On October 28, 2021, several details were released regarding the US Occupational Safety and Health Administration’s (OSHA) highly anticipated emergency temporary standard (ETS), also known as the “vax-or-test rule.” The ETS, which will apply to employers with at least 100 employees, was sent to the White House on October 12, 2021, for final review and is expected to be published in the first week of November 2021.

According to leaked information, under the upcoming rule, employers will be permitted to decide to either mandate vaccination for all employees (except those with a legally protected exemption) or allow unvaccinated employees to opt for testing and masking.
If employees are able to be vaccinated but choose the “test and mask” option (under their employer’s policy), OSHA’s rule will allow employers to require employees to pay for their own tests and masks.

Sources noted, however, that if an employee has a legally protected reason that precludes vaccination, such as a medical condition or a sincerely held religious belief, the employer will be required to cover the cost of testing and masking supplies.

Regardless of the reason for remaining unvaccinated, it appears that all unvaccinated employees will be required to wear masks while indoors and when in close contact with coworkers.

It is currently unclear how exactly OSHA’s testing payment requirements will interplay with state and local laws that require employers to compensate employees for time spent “working,” as well as state and local laws governing reimbursement of necessary business expenses.

OSHA is expected to provide employers with a reasonable period to develop and implement policies in compliance with the upcoming rule before enforcement begins. Citations could amount to as much as $14,000 per violation.

OSHA’s ETS has yet to be finalized and details are subject to change. McDermott is keeping up with the latest developments as they become available.

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