

Alert

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White House Announces OSHA ETS Mandating Vaccinations or Weekly Testing for Most Workers

In an announcement that is unprecedented in OSHA's 50 year history, it was announced today that the Labor Department plans to issue, in record time, an emergency temporary standard (ETS) to require employers with more than 100 employees to ensure that every employee is fully vaccinated against COVID-19 or tests negative every week. OSHA plans to issue this ETS in an expedited manner with, apparently, none of the usual public comment from stakeholders generally required during the rulemaking process. Neither the White House nor the Labor Department have yet disclosed many details of the proposed ETS, but all indications are that it will be issued quickly. (By comparison, the current COVID-19 ETS took more than six months in the regulatory process.)

The proposed ETS will apparently incentivize vaccination by requiring employers to provide employees with paid time off to get vaccinated and to recover from any side effects. Meanwhile, there is no mention of compensation for employees who opt for weekly COVID-19 testing, and who may be unable to work and in an unpaid status while awaiting test results. The proposed ETS would similarly encourage employers to mandate vaccines, avoiding the uncertainty of weekly testing for employees, the related questions of compensation, and the unpredictability of employees who may be awaiting test results. Additionally, the ETS will reportedly subject employers to proposed penalties of up to \$14,000 per violation.

The administration acknowledged that this proposed ETS is likely to be challenged in court, but, it apparently hopes that employers will institute these mandates *before* the rule is either upheld or invalidated by the federal courts. It is questionable whether the Labor Department will be able to establish that a "grave danger" exists now to justify such a rule when it opted not to issue a similar rule in the spring of this year.

The president also signed an executive order today, requiring all government workers in the executive branch be vaccinated, with no option of being regularly tested instead. A separate executive order was also signed requiring the same obligation of all federal contractors, irrespective of whether their employees are employed on federal worksites.

Employers should anticipate that while this ETS will be rushed through the required rulemaking process, it will still include the required benefit/cost analysis performed by the Office of Information and Regulatory Affairs, (OIRA), the federal government's central authority for the review of executive branch regulations. Cozen O'Connor attorneys represented firm clients at meetings held by OIRA during the process leading up to the current COVID-19 ETS. Given the expedited nature of this initiative, however, it is likely that OIRA will limit this process to one or two "listening sessions," if that, but Cozen O'Connor will still be requesting to participate in those limited opportunities.



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