

Bodman PLC

November 2021

### **OSHA Releases the Anticipated Vaccinate-or-Test Emergency Temporary Standard**

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

The Occupational Safety and Health Administration (“OSHA”) released its much-anticipated Emergency Temporary Standard (“ETS”), requiring “large” employers to implement COVID-19 vaccine mandates or otherwise subject unvaccinated employees to weekly testing, based upon the finding that COVID-19 poses a grave danger to the workplace given evidence that unvaccinated individuals are more likely to contract, transmit, and suffer severe health outcomes from COVID-19. The ETS is effective today, November 5, 2021, as of its publication in the Federal Register. The Michigan Occupational Safety and Health Administration (“MIOSHA”) is expected to issue a State Plan that is “at least as effective as the ETS” within the next 30 days.

#### **Covered Employers and Employees**

The ETS applies to most employers with 100 or more employees. An employer is considered to meet the 100-employee threshold if, at any time during the effective period of the ETS, the employer has 100 or more employees, taking into consideration “all employees at all locations.” Of note, federal agencies, federal contractors covered by Executive Order 14042, and healthcare employers covered by the OSHA Healthcare ETS, published on June 21, 2021, need not comply.

The ETS does not apply to employees who: (1) “do not report to a workplace where other individuals such as coworkers or customers are present”; (2) work remotely from their homes; or (3) work exclusively outdoors. When remote employees visit an occupied worksite, and when employees who work outdoors perform more than *de minimis* indoor activities, employers must enforce the ETS.

#### **Policy Requirements**

A covered employer “must establish, implement, and enforce a written mandatory vaccination policy . . . [or] a written policy allowing any employee not subject to a mandatory vaccination policy to choose either to be fully vaccinated against COVID-19 or provide proof

of regular testing for COVID-19.” In short, covered employers must mandate vaccination or establish a weekly testing protocol for all employees who choose to remain unvaccinated.

Employers have 60 days to establish their testing protocols and 30 days to satisfy all other ETS requirements.

Any vaccination mandate must be effectuated in compliance with state and federal laws, including the Americans with Disabilities Act (“ADA”) and Title VII of the Civil Rights Act (“Title VII”), meaning employers must determine whether reasonable accommodations exist for employees who are unable to become fully vaccinated because of a disability or sincerely-held religious belief. The ETS also recognizes that employees may delay or avoid vaccination due to “medical contraindication” (e.g., severe allergic reactions) and/or “medical necessity.”

The written policy must inform employees of the following:

- Whether employees are subject to a vaccination mandate, and, if so, what exemptions may be available;
- The manner in which the employer is collecting and maintaining proof of employee vaccination;
- Any masking and testing rules;
- Paid leave available to undergo and recover from vaccination;
- The notification, removal, and return-to-work procedures if there is a confirmed case of COVID-19 onsite;
- The requirements of the ETS and the policies and procedures utilized in implementation thereof, including explanations of the policy’s effective date, covered employees, and relevant deadlines;
- “COVID-19 vaccine efficacy, safety, and benefits of being vaccinated,” as delineated in the document, “Key Things to Know About COVID-19 Vaccines,” published by the Centers for Disease Control and Prevention (“CDC”);
- Protections against discrimination or retaliation, including those protections afforded to employees who report work-related injuries or unsafe working conditions;
- The potential for criminal penalties for the knowing provision of false statements or documentation; and
- Disciplinary consequences for policy violations.

Employees should review and acknowledge receipt of their employer’s disseminated written policy.

### **Employee Vaccination Status**

Employers “must determine the vaccination status of each employee” and properly store each employee’s “acceptable proof of vaccination status.” This information must be memorialized in a “roster of each employee’s vaccination status.”

The following may constitute “acceptable proof”: (1) record of immunization provided by the employee’s healthcare provider or pharmacy or a public health, state, or tribal immunization information system; (2) a copy of the COVID-19 Vaccination Record Card; or (3) a copy of the employee’s medical records documenting vaccination.

The “acceptable proof” documentation and roster are considered employee medical records and should be maintained confidentially by the employer’s human resources department.

In addition to recording employees’ vaccination statuses, employers must provide: (1) “a reasonable amount of time” and “up to 4 hours paid time, including travel time, at the employee’s regular rate of pay” to seek vaccination during working hours; and (2) “reasonable time and paid sick leave to recover from” vaccination side effects.

### **COVID-19 Testing Protocol**

Within 60 days, employers need to begin weekly testing of unvaccinated employees who perform in-person work, including those who are approved for disability-related or religious reasonable accommodations. Covered employees must be tested and submit documentation of a negative test result at least once every seven days.

If an employee recovers from COVID-19, they are excused from testing for 90 days. Employees who work remotely or in a workplace with no other individuals are not subject to weekly testing, but, if such employees plan to visit an occupied worksite, they must undergo testing in the seven days before their visit and submit documentation of a negative test result at the time of the visit.

OSHA guidance defines a permissible “COVID-19 test” as a test that is cleared, approved, or authorized by the U.S. Food and Drug Administration (“FDA”), and that is “not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor,” aiming to “ensure the integrity of the result.” Examples of satisfactory tests include laboratory tests of “home or on-site collected specimens,” “proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer.”

The ETS does not require that employers cover the cost of testing. However, there is a question as to whether time spent testing is considered compensable under the Fair Labor Standards Act (“FLSA”). Indications are that the Department of Labor (“DOL”) will address this issue in light of the ETS.

If an employee violates an employer’s testing protocol, the employee is denied entry to or removed from the workplace until the employee demonstrates compliance with the submission of a negative test result.

Employers must retain all test results. Like proof of vaccination, these test results are considered employee medical records and must be stored confidentially.

### **Masking Rules**

Employees who are not fully vaccinated must properly wear a face covering when indoors and when occupying a vehicle with another individual in the course of employment, unless:

- The employee is alone in a room with a closed door;
- The employee is eating or drinking for a limited time;

- The employee must remove their face covering momentarily for safety and security identification purposes;
- The employee is wearing a respirator or facemask as an alternative to a face covering; or
- The employer demonstrates that the face covering is infeasible or poses a greater hazard to employee safety.

Though not required by the ETS, OSHA's "Protecting Workers" guidance recommends that all employees, regardless of vaccination status, wear masks when indoors in areas with high or substantial levels of community transmission. All Michigan counties are currently experiencing high levels of community transmission.

### **Confirmed COVID-19 Cases**

Any employee with a confirmed case of COVID-19 must notify their employer, and the employer must immediately remove the employee from the worksite until the employee satisfies the symptom-based strategy as summarized in the CDC's "Isolation Guidance," or receives a release to return to work from a licensed healthcare provider. Michigan's Enrolled Senate Bill 1258 similarly requires that employers abide by CDC guidance or a healthcare provider's release when considering the timing of a diagnosed employee's resumption of in-person work. These return-to-work requirements and other safety precautions should also be summarized in a COVID-19 Preparedness and Response Plan.

The ETS specifies that employers are required to report a work-related COVID-19 fatality to OSHA within 8 hours, and employers are required to report a work-related COVID-19 in-patient hospitalization within 24 hours.

### **Recordkeeping**

If requested by an employee or an employee's authorized representative, employers must provide, by the end of the next business day, that individual's COVID-19 vaccination documentation and/or test results and the aggregate number of vaccinated and unvaccinated employees. If requested by the Assistant Secretary of Labor for Occupational Safety and Health, employers must provide, within four business hours, the employer's written policy and, by the next business day, all other records related to employees' COVID-19 test results and vaccination statuses.

Employers should contact any member of **Bodman's Workplace Law Group** to discuss their compliance with OSHA's ETS and the creation of the requisite written policy. 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.

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