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ALERT

November 5, 2021

**OSHA ISSUES THE COVID-19 EMERGENCY TEMPORARY STANDARD
ON NOVEMBER 5, 2021**

On November 5, 2021, OSHA issued its COVID-19 Emergency Temporary Standard (ETS) effective immediately with implementation of all sections except testing by December 5, 2021, and implementation of the testing section by January 4, 2022. Lawsuits against the standard have already been filed. If the ETS is stayed, we will alert you that day. The rest of this Alert addresses the requirements of the ETS.

Coverage

This standard applies to every private sector employer with a total of 100 employees – full time and part time – at any time the ETS is in effect. In other words, if on one day an employer employs 100 employees, they are covered by this standard thereafter. The ETS is applied to all types of employers. Agricultural operations that employ 100 employees at any time and either have temporary housing or 11 or more hand harvest employees are also covered. The only employers with 100 employees or more that are not covered are federal contractors and subcontractors and healthcare workers who are covered by the more stringent federal rules that among other things do not allow the testing options.

Employees are not covered by this section when working at a place with no other workers or customers, who work at home or work exclusively outdoors.

Written Mandatory Vaccination Policy

Employers must have a written vaccination policy that they implement and enforce. The policy must require all employees to be vaccinated other than employees for whom the vaccine is medically contraindicated, or medical necessity requires a delay or who have a legal right for reasonable accommodation under federal civil right laws because they have a disability or sincerely held religious beliefs. Additionally, employees who do not want to be vaccinated must be tested weekly and wear a face covering. If any unvaccinated employee tests positive for COVID-19 and is diagnosed with COVID, they get a 90-day period in which they do not have to be tested weekly.

Determination Of Employee Vaccination Status

Employers must require and document the vaccination status of each vaccinated employee. The employer must copy and retain written proof of vaccination for as long as the ETS applies. The ETS lists the specific acceptable proof of vaccination the employee must provide. Interestingly, the standard in specified instances allows employees to submit a signed and dated statement by the employees; however, the standard mandates a specific statement spelled out in the ETS, which

includes the section that “knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.” If an employee does not provide proof of vaccination, the employee must be treated as unvaccinated. There is also an exemption for an employer who has ascertained employee vaccine status prior to the effective date of this Section through another form of attestation or proof and retained records of that ascertainment.

Support Of Employee Vaccination

Employers must provide employees with a reasonable amount of time to get each primary vaccination dose and provide the employee with up to 4 hours of paid time at the employee’s regular rate. If an employee needs leave to recover from side effects, the employer must provide reasonable time and paid sick leave to recover from the side effects. The standard does not define what is reasonable time or address booster shots.

Covid Testing for Employees Not Fully Vaccinated

Employees who are not fully vaccinated must be tested for COVID-19 at least once every 7 days and provide documentation of that testing within 7 days from the last date that documentation was provided. If the employee has been away from the workplace, the employee must be tested within 7 days prior to returning to the workplace. If the employee does not provide the test results, the employee must be removed from the workplace until the employee provides test results. These test results are treated as employee medical records under 1910.1020. Finally, an employer may require the employee to pay for the tests, subject to possible requirements under state rules or collective bargaining agreements.

Employee Report of Positive COVID-19 Result or Diagnosis of COVID-19

Any employee who tests positive for COVID-19 or is diagnosed with COVID-19 must promptly report to the employer and be removed from the workplace until the employee receives a negative result on a COVID-19 nucleic acid amplification test, meets the CDC return-to-work criteria or gets a return-to-work recommendation from a licensed healthcare provider. The standard does not require paid leave for this absence.

Unvaccinated Employees Must Wear Face Coverings

When an unvaccinated employee is indoors or in a vehicle with another person for work purposes, the employee must wear a face covering except when they are in an enclosed room with a closed door, eating or drinking or the face covering is infeasible or causes a greater hazard. Employees may be exempt from face coverings if they have a medical reason not to wear them.

Information Provided to Employees

Employers must inform employees in a language and literacy level by 1) telling them about the requirements of the ETS and employer’s policies and procedures implementing this standard; 2) giving

them a copy of “Key Things to Know about COVID-19 Vaccines” written by the CDC; 3) the retaliatory provisions of 1904.35 and 11(c) of the OSH Act and 4) the prohibitions of providing false statements under 18 U.S.C. 1001 and section 17(g) of the OSH Act.

Reporting COVID-19 Fatalities and Hospitalizations to OSHA

Employers are required to report work-related COVID-19 fatality and hospitalizations.

Availability of Records

By the end of the next business day after a request, the employer must make available the individual COVID vaccine documentation and results for a particular employee to that employee and anyone having written authorized consent of that employee. Further, in the same time period, employer must make available to an employee or an employee representative, an accurate number of the fully vaccinated employees at a workplace along with the total number of employees at that workplace.

The entire Standard is attached hereto.

If you have any questions, please contact Larry Stine, Kathleen Jennings or Jim Wimberly at 404-365-0900 or at jls@wimlaw.com, kjj@wimlaw.com or jww@wimlaw.com.

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