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John M. Semmens, Editor

OSHA Emergency Temporary Standard Creates New Legal Requirements For Employers With More Than 100 Employees

By Scott D. Hagel

The Occupational Safety and Health Administration (“OSHA”) has issued its much-awaited [Emergency Temporary Standard](#) (“ETS”) in response to President Joe Biden’s September 9, 2021, [COVID-19 Action Plan](#). The ETS requires that: (i) employers who employ more than 100 employees adopt written COVID-19 vaccination policies and determine the vaccination status of their employees no later than December 5, 2021; and (ii) most employees of larger employers be fully vaccinated against the virus by January 4, 2022, or else pay for their own weekly COVID-19 testing prior to entering the workplace.

Additionally, new rules issued by the Centers for Medicare & Medicaid Services (“CMS”) require employees of most health care facilities to be fully vaccinated by January 4, 2022, with no exception for employees to instead opt for weekly testing (see related story in this newsletter). Both the ETS and new CMS rules are scheduled to take effect on November 5, 2021, upon publication in the federal register.

OSHA’s new ETS applies to all employers with 100 or more employees. Specifically, it requires employers take various steps by December 5, 2021, including the following:

- Employers “must establish, implement, and enforce a written mandatory vaccination policy.” The employer may be exempted from this requirement if it instead establishes, implements, and enforces a written policy allowing any employee to instead choose to be fully vaccinated against COVID-19, or provide proof of regular testing for COVID-19 at least weekly and wear a face covering in the workplace. Employees may be entitled to reasonable accommodations to these requirements due to disabilities or sincerely held religious beliefs, or if a “vaccine is medically contraindicated” for an individual employee.

- Employers must determine the vaccination status of each employee and determine whether the employee is fully vaccinated. Employers must require each vaccinated employee to “provide acceptable proof of vaccination status,” including whether they are fully or partially vaccinated.
- Employers must maintain records of their employees’ vaccination status, including “a roster of each employees’ vaccination status.” Employers also must maintain a separate record of each employee’s vaccination status, which must be treated as confidential employee medical records and not be disclosed except as required or authorized by the ETS or other federal law.
- Employers must support their employees’ COVID-19 vaccination efforts in the following ways: (a) by providing a reasonable amount of time for each employee for each of their primary vaccination doses; (b) by providing up to 4 hours paid time, including travel time, at the employee’s regular rate of pay to obtain the vaccination doses; and (c) by providing reasonable time and paid sick leave to recover from side effects following any primary vaccination dose.
- Employers must require each employee to promptly notify the employer of a positive COVID-19 test result or diagnosis. Employers must then immediately remove the COVID-19 positive employee from the workplace. Employers may not allow employees to return to work until they meet the return-to-work criteria in the isolation guidance provided by the Centers for Disease Control and Prevention or receive a recommendation to return to work from a licensed health care provider.
- Employers are not required to provide paid leave to employees who are removed from work due to COVID-19 unless required by other laws, regulations, or collective bargaining agreements.
- Employers must require all employees who are not fully vaccinated to wear “a face covering when indoors and when occupying a vehicle with another person for work purposes,” except: (a) when employees are alone in a room with floor to ceiling walls and a closed door; (b) for a limited time while eating or drinking or for identification purposes; (c) when an employee is wearing a respirator or face mask; or (d) where the employer can show that the use of face coverings is infeasible or creates a greater hazard that would excuse compliance.
- Employers must ensure that face coverings worn by employees comply with the ETS, including that: (a) it meets the ETS specific definition of a face covering; (b) the employee’s face covering fully covers the employee’s nose and mouth; and (c) the employee’s face covering is replaced when wet, soiled, or damaged.
- Employers must ensure their employees understand: (a) the terms of the ETS, as well as the employer’s policies adopted in response to the ETS; (b) the “efficacy, safety, and benefits” of the COVID-19 vaccine; and (c) certain aspects of federal law, including 29 CFR 1904.35(b)(1)(iv), 18 U.S.C. 1001, and § 17(g) of the OSH Act.
- Employers must report to OSHA: (a) each work-related COVID-19 fatality within 8 hours of the employer learning about the fatality; and (b) each work-related COVID-19 in-patient hospitalization within 24 hours of the employer learning about the hospitalization.

By January 4, 2022, employers must ensure all employees who are not fully vaccinated comply with subsection (g) of the ETS, including the following:

- Any employees who report at least once every seven days to a workplace where other individuals such as co-workers or customers are present: (a) must be tested for COVID-19 at least once every 7 days; and (b) provide documentation of their most recent COVID-19 testing to their employer no later than the seventh day following the date on which the employee last provided a test result. An employee who does not report to a workplace where employees or customers are present during a period of seven or more days must be tested for COVID-19 within seven days of returning to the workplace and provide the employer with documentation of the testing.
- Notably, employers are not required to pay for the costs of employee testing unless required by other laws, regulations, or collective bargaining agreements. Employers may elect to pay for testing if they so choose.
- Employers must keep any employees who do not provide documentation of test results removed from the workplace until the employees provide their test result.

- When an employee has tested positive or been diagnosed with COVID-19, employers must not require that employee to undergo further COVID-19 testing for 90 days following the date of the positive test or diagnosis.
- Employers are required to maintain records of each employee COVID-19 test result, which must be treated as confidential employee medical records and not be disclosed except as required or authorized by the ETS or other federal law.

Although employers are covered by the ETS if they have at least 100 employees, including part-time employees and employees who work in different locations, some employees or workplaces are exempt from the vaccination and testing requirements, including: (a) employees whose workplaces are subject to the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors; (b) workplaces where any employee provides healthcare services or healthcare support services when subject to OSHA's already-issued ETS for healthcare services; (c) employees of covered employers who do not report to a workplace where other individuals, such as coworkers or customers, are present; (d) employees who work from home; and (e) employees who work exclusively outdoors.

Federal preemption issues

The ETS specifically states its intent to preempt inconsistent or conflicting state laws, regulations, or executive orders, such as Montana's HB 702, which generally prohibits employers from requiring its employees to obtain a COVID-19 vaccine. The ETS and Montana's HB 702 appear to be in direct conflict with one another, and the ETS (as well as the new CMS rules detailed below) specifically identifies Montana's HB 702 as one of the state laws OSHA intends to preempt with its new ETS.

On October 27, 2021, Montana Governor Greg Gianforte [declared](#) that the new federal rules (which at that time had not yet been issued) violate Montana law and are unenforceable, which sets up a legal dispute between Montana and the federal government over the ETS. At least two lawsuits, including one from the Montana Medical Association and a Missoula hospital, have already been filed in Montana seeking to declare Montana's HB 702 unconstitutional.

While Governor Gianforte's pronouncement and a related guidance document purports to provide legal analysis to Montana employers, it also states it is not, and should not be construed as, legal advice. The arguments regarding federal preemption will need to be resolved by the courts. In the meantime, Crowley Fleck recommends employers contact their legal counsel for advice on the difficult choice of whether to comply with federal or state law.

For Employers with Additional Questions

For employers with additional questions, Crowley Fleck PLLP has an experienced team of attorneys who can assist with all manner of employment questions, including questions related to compliance with federal laws related to COVID-19. If you would like more information, please contact Crowley Fleck's Employment Practice Group.

[New CMS Rules Require Health Care Employees To Receive COVID-19 Vaccinations, With No Alternative For Weekly Testing](#)

By: Scott D. Hagel

New [rules](#) issued by the Centers for Medicare & Medicaid Services ("CMS") require nearly all employees of most health care facilities in the United States to be fully vaccinated against COVID-19 by January 4, 2022. CMS also published a [document](#) answering frequently asked questions regarding the new rules.

Like the new Emergency Temporary Standard (“ETS”) concurrently issued by the Occupational Safety and Health Administration (“OSHA”) and applicable to larger employers, the new CMS rules were rolled out in response to President Joe Biden’s [COVID-19 Action Plan](#) announced on September 9, 2022. The CMS rules take effect upon publication in the Federal Register on November 5, 2021.

The rules do provide for recognized exemptions for employees who are entitled to reasonable accommodations for disabilities, sincerely held religious beliefs or other medical exemptions. Unlike employees of larger employers who are not health care facilities, employees of facilities subject to the CMS regulations do not have the option to undergo weekly testing for COVID-19 in lieu of becoming vaccinated.

The CMS rules apply to “all staff” of the following types of health care facilities:

- Ambulatory surgical centers;
- Hospices;
- Psychiatric residential treatment facilities;
- Programs of All-Inclusive Care for the Elderly;
- Hospitals;
- Long Term Care Facilities, including skilled nursing facilities and nursing homes;
- Intermediate Care Facilities for Individuals with Intellectual Disabilities;
- Home Health Agencies;
- Comprehensive Outpatient Rehabilitation Facilities;
- Critical Access Hospitals;
- Clinics, rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services;
- Community Mental Health Centers;
- Home Infusion Therapy suppliers;
- Rural Health Clinics / Federally Qualified Health Centers; and
- End-Stage Renal Disease Facilities.

The new CMS rules do not apply to other health care entities, such as physician offices, that are not regulated by CMS.

The CMS rules will be implemented on the following schedule:

- Phase 1 is effective 30 days after publication of the rules in the Federal Register. All applicable staff must have received, at a minimum, the first dose of the primary series or a single dose COVID-19 vaccine, or requested and been granted a lawful exemption, prior to the staff providing any care, treatment, or other services for the facility or its patients. Phase 1 also requires health care facilities to develop and implement certain policies and procedures.
- Phase 2 is effective 60 days after publication in the Federal Register. It requires that all applicable staff be fully vaccinated against COVID-19, except for those staff who have been granted lawful exemptions from COVID-19 vaccination or those staff for whom COVID-19 vaccination must be temporarily delayed, as recommended by the CDC, due to clinical precautions and considerations.

The new CMS rules broadly apply to all staff, even those who provide services outside of a facility (such as home health, hospice, or therapy staff), except those who provide services 100 percent remotely.

The CMS has promised to vigorously enforce the new rules. It will issue interpretive guidelines, which include survey procedures, and will advise and train state surveyors on how to assess compliance with the new requirements. Surveyors will conduct interviews with health care staff to verify their vaccination status. Guidance will be issued on how to cite providers for non-compliance, and expected penalties will include civil money penalties, denial of payment for new admissions, and/or termination of the Medicare/Medicaid provider agreement.

Federal Preemption Issues

Like the new OSHA ETS applicable to larger employers, the new CMS rules promise to launch a legal battle between the federal government and states such as Montana that have enacted statutes, rules, or executive orders that conflict with these vaccine mandates (such as Montana's HB 702). The CMS states the new rules specifically preempt the applicability of any state or local law providing for exemptions broader than those provided under federal law and which are inconsistent with the new CMS rules.

Whether health care facilities elect to follow conflicting state or federal law will be a difficult choice until the courts have resolved the preemption issue, a process that will take months or years. Crowley Fleck recommends that health care facilities consult with their legal counsel in determining how to proceed.

For Employers with Additional Questions

For employers with additional questions, Crowley Fleck PLLP has an experienced team of attorneys who can assist with all manner of employment questions, including questions related to compliance with federal laws related to COVID-19. If you would like more information, please contact Crowley Fleck's Employment Practice Group.

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