



## **OSHA RULE FOR PRIVATE EMPLOYER VACCINE MANDATE REINSTATED; APPEAL TO SUPREME COURT PENDING**

On Friday evening, December 17, 2021, the Sixth Circuit Court of Appeals lifted the stay of the OSHA Emergency Temporary Standard (“ETS”) implementing the COVID-19 vaccination mandate for private employers with 100 or more employees. Below is a review of the ETS provisions together with some new developments and a list of steps for employers to take to prepare for the ETS. Be aware that the ETS already is on appeal to the United States Supreme Court, and the Supreme Court again could stay the ETS while the underlying litigation continues.

### **Timing of the private employer vaccine mandate pending Supreme Court review**

- OSHA will not attempt to enforce any ETS requirements until January 10, 2022
- OSHA will not issue any citations for noncompliance until February 9, 2022
- All unvaccinated workers must begin wearing masks on January 10, 2022
- All unvaccinated workers must begin producing a negative COVID-19 test result on a weekly basis beginning January 10, 2022
- Employers are not required to pay for or provide tests unless regulated by state law or a collective bargaining agreement

### **Next steps for employers**

- Determine whether your company has 100 or more employees and is subject to the mandate. Count the number of employees company wide, whether full or part time. Fully remote employees do not have to get vaccinated, but those employees do count toward the 100 employee threshold. Independent contractors and leased employees do not count toward the threshold
- Designate one (or a few) persons to collect vaccine information and exemption requests. Employees should NOT provide vaccine information or exemption requests to their immediate supervisors. As with disability issues and FMLA requests, immediate supervisors should not have medical information about their subordinates unless there is a “need to know”
- Begin collecting vaccination records for employees. Employers will need to maintain those records in the event of OSHA review
- Decide whether to offer testing at the worksite. Employers who have a significant portion of unvaccinated workers may want to establish an onsite testing program to eliminate any potential of having to pay employees for time needed to go get



vaccinated at an outside location. Employers who provide an onsite testing program reduce the risk of losing good employees who cannot afford weekly testing expenses. Also, if the employee's costs for weekly testing will bring the employee's weekly pay below the minimum wage, the employer will have to pay for the testing so as not to run afoul of the Fair Labor Standards Act. On-site testing programs can eliminate many of those issues. Even if an employer cannot get a testing program in place by January 10, 2022, employers can work toward setting up a program and have the program in place by February 9, 2022 when enforcement actions/citations could begin

- Prepare to give paid time off for employees who choose to get the vaccine or need time off to recover from the side effects of the vaccine. Employers must give up to four hours of paid time off to employees who get the vaccine, plus a “reasonable” amount of paid time off to recover from side effects of the vaccine. Note that booster shots currently are not in the definition of “fully vaccinated” but that could change
- Communicate to employees about exemption requests. Tell employees that they may seek a religious and/or medical exemption from the vaccine requirement. If employees who are granted exemptions will be required to submit weekly tests as an “accommodation” of their religious/medical exemption, let employees know that in advance. Some employees simply will opt to test weekly without seeking an exemption in an effort to protect their private information. Be honest and open with employees and tell them up front that they can opt for weekly testing without having to seek an exemption. Some employees still may seek exemptions and may have reasons why they cannot test weekly, but others may simply opt for weekly testing. Remember that employees also may ask for exemptions from mask wearing. Be prepared to grant those exemptions as warranted and consider weekly testing as an “accommodation” which addresses both the mask and vaccine mandates.
- Prepare for employee pushback and work to retain employees. Some employees will seek employment with companies not subject to the mandate, and most employers cannot afford to lose any significant number of employees. Guard against the possibility of employee loss by considering an in-house testing program to eliminate cost and as much inconvenience to employees as possible.

We will keep you updated as we receive more information about the OSHA ETS and the current appeal to the United States Supreme Court. If you have any questions in the interim, please contact ELDI Founder Kimberly L. Russell, Esquire at [krussell@kaplaw.com](mailto:krussell@kaplaw.com) or (610) 941-2541.