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**OSHA’s COVID-19 Vaccination and Testing Emergency  
Temporary Standard (“ETS”)**

**I. OVERVIEW**

The Occupational Safety and Health Administration (“OSHA”) issued an Emergency Temporary Standard (“ETS”) on November 4, 2021 requiring covered employers to implement a mandatory COVID-19 vaccination policy or, in the alternative, adopt a policy requiring employees to undergo regular COVID-19 testing and wear a face covering at work. The ETS became effective immediately upon publication in the Federal Register on November 5, 2021. *See* 29 C.F.R. §1910.501. Importantly, on November 6, 2021, the United States Court of Appeals for the Fifth Circuit enjoined the ETS nationwide pending expedited judicial review, finding “grave statutory and constitutional issues.” On November 12, 2021, the Fifth Circuit issued a decision affirming the stay pending adequate judicial review on the motions for permanent injunction. OSHA is not permitted to take further steps to implement or enforce the ETS until further Court order. Notwithstanding, this memorandum provides a summary of the ETS and covered employers’ obligations thereunder should its legality be upheld.

**II. REQUIREMENTS UNDER THE ETS**

**A. Covered Employers:**

All private employers with 100 or more employees company-wide, including temporary workers, seasonal workers, and minors, are covered under the ETS.<sup>1</sup> Excluded employers include federal contractors, federal subcontractors and certain healthcare service providers. *See* 29 C.F.R. §1910.501(b)(2).

**B. Employees Exempted from the ETS:**

The ETS does not apply to employees: (1) who do not report to a workplace where other individuals, such as coworkers or customers, are present; (2) while they are working remotely; or (3) who work exclusively outdoors.<sup>2</sup>

**C. ETS Requirements for Covered Employers**

**i. Develop Mandatory Vaccination Policy**

Employers are required to develop, implement, and enforce a mandatory COVID-19 vaccination policy for all employees, except those for whom (1) the vaccine is medically harmful, (2) medical necessity requires delay in vaccination, or (3) are legally entitled to a reasonable accommodation due to a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.<sup>3</sup>

Alternatively, the employer may instead develop, implement, and enforce a policy allowing employees to elect either to be vaccinated or to undergo weekly COVID-19 testing and wear a face covering at the workplace.<sup>4</sup>

ii. Determine and Record Vaccination Status

Employers must determine vaccination status of employees, obtain acceptable proof of vaccination from vaccinated employees, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status.<sup>5</sup>

iii. Provide Paid Time for Vaccination and Recovery

Employees must be provided reasonable time, including up to four (4) hours of paid time, to receive each vaccination dose, and reasonable time and paid sick leave to recover from side effects experienced following each dose.<sup>6</sup>

iv. Provide Employees with ETS and Related Information

Employers must provide employees the following in language and literacy level the employee understands: (1) information about the requirements of the ETS and workplace policies and procedures established to implement the ETS<sup>7</sup>; (2) the CDC document "Key Things to Know About Covid-19 Vaccines"; (3) information about protections against retaliation and discrimination under 29 C.F.R. § 1904.35(b)(1)(iv) and Section 11(c) of the OSHA Act; and (4) information about laws that provide for criminal penalties for knowingly supplying false statements or documentation under 18 U.S.C. § 1001 and of Section 17(g) of the OSH Act.<sup>8</sup>

v. Require Unvaccinated Employee to Undergo Weekly Testing

Employees who are not fully vaccinated must submit to weekly COVID-19 testing if present at the workplace at least once a week, or within seven (7) days before returning to work if away from the workplace for a week or longer.<sup>9</sup>

vi. Require Unvaccinated Employees to Wear Face Coverings

Employers must require each employee who is not fully vaccinated to wear a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances.<sup>10</sup>

vii. Remove Employees with Positive Test Results from Workplace

Employers must: (1) require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19; (2) immediately remove any employee from the workplace, regardless of vaccination status, who received a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider; and (3) keep removed employees out of the workplace until they meet criteria for returning to work.<sup>11</sup>

viii. Report COVID-19 Fatalities and Hospitalizations to OSHA

Employers must report work-related COVID-19 fatalities to OSHA within 8 hours of learning about them, and work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization.<sup>12</sup>

**D. The ETS preempts State and Local laws**

The ETS is intended to preempt state and local laws adopting and enforcing workplace requirements that ban or limit an employer from requiring vaccination, face covering, or testing for COVID-19.

**E. Additional Considerations**

i. Testing Costs

While the ETS does not require employers to cover the costs of testing, we believe New York State laws may require employers to bear the cost of testing.<sup>13</sup> Additionally, under the Federal Fair Labor Standards Act ("FLSA"), employers must pay nonexempt employees for the time spent undergoing

testing during the workday. Therefore, if employers require employees to take the test on their own time, employers may still be required to compensate them for the time under federal law. Given the lack of guidance from the Department of Labor on whether time spent on taking the test in compliance with the ETS is compensable, covered employers should consider testing all unvaccinated employees onsite at the beginning of each week if the ETS is upheld. This ensures the testing is done properly and on a timely basis, and that the employer gets reliable results directly and consistently, while potentially minimizing compensable time.

ii. Reasonable Accommodations

Once a vaccination policy is adopted and distributed, employers may receive requests for reasonable accommodations from employees, seeking either a medical or religious exemption. Employers will thereafter be required to engage in the interactive process with employees to develop reasonable accommodations for employees, if warranted. We will circulate additional compliance alerts in the near future with guidance on how to respond to requests for reasonable accommodations and best practices.

### III. CONCLUSION AND NEXT STEPS

On November 12, 2021, enforcement of the ETS was stayed by the United States Court of Appeals for the Fifth Circuit pending adequate judicial review. Although the viability of the ETS is uncertain, covered employers can implement policies outside of the ETS that support the policy considerations underlying the ETS subject to state law guidance to the contrary. Furthermore, it is anticipated the ETS will be reviewed by the Supreme Court and may be potentially endorsed.

We will continue to keep employers abreast of further developments regarding the ETS and look forward to assisting you navigate its requirements should the stay be lifted and the ETS is enforced. Upon your receipt and review of this memorandum, should you have any questions, please do not hesitate to contact Larry R. Martinez, Esq., Asish Anne Nelluvely, Esq. or Allyson N. Brown-Hanif, Esq.

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<sup>1</sup> See 29 C.F.R. §1910.501(b)(1). In states with OSHA-approved State Plans, state and local-government employers, as well as private employers, with 100 or more employees, will be covered by state occupational safety and health requirements.

<sup>2</sup> See 29 C.F.R. §1910.501(b)(3).

<sup>3</sup> See 29 C.F.R. §1910.501(d)(1).

<sup>4</sup> See 29 C.F.R. §1910.501(d)(2).

<sup>5</sup> See 29 C.F.R. §1910.501(e).

<sup>6</sup> See 29 C.F.R. §1910.501(f).

<sup>7</sup> See sample vaccination and testing policies provided by OSHA can be found at <https://www.osha.gov/coronavirus/ets2>

<sup>8</sup> See 29 C.F.R. §1910.501(j).

<sup>9</sup> See 29 C.F.R. §1910.501(g).

<sup>10</sup> See 29 C.F.R. §1910.501(i).

<sup>11</sup> See 29 C.F.R. §1910.501(h).

<sup>12</sup> See 29 C.F.R. §1910.501(k).

<sup>13</sup> See N.Y. Labor Law § 201-b (An employer cannot require an employee as a condition of continued employment to pay the cost of any medical examination or the cost of furnishing any health certificate where: (1) the employee is not covered by any health insurance or their health insurance does not cover the exam/certificate or the employer does not provide qualified medical personnel to conduct the exam without cost to the employee; and (2) the exam/certificate is not required by a state, local, or federal law). See also NYC's Earned Sick and Safe Time Act, NYC Admin. Code § 20-914(a) (If an employer requires testing or clearance from a healthcare provider as a condition of returning to work, then the city law requires employers to reimburse employees for fees charged by healthcare providers for sick leave documentation that the employee requested); S08091, N.Y. Legis. Assemb., 2019-2020, (2020-03-18) §§ 1(a)-(c), 1.1(a) (Under NY's Paid Quarantine Leave, employers are required to provide at least five (5) days of job protected, paid sick leave to employees who need to take leave because they are under a mandatory or precautionary order of quarantine or isolation due to COVID-19).