

Bodman PLC

September 2021

Common Questions and Concerns About OSHA's Workplace Vaccine Mandate – Part 1 of 2

By: Rebecca Seguin-Skrabucha, Senior Associate and Alexander J. Burridge, Associate, Workplace Law Group

President Biden's ["Path Out of the Pandemic"](#) action plan has left many employers wondering – what will happen next? Although there is more unknown than known at this point, **Bodman's Workplace Law Group** has collected clients' most common questions and concerns about the Occupational Safety and Health Administration's ("OSHA") anticipated Emergency Temporary Standard ("ETS"). In an effort to alleviate uncertainty and aid in early preparation efforts, provided below are answers to many of the enforceability questions we have received:

1. **What will be required under OSHA's ETS?**

President Biden announced that OSHA is preparing an ETS that will require private employers with 100 or more employees to: (1) "ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work"; and (2) provide paid leave to employees who are unable to work because they are undergoing and/or recovering from vaccination. The latter requirement is already recommended under OSHA's ["Protecting Workers" Guidance](#). The details of the ETS and its specific requirements will not be clear until publication.

2. **When will employers be required to comply with OSHA's ETS?**

At this time, it is unclear when OSHA will publish the ETS. Many commentators expect OSHA to issue the ETS in 15 to 45 days. Employers are typically afforded a grace period between publication and enforcement. The National Retail Federation and Retail Industry Leaders Association are specifically requesting 90 days of "lead time."

An ETS may remain in effect for six months, after which it must be rescinded or replaced by a permanent rule.

It should be noted that various special interest groups have expressed an intent to challenge the legality of the ETS, and, as a result, it could be held in abeyance by a court after

publication. OSHA has promulgated 10 emergency standards in its 50-year history, 5 of which were partially or completely invalidated.

3. How will the “100 or more employees” threshold be calculated?

The ETS will define the calculation method employers must use when determining whether they are covered, and, therefore, required to comply.

Some clues may be provided by a separate OSHA regulation that specifies which employers are considered to employ 10 or more employees and subject to OSHA’s injury and illness reporting obligations. A company must take into consideration: (1) its size based on the number of employees in the entire company, not just the size of each individual business establishment; and (2) its peak number of employees during the preceding calendar year.

4. Does President Biden have the Constitutional power to force OSHA to issue an ETS?

The President may utilize executive authority to instruct a government agency (e.g., OSHA) to engage in rulemaking that affects businesses. OSHA will draft and publish an ETS in accordance with its authority and corresponding regulations.

5. Does OSHA have the regulatory power to promulgate a rule that forces private employers to issue a mandatory vaccine policy?

OSHA has the power to promulgate an ETS upon determining that: (1) employees are subject to a grave danger from the exposure to substances or agents determined to be toxic or physically harmful; and (2) an emergency standard is necessary to protect employees from such danger. To meet this standard, OSHA will need to provide data that sufficiently evidences COVID-19’s classification as a grave danger in various types of workplaces and the protection provided by a vaccine mandate and/or testing protocol.

6. How will OSHA’s ETS interplay with workers’ compensation laws?

In general, if an employer mandates that an employee become fully vaccinated and the employee has an adverse reaction to the vaccine that causes serious illness or injury, the employee could be entitled to workers’ compensation benefits.

An employee may also be entitled to benefits if they are able to evidence that they contracted COVID-19 in the course of their employment.

Whether or how OSHA’s ETS will address this issue is unclear.

7. Will a unionized employer be required to collectively bargain over the implementation of a vaccine mandate or weekly testing?

It is well-established that an employer has no duty to bargain over a non-discretionary change in the terms and conditions of employment mandated by federal, state, or local law.

However, when an employer has discretion over how to implement certain changes, the employer has a duty to notify and bargain with the union over the means of implementation.

8. What should we do while we await the ETS?

In preparation for OSHA’s imminent ETS, employers should take the following steps: (1) conduct a workplace survey to determine who is and who is not vaccinated; (2) consider whether weekly testing will be allowed as an alternative; (3) prepare basic policies, procedures, and communications for employees that can be adapted based on the ETS; (4) prepare the Human Resources Department for the tasks related to the administration of paid leave and accommodation requests; and (5) watch for additional legal developments.

The answers provided here are necessarily speculative and designed to assist employers in the planning of policies and procedures that will become clearer upon publication of the ETS. **Bodman’s Workplace Law Group** continues to monitor for developments and can be contacted with any remaining questions. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

WORKPLACE LAW PRACTICE GROUP	AARON D. GRAVES <i>Chair</i> 313.392.1075 agraves@bodmanlaw.com	JOHN T. BELOW 248-743-6035 jbelow@bodmanlaw.com	JOHN C. CASHEN 248.743.6077 ccashen@bodmanlaw.com
	GARY S. FEALK 248-743-6060 gfealk@bodmanlaw.com	JOHN DAVID GARDINER 616.205.3123 jgardiner@bodmanlaw.com	MELISSA M. TETREAU 248.743.6078 mtetreau@bodmanlaw.com
	REBECCA C. SEGUIN-SKRABUCHA 313.393.7594 rseguin-skrabucha@bodmanlaw.com	MICHELLE L. KOLKMEYER 248.743.6031 mkolkmeier@bodmanlaw.com	ALEXANDER J. BURRIDGE 313.393.7560 aburridge@bodmanlaw.com
	DAVID B. WALTERS 248.743.6052 dwalters@bodmanlaw.com	KAREN L. PIPER <i>Of Counsel</i> 248.743.6025 kpiper@bodmanlaw.com	