

OSHA EMERGENCY VACCINATION RULE IMPOSES NEW REQUIREMENTS ON PUBLIC AND PRIVATE SECTOR NEW YORK EMPLOYERS ALIKE

The federal Occupational Safety and Health Administration (“OSHA”), following a directive issued by President Biden in a September 9, 2021 national address, has released a long-awaited Emergency Temporary Standard (“ETS”), an emergency rule that imposes significant new requirements for employee vaccination, testing, reporting and recordkeeping on both private- and public-sector New York State employers.

Who is Affected By OSHA’s New Emergency Rule?

The new rule affects private-sector employers with at least 100 employees during any time period that the ETS is in effect—meaning that smaller employers who expand their workforces must remain aware of the rule, in the event that they reach the 100-employee threshold. The 100-employee threshold applies regardless of whether the employees are concentrated at one worksite, or spread out at multiple sites (including remote- and home-based employees); it likewise applies regardless of whether some or all of the employees are part-time, as opposed to full-time. (Employers, however, do not need to count temporary

employees supplied by an outside staffing agency.)

The new rule also applies, as a practical matter, to New York State’s *public*-sector employers, including state and municipal entities with 100 or more employees, due to New York’s participation in a “State Plan” with OSHA—which commits the State to adopting requirements that are identical or “at least as effective” as the federal rule. (Historically, OSHA’s jurisdiction does not extend to state and local government employees in the absence of a State Plan like New York’s.)

Healthcare workers already covered by OSHA’s August 13, 2021 ETS—which continues to apply to the healthcare industry—are unaffected by the new rule.

Importantly, the new rule is intended to preempt State and local requirements that are inconsistent with its provisions (such as state or local government bans or limits on the authority of employers to require vaccination or testing). In doing so, OSHA’s new ETS—if upheld through anticipated court challenges—seeks to be the “final word” on the issues that it addresses.

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What Are OSHA's New Requirements for Employers?

As expected, the core of the emergency rule is a requirement that covered employers adopt, implement, and enforce policies requiring either the mandatory vaccination of employees, or the implementation of a regimen of weekly Covid-19 testing and face coverings for unvaccinated employees. The numerous mandates imposed by the ETS to achieve this requirement can be generally broken down into six primary areas of activity.

1. Written Policy Adoption

The ETS requires covered employers to establish, implement and enforce a written mandatory vaccination policy, *or* a policy that allows employees to choose between vaccination and a regular regimen of Covid-19 testing coupled with the use of face coverings in the workplace. The ETS notes that—even where an employer chooses to implement a mandatory vaccination policy—employees may be entitled to reasonable accommodation (including exemption from vaccination) under the Americans with Disabilities Act (ADA) or the religious-discrimination protections of Title VII of the Civil Rights Act of 1964.

2. Paid Time Off For Vaccination and Side Effects

The new rule requires employers to provide reasonable time, including up to four hours of *paid* time at an employee's regular rate of pay, to obtain each of their primary vaccination doses: i.e., eight hours of paid time in total, if

the employee is receiving a two-dose vaccination. (Employees requiring additional time beyond four hours to obtain a vaccination dose, must be given additional “reasonable” time off to do so, but the additional time off need not be paid.) The rule likewise requires “reasonable time and paid sick leave to recover from side effects experienced” following a vaccination does, although the rule does not discuss in depth what a “reasonable” amount of time off for side effects may be.

3. Covid-19 Testing and Face Coverings for Unvaccinated Employees

Employees who remain unvaccinated under the new rule, are subject to a series of new Covid-19 testing requirements. The ETS mandates that covered employers require, and obtain documentation of, weekly testing for employees who report at least once every seven days to a workplace where other individuals (such as coworkers or customers) are present. For employees who do not report to such a workplace on a regular basis—for example, home-based remote employees—employers must ensure that they are tested, and obtain documentation of the test results, within seven days prior to reporting to such a workplace. Employers are not required to pay for employee testing, although they may opt to do so under the rule, or may otherwise be obligated to do so by the terms of an employee's contract or collective bargaining agreement.

The ETS requires employers to remove *any* employee (vaccinated or not) from the workplace upon receipt of a positive Covid-19

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test result, whether or not the test was conducted pursuant to the requirements of the rule. Employees removed for a positive test result may only return after receiving a negative result in a confirmatory test; meeting the return-to-work criteria of the Centers for Disease Control’s (“CDC”) “Isolation Guidance,” or otherwise obtaining a recommendation to return to work from a licensed healthcare provider.

In addition to Covid-19 testing regimens, unvaccinated employees are also subject to a face covering requirement under the new ETS. OSHA’s emergency rule calls for covered employers to mandate face coverings for all employees who are not fully vaccinated whenever those employees are either indoors, or occupying a vehicle with another person for work purposes, except in limited circumstances where the employee is alone in a room with “floor to ceiling walls and a closed door”; “eating or drinking at the workplace”; or wearing a respirator or facemask. An unvaccinated employee may also avoid the face covering requirement if it is infeasible or hazard-creating; for example, where the employee is engaged in work that requires an uncovered mouth.

The ETS reaffirms that employers may not prevent any employee—whether vaccinated or not—from voluntarily wearing a face covering in the workplace, except where the employer can demonstrate that the face covering would create a risk of serious injury or death.

4. Records Maintenance and Collection

Implementing and enforcing compulsory vaccination and testing policies will generate many new employee records—which the ETS requires covered employers to preserve and, in some instances, create. Under the new rule, employers are required to determine each employee’s vaccination status and obtain proof of vaccination, which may come in the form of a healthcare provider or pharmacy record; a Covid-19 Vaccination record Card; a copy of a medical record, public health record, or other official document that documents the vaccination (for example, a record from a tribal immunization information system); or a signed and dated declaration from the employee attesting to his or her vaccinated status, for employees who are unable to produce documentary proof. Records of each employee’s vaccination status, as well as copies of the proof presented by each employee, must be retained by the employer—together with a “roster” showing each employee’s vaccination status. Employers must also preserve copies of Covid-19 test results furnished by unvaccinated employees who are subject to testing requirements in lieu of vaccination.

5. Distribution of Information to Employees; Employee Access to Records

In addition to collecting voluminous new records under the ETS, covered employers will also be responsible for distributing specific information to employees. OSHA’s emergency rule requires employers to provide each employee with information about the rule itself, and its requirements—including, specifically,



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the policies that the employer itself has adopted in response to the ETS; a copy of the CDC document “Key Things to Know About COVID-19 Vaccines”; information about OSHA’s anti-discrimination and anti-retaliation provisions, (which protect workers from discharge for exercising rights under the OSH Act); and information about criminal penalties stemming from knowingly supplying false statements or documentation. This information is required to be provided to employees in a language, and at a literacy level, that they are able to understand.

The ETS also directs employers to make certain information available to employees and their representatives. Under the emergency rule, an employee and/or his or her representative is entitled to copies of his or her own Covid-19 vaccination information (including test results, if applicable), as well as the aggregate number of fully vaccinated employees in the workplace, and the total number of employees in the workplace, no later than the end of the next business day after a request.

6. Agency Access and Reporting to OSHA

Not only do covered employees have information-access and information-sharing requirements to their employees under the new rule; they also have similar requirements to OSHA itself. The ETS requires covered employers to report any “work-related COVID-19 fatality” to the agency within eight hours of the employer learning of the fatality; as well as any “work-related COVID-19 in-patient hospitalization” within 24 hours.

The ETS likewise gives OSHA the power to demand a wide-range of compliance-related documents from covered employers, with highly-accelerated timelines for production and disclosure. Under the new rule, employers must provide the agency their written policies (adopted under the ETS) within four hours of an agency demand. All other records and documents maintained in accordance with the ETS—including employee vaccination status records; proof of vaccination; Covid-19 test results, and employee vaccination “rosters,” among others—must be produced to the agency by the end of the next business day following a demand.

When Must Employers Comply With the ETS?

The ETS imposes this dramatic new set of requirements on covered employers with only a short window of compliance. Under the new rule, all requirements except the implementation of a testing regimen (for employees who have not completed their primary vaccination dose(s)) must be implemented within 30 days of the rule’s publication (currently scheduled for November 5). Testing for employees who have not yet received all of their primary vaccination doses, must commence within 60 days of the ETS’ publication, or by January 4, 2022.

Despite OSHA’s claim that it is “confident” that the new rule is administratively and economically feasible for employers, the new rules will unquestionably require employers to decide on and draft policies, delegate administrative responsibilities, and collect and maintain new records—all within a short



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period of time. Moreover, OSHA's commentary, released along with the draft of the rule, indicates that the agency is open to changes in the rule at a later date—including, possibly, the adoption of rules aimed at smaller employers than are currently covered. As a result, all employers—regardless of size—should be aware of the current requirements and, if covered, move quickly to respond to OSHA's new mandates.

Bolaños Lowe PLLC will continue to monitor and update its reporting and alerts on the new ETS, as additional guidance and analysis become available.

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