at least one day every seven days, must:

- Be tested for COVID-19 at least once every 7 days; and
- Provide documentation of the most recent COVID-19 test result to the employer no later than the 7th day following the date on which the employee last provided a test result.

An employee who does not report to such a workplace during a period of seven or more days (e.g., teleworking for two weeks prior to reporting to a workplace with others) must:

- Be tested for COVID-19 within 7 days prior to returning to the workplace; and
- Provide documentation of that test result to the employer upon return to the workplace.

If an employee does not provide documentation of a COVID-19 test result as required above, the employer must keep that employee removed from the workplace until the employee provides a test result.

The rule is written interestingly as though it defaults to a mandatory or "hard" vaccine-mandate, but exempts employers who implement a soft mandate. The effect of that is that the rule technically only requires the soft mandate, as we have discussed throughout. That is, employers are *"exempted from the requirement [to establish a mandatory vaccination policy] only if the employer establishes, implements, and enforces a written policy allowing any employee not subject to a mandatory vaccination policy to choose either to be fully vaccinated against COVID-19 or provide proof of regular testing for COVID-19 … and wear a face covering…."*

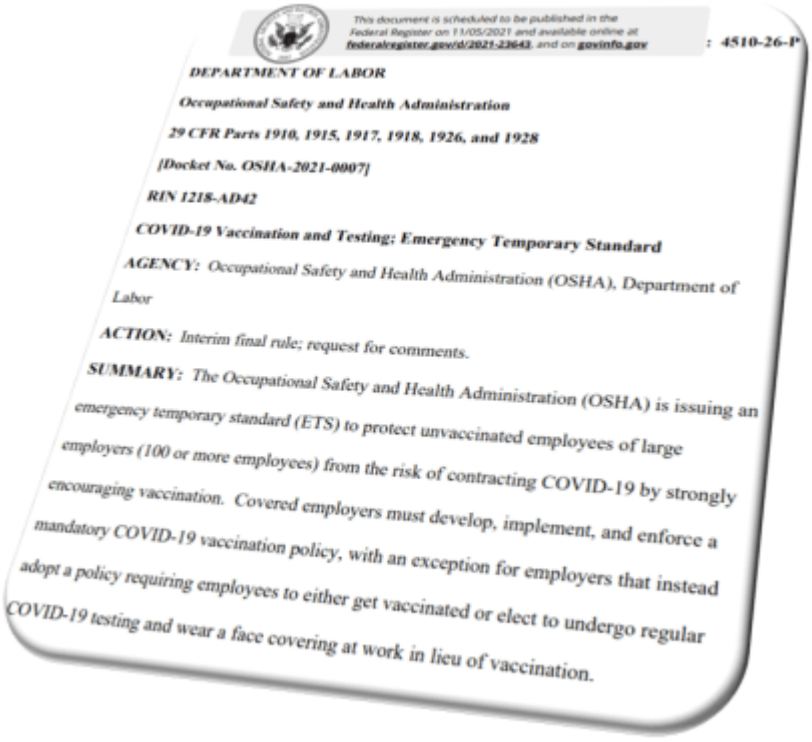
How is "fully vaccinated" defined in the ETS?

As we advocated for, the ETS does not require booster shots for any employee to be considered fully vaccinated. Rather, the ETS defines "fully vaccinated" as two weeks after receiving a single dose vaccine or after receiving the second dose of a two-dose vaccine. And the ETS expressly accepts not only the US FDA-approved vaccines, but also those vaccines that are listed for emergency use by the World Health Organization or administered as part of a clinical trial at a US site, if the recipient is documented to have primary vaccination with the active (not placebo) COVID-19 vaccine.

What type of testing will be acceptable for the soft mandate?

The two big takeaways here are that simple home rapid antigen test kits are acceptable, but the test cannot be BOTH self-administered and self-read by the employee outside the presence of the employer or a healthcare or telehealth test proctor. Specifically Here is how the ETS defines "COVID-19 test" as any form of testing for

SARS-CoV-2 that is:



This document is scheduled to be published in the Federal Register on 11/05/2021 and available online at federalregister.gov/d/2021-23643, and on govinfo.gov

4510-26-P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, 1917, 1918, 1926, and 1928

[Docket No. OSHA-2021-0007]

RIN 1218-AD42

COVID-19 Vaccination and Testing; Emergency Temporary Standard

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor

ACTION: Interim final rule; request for comments.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is issuing an emergency temporary standard (ETS) to protect unvaccinated employees of large employers (100 or more employees) from the risk of contracting COVID-19 by strongly encouraging vaccination. Covered employers must develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination.

1. Cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the FDA to detect current infection with the SARS-CoV-2 virus (e.g., a viral test)
2. Administered in accordance with the authorized instructions; and
3. Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

Examples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens), proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer.

Antibody tests that look for antibodies in the immune system produced in response to SARS-CoV-2 and are not used to diagnose an active COVID-19 infection are NOT acceptable for weekly testing compliance.

Does the ETS account for "Natural Immunity"?

Sort of. As expected, the ETS does not offer a blanket exemption to vaccination or testing based on "natural immunity" or the presence of antibodies from a previous infection. We presented the definition of "fully vaccinated" above, and the ETS makes clear that any employee who does not meet that definition is not considered fully vaccinated, regardless if they have previously tested positive for COVID-19. "Natural immunity" as considered by OSHA in the ETS, is the immune response of an individual previously infected with COVID-19. In the preamble to the rule, OSHA cites several studies which indicate that a previous COVID infection, regardless of the severity of the infection, was insufficient to protect against future infection. Consequently,

"[w]hile the agency acknowledges that the science is evolving, OSHA finds that there is insufficient evidence to allow the agency to consider infection-acquired immunity to allay the grave danger of exposure to, and reinfection from, SARS-CoV-2." Therefore, an employee previously infected with COVID-19 but who has not been vaccinated must be treated the same as any other unvaccinated employee, and either receive a vaccination or undergo weekly COVID-19 testing and wear a face covering in the workplace.

However, when an employee has received a positive COVID-19 test, or has been diagnosed with COVID-19 by a licensed healthcare provider, the employer must not require that employee to undergo COVID-19 testing as required above for 90 days following the date of their positive test or diagnosis. The rationale for the testing exemption after the first 90 days of a COVID-positive diagnosis, is the high likelihood of false positive result that does not indicate active infection.

When does the rule and its various components go into effect?

The ETS is expected to be published in the Federal Register tomorrow, **Friday, November 5**. By law, under the OSH Act, emergency temporary standards become effective immediately when they are published in the Federal Register. However, as we pushed for throughout this rulemaking, OSHA has provided delayed compliance dates to allow employers to develop and roll-out their new policies under the ETS. Technically, no elements of the rule go into effect before December 5th, and some elements are pushed out until next year. Here is a breakdown of the compliance dates for the various requirements of the ETS:

- PTO to get vaccinated begins on December 5th
- PTO to recover from adverse effects from the vaccines begins on December 5th
- Removal from work of COVID-19 positive workers begins on December 5th (although this should be done now, as we have been doing throughout the pandemic)
- Face coverings must be worn by all non-fully vaccinated workers (or those who status you do not yet know) begins on December 5th
- Confirm "fully vaccinated" status by January 4th to be permitted to report to work without proof of a negative test
- Verify negative test results weekly to report work beginning on January 4th

Who is required to pay for testing for unvaccinated workers?

Amazingly, the ETS explicitly states that it "does not require the employer to pay for any costs associated with testing." However, "employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements." And, of course, the ETS explains that it "does not prohibit the employer from paying for costs associated with testing."

However, if an employee is participating in the testing program because of a medical or religious accommodation to vaccination, employers would be responsible for the costs associated with testing.

What documentation is required to verify vaccination status?

Employers must maintain a record of each employee's vaccination status and must preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated. The employer must maintain "a roster of each

employee's vaccination status." The ETS provides that all employers must determine employees' vaccination status, and that the "must require each vaccinated employee to provide acceptable proof of vaccination status.... Acceptable proof of vaccination status is:

1. The record of immunization from a health care provider or pharmacy;
2. A copy of the COVID-19 Vaccination Record Card;
3. A copy of medical records documenting the vaccination;
4. A copy of immunization records from a public health, state, or tribal immunization information system; or
5. A copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s)."

Interestingly, self-attestation is not outright excluded under the ETS. The rule provides that "in instances where an employee is unable to produce acceptable proof of vaccination as listed above, a signed and dated statement by the employee:

- Attesting to their vaccination status (fully vaccinated or partially vaccinated);
- Attesting that they have lost and are otherwise unable to produce proof required by this section; and
- Including the following language: *'I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.'*"

The self-attestation should include the employee's best recollection about the type of vaccine administered, the date(s) of vaccination, and the name of the healthcare provider or site administering the vaccine(s).

An important caveat to all of this is that employee vaccination-status ascertained by employers prior to the effective date of the ETS through any other form of attestation or proof, and retained records of that ascertainment, the employer is exempt from these verification requirements for each employee whose fully vaccinated status has been documented prior to the effective date of this section.

What documentation is required to verify a negative COVID-19 test result?

As we anticipated, the rule does NOT allow self-attestation for negative test results. As we noted above, a COVID-19 test cannot be self-administered and self-read without independent confirmation/observation of the result by the employer or a healthcare provider. OSHA cites the "many social and financial pressures for test-takers to misrepresent their results" as justification for requiring independent confirmation of results.

Like verifying vaccination statutes, employers are expected to observe in some form a test result, and the ETS outlines methods for which employers can independently confirm the results of COVID-19 testing, including reliance upon testing by healthcare providers, requiring employees to conduct and read the test results under the observation of an authorized employee or telehealth proctor. Further "[e]xamples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens), proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer."

The ETS also requires employers to specify "how testing will be conducted (e.g., testing provided by the employer at the workplace, employees independently scheduling tests at point-of-care locations, etc.). The employer must also specify in their policy how employees should provide their COVID-19 test results to the employer (e.g., an online portal, to the human resources department)."

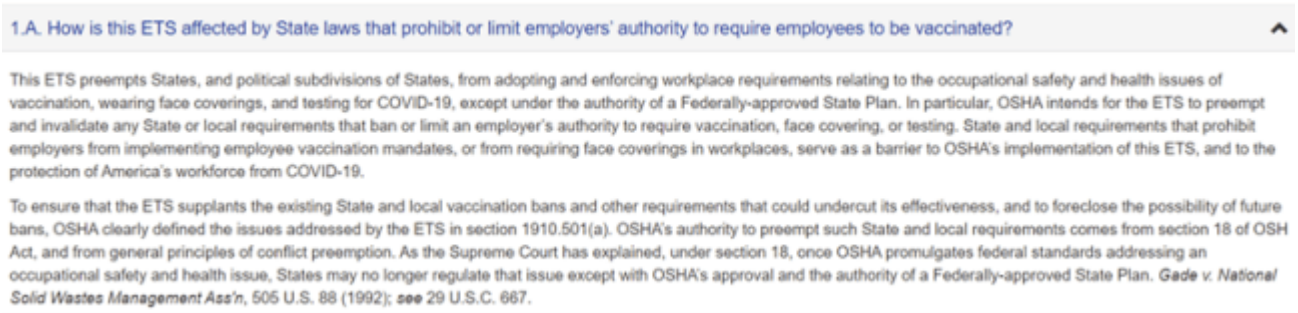
Finally, the ETS provides that the employer must maintain a record of each test result provided by each employee or obtained during tests conducted by the employer pursuant to the soft mandate element of the ETS, and the records must include information that "identifies the worker (i.e., full name plus at least one other identifier, such as date of birth), the specimen collection date, the type of test, the entity issuing the result (e.g., laboratory, healthcare entity), and the test result."

For how long must an employer retain documents generated or obtained to verify vaccination status or test results?

As we advocated for, the ETS expressly excludes from OSHA's 30+ year record-retention requirement for employee medical records the records that are generated or obtained to prove compliance with the ETS (i.e., vaccination records and documentation of negative test results). Interestingly, the way the ETS addresses this is by declaring all such records to be Employee Medical Records covered by OSHA's regulation for Access to Employee Medical Records (1910.1020), but declares that the "these records … are not subject to the retention requirements of § 1910.1020(d)(1)(i), but must be maintained and preserved while [the ETS] remains in effect."

How does the ETS interest with competing or conflicting state laws or resistance by State OSH Plan agencies?

In the very first FAQ included in the preamble package, OSHA flexes its muscles:



1.A. How is this ETS affected by State laws that prohibit or limit employers' authority to require employees to be vaccinated?

This ETS preempts States, and political subdivisions of States, from adopting and enforcing workplace requirements relating to the occupational safety and health issues of vaccination, wearing face coverings, and testing for COVID-19, except under the authority of a Federally-approved State Plan. In particular, OSHA intends for the ETS to preempt and invalidate any State or local requirements that ban or limit an employer's authority to require vaccination, face covering, or testing. State and local requirements that prohibit employers from implementing employee vaccination mandates, or from requiring face coverings in workplaces, serve as a barrier to OSHA's implementation of this ETS, and to the protection of America's workforce from COVID-19.

To ensure that the ETS supplants the existing State and local vaccination bans and other requirements that could undercut its effectiveness, and to foreclose the possibility of future bans, OSHA clearly defined the issues addressed by the ETS in section 1910.501(a). OSHA's authority to preempt such State and local requirements comes from section 18 of OSH Act, and from general principles of conflict preemption. As the Supreme Court has explained, under section 18, once OSHA promulgates federal standards addressing an occupational safety and health issue, States may no longer regulate that issue except with OSHA's approval and the authority of a Federally-approved State Plan. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992); *see* 29 U.S.C. 667.

A state can avoid preemption ONLY if it submits and receives federal approval to operate a State OSH Plan agency, and those agencies are required to adopt an ETS that is "at least as effective" as the Federal standard. So for "state-plan" states, the state OSH agencies will need to adopt amendments that reflect these new vaccination and testing requirements within 30 days. Thus, you may have more time for implementation in those jurisdictions.

Does the ETS affect requirement for reporting COVID-19 cases to OSHA?

Under the ETS, all covered employers are now required to report all work-related COVID-19 fatalities and in-patient hospitalizations of any employee, regardless of the amount of time between the exposure to COVID-19 in

the work environment and the death or in-patient hospitalization. This differs from the current requirements for reporting under 29 C.F.R. 1904.39, which only requires reporting of an *in-patient hospitalization that occurs within 24 hours of the work-related exposure that caused the hospitalization* or a *death that occurs within 30 days of the work-related exposure*. In other words, under the ETS, if an employee is hospitalized in the in-patient unit for COVID-19 or dies, and the employer determines the case is work-related, the employer must report the in-patient hospitalization even if it occurred more than 24 hours after the work-related exposure and the death even if it occurred more than 30 days after the work-related exposure.

* * * * * *

As we continue to dig into the ETS and the 490-page preamble package, we will share any further insights.

Let us know if you have any questions.