The Federal Occupational Health and Safety Administration (OSHA) has released its long-awaited Emergency Temporary Standard (ETS) pertaining to workplace COVID-19 vaccination and testing requirements for employers with 100 or more employees.
The new rule – which is expected to cover 84 million American workers or 2/3rds of the private American workforce - is sweeping in its scope. It will also require covered employers to take several steps within the next two months to come into compliance.

At its core, the new rule requires covered employers to adopt a written policy that implements one of two permissible approaches:

1. a mandatory COVID-19 vaccination policy (under which only workers with legally recognized accommodation exemptions may abstain from vaccination);
   or
2. a requirement that employees either become vaccinated or submit to weekly diagnostic testing and required facemask use.

The OSHA ETS goes much further, though: it requires employers to provide paid leave for vaccination and recovery; obtain and retain acceptable documentation of vaccination from employees; maintain records of diagnostic test results where employees are permitted to test instead of vaccinate; and much more.

The majority of these measures must be implemented by approximately December 5, 2021 – just 30 days from now. The remainder, including the requirement to become fully vaccinated and the commencement of any testing regime, will go into effect on January 4, 2022 – also a short time frame given the upcoming holiday season and the length of time it takes for individuals to become “fully vaccinated” under the rule.

The newly released OSHA ETS is one of – if not the – broadest federal directive pertaining to workplace COVID-19 policy since the pandemic began. Alongside the issuance of its new rule, OSHA created a wide-ranging FAQ guide, which covers many of the major questions now facing employers, and written policy templates. But questions regarding the new rule remain. There will no doubt be further important developments here as employers begin their compliance efforts.

Our summary below, while comprehensive, is not exhaustive – after all, the OSHA rule and its interpretive guidance spans almost 500 pages – but we attempt to distill many of the most important details and employer considerations below. In the coming days and weeks, we will also write more extensively about several discrete issues raised by the new rule in separate posts, so stay tuned for additional coverage.

I. Employers Must Choose Whether to Mandate Vaccination or Implement a Policy That Allows for Weekly Testing in Lieu of Vaccination.

OSHA has concluded that unvaccinated employees currently face a grave danger from exposure to COVID-19, and that the ETS is necessary to protect them from such exposure, and in turn, from getting sick and dying. OSHA posits that implementing the ETS will help “significantly slow the transmission of COVID-19 in workers and workplaces and mitigate the rise of future variant.”
The “best method” according to OSHA to address this “grave danger” is to “strongly encourage the use of the single most effective and efficient protection available: vaccination.” And thus, OSHA has presented employers with two options regarding vaccination. More specifically, employers have the discretion to implement a mandatory vaccination policy, or in the alternative, to implement a policy that provides employees with the option to vaccinate or submit to weekly testing and use a facemask.

OSHA urges employers to select Option No. 1 – the true mandate – that is, one with no test out option (and the agency forecasts that 60% of covered employers and possibly more will pick this option). But it is equally clear that employers may select Option No. 2 – a vaccination policy with a test out option.

OSHA is also clear about two other things:

1. It believes that this rule preempts state and local laws that attempt to limit an employer’s ability to vaccinate (e.g. Montana’s no mandatory vaccination rule); and
2. Employers should view these as minimum standards – employers may go further in implementing protective measures in their workplace (including as otherwise consistent with applicable law or applicable collective bargaining agreements). For example, an employer could implement a policy that requires testing twice a week instead of weekly, or it could require all employees, regardless of vaccination status, to wear masks at work.

OSHA believes that as a result of this rule, about 22.7 million employees (or about 72% of the current unvaccinated employee population covered by the ETS) will become vaccinated.

Employers should give careful consideration to which option makes the most sense for them to apply to their workforce, taking into account their organization’s mission, culture, existing compliance efforts, labor market, among other considerations.

II. Employers With More Than 100 Employees Must Comply with the OSHA Rule.

The ETS applies to employers with 100 or more employees. According to OSHA, the rule will cover approximately 264,000 employers. OSHA’s guidance on conducting the relevant headcount includes the following:

1. The rule applies to employers who have at least 100 employees at any time the rule is in effect.
2. Employers must count their overall U.S. workforce and not confine the inquiry by workplace, facility, office, etc.
3. Employers must count an employee towards the 100-employee threshold even if the ETS does not cover the particular employee (for instance, where the employee is a remote worker; as discussed further below with respect to
4. Employers should count part-time workers and directly employed temporary and seasonal employees toward the 100 mark, but not independent contractors.

5. For traditional franchisor-franchisee relationships, in which each franchise location is independently owned and operated, the franchisor and franchisees would be separate entities for coverage purposes, such that the franchisor would only count “corporate” employees, and each franchisee would only count employees of that individual franchise.

6. If two or more related entities “handle safety matters as one company,” they may be treated as an integrated single employer and all of their employees must be counted.

7. For staffing agencies with employees at a host location, only the staffing agency would count the employees.

8. For multi-employer worksites, such as a construction site, each company represented, including the host employer, the general contractor, and each subcontractor, would only need to count their own workers. But OSHA was quick to remind those distinct employers that they still need to count each of their own employees at all of their worksites to see if they meet the 100-employee threshold.

9. Initially Employers should determine their headcount as of November 5, 2021. If the employer exceeds 100 employees on that date, they must comply with the rule while it is in effect, even if they subsequently fall below 100 employees. Further, if an employer has fewer than 100 employees as of November 5, 2021, but later exceeds the threshold while the ETS is in effect, the employer would need to then come into compliance with the rule and it would remain in effect notwithstanding future workforce size fluctuations.

10. Even if an employer exceeds the 100-employee threshold, the rule does not cover: (i) any employer workplace that is covered under the Federal Contractor Executive Order’s workplace safety guidance; and (ii) any settings where any employee provides healthcare services or healthcare support services when subject to the requirements under OSHA’s separate Healthcare ETS. We are looking at this more closely as it may mean that an employer operating different facilities with segregated categories of workers could be subject to more than one vaccination rule. For example, a Federal contractor employer may operate a “workplace” that is not covered by the Federal Contractor safety guidance, because it is a separate facility where no employees perform services whether directly or indirectly related to a Federal contract whereas it may operate another facility where its employees would qualify under the OSHA ETS.

III. The Rule Covers Most Employees, But Provides Several Important Carve-Outs.

OSHA estimates that its requirements will extend to approximately 84 million of the 109 million employees employed by ETS-covered employers. That is because the ETS
requirements do not apply to employees:

1. Who work remotely – whether in their homes (even if others are present) or at other sites where no coworkers or customers are present; or

2. Who work exclusively outdoors.

OSHA makes clear, however, that an employee who works remotely only part of the time would not be excluded from coverage. The same result would occur for an employee who works outdoors only part of the time (although *de minimis* indoor activities would not count).

These exceptions are significant as they lessen the burden on employers and employees who work remotely and outdoors. We also note that under the Federal Contractor rule, the requirement is more onerous – those working on Federal contracts remotely are still required to be vaccinated.

The rule, however, for several reasons, does not exempt from its requirements, employees with infection-induced rather than vaccination-induced immunity.

**IV. Employers Must Develop and Implement Robust Vaccination Policies and Provide Employees with Various Categories of ETS-Related Information.**

Here is where employers must get to work immediately: no later than *December 5th*, employers must develop and implement (or update existing) mandatory vaccination policies.

The rule defines a mandatory vaccination policy as one that requires each employee to be fully vaccinated, except for those employees where: (1) a vaccine is medically contraindicated; (2) a medical necessity requires a delay in vaccination; or (3) they are legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.

Alternatively, employers may, implement a written policy allowing the employee to choose to either: (1) provide proof that they are fully vaccinated; or (2) provide proof of weekly testing and wear an accepted face covering when indoors or occupying a vehicle with another person for work purposes.

The written policy should include the following information:

1. requirements for COVID-19 vaccination;

2. applicable exclusions from the written policy (e.g., medical contraindications, medical necessity requiring delay in vaccination, or reasonable accommodations for workers with disabilities or sincerely held religious beliefs);

3. information on determining an employee’s vaccination status and how this information will be collected;
4. paid time and sick leave for vaccination purposes;
5. notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace;
6. information to be provided to employees (discussed further below);
7. disciplinary action for employees who do not abide by the policy;
8. procedures applicable to unvaccinated employees, including COVID-19 testing requirements and face covering use; and
9. all other relevant information, including regarding the policy’s effective date, to whom the policy applies, deadlines (e.g., for submitting vaccination information, for getting vaccinated), and procedures for compliance and enforcement.

OSHA has made templates available, which employers can access [here](#). OSHA recognizes that employers may have already developed and implemented written policies outlining vaccination, testing, and/or face covering use. Where employers have already issued such policies, they should review and update them to ensure that they have included each of the required ETS elements.

OSHA also recognizes the possibility that employers may implement vaccination policies that differ by workplace, location, or type of business operation. In practice, this could mean that an employer implements a mandatory vaccination policy that applies to certain locations, but opts to implement a policy that permits employees at other locations to choose between vaccination and COVID-19 testing/face covering use. Employers choosing to implement partial mandatory vaccination policies that only apply to certain subsets of their employees should ensure that they clearly delineate between the different groups in any written policy that they produce.

In addition to creating a written policy, OSHA expects employers will take steps to ensure that they enforce the requirements of their policies, including through training and the implementation of work rules and the workplace disciplinary system.

OSHA also requires employers to provide their employees with other information related to the ETS, including:

1. The requirements of the ETS and the employer’s policies and procedures established to comply with the ETS;
2. Information on COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated via [this document](#);
3. The anti-discrimination and retaliation provisions set forth in the OSH Act, which prohibit employers from discharging or disciplining employees for reporting work-related injuries or illnesses or for exercising rights afforded by the OSH Act; and
Employers may provide this information to employees through email communications, printed fact sheets, or during a discussion at a regularly scheduled team meeting. Employers can also designate a contact for employees who have questions about the information provided. The ETS explicitly requires that employers provide this information in a language and at a literacy level that employees will understand.

V. Employers Must Provide Paid Time Off Related to Vaccinations.

The ETS requires employers to provide employees with paid time off to become vaccinated and to recover from any side effects of vaccination.

More specifically, employers must provide “a reasonable amount of time to each employee for each of their primary vaccination dose(s),” which the rule explains means “up to 4 hours paid time, including travel time, at the employee’s regular rate of pay.” The ETS goes one step further, requiring employers to also provide employees “reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination dose.” As part of these requirements, employers should note the following:

1. “Reasonable time” includes time off for activities such as registering for vaccination appointments; completing required paperwork; all time spent at the vaccination site (e.g., receiving the vaccination dose, post-vaccination monitoring by the vaccine provider), and time spent traveling to and from the location for vaccination, including travel to an off-site location (e.g., a pharmacy, or situations in which an employee working remotely or in an alternate location must travel to the workplace to receive the vaccine).

2. Employers may not require employees to use accrued sick leave or other leave to obtain their primary vaccination dose(s). OSHA explains that requiring employees to use such leave could have provide a disincentive, leading to fewer employees “gaining the health protection of vaccination.”

3. In circumstances where an employee needs more than four hours to obtain a vaccination dose, such time may be unpaid but is still considered protected leave.

4. Although employers must provide paid time off for vaccination during work hours, employers are not required to pay employees who elect to become vaccinated during non-working hours.

5. Employers are not required to reimburse employees for transportation costs incurred to receive the vaccination.

6. Where an employee takes leave to recover from side effects experienced following a vaccination dose, employers may require the employee to use their accrued sick leave. Importantly, where an employer offers multiple types of
leave, such as sick leave and vacation, the employer can only require employees to use sick leave when recovering from side effects.

7. Where an employer does not offer sick leave or the employee does not have any sick leave available, the employer must provide paid leave to recover from vaccination side effects. The employer cannot require the employee to establish a negative sick leave balance or advance sick leave.

8. The ETS does not define “reasonable time” to recover, but OSHA “presumes that, if an employer makes available up to two days of paid sick leave per primary vaccination dose for side effects, the employer would be in compliance with this requirement.”

9. Neither the paid leave employers are required to afford employees to obtain the vaccination dose(s) nor the sick leave to recover from vaccination side effects are retroactive requirements for vaccine dose(s) received prior to the promulgation of the ETS.

10. Employers should pay close attention to whether any state or local laws provide employees with vaccine-related paid leave. Employers satisfy their ETS paid leave obligation when complying with those laws, provided they equal or exceed the ETS requirements.

VI. Employers Must Take Steps to Verify Each Covered Employee’s Vaccination Status.

Employers must determine the vaccination status of each employee by obtaining a physical or digital copy of the proof of vaccination supplied by employee. Acceptable proof of vaccination status includes:

1. a copy of a COVID-19 vaccination card;

2. a record of immunization from a health care provider or pharmacy;

3. a copy of medical records documenting the vaccination;

4. a copy of immunization records from a public health, state, or tribal immunization information system; or

5. a copy of any other documentation that contains the type of vaccine administered, date(s) of administration, and the name of the healthcare professional or vaccine clinic site administering the vaccine.

For certain states, digital QR codes (e.g., those included on vaccine passports) are an official record of the state for proof of vaccination purposes. However, the QR code itself in insufficient for ETS purposes. The employer must retain a copy of the vaccination information retained when the employee’s QR code is scanned.

If an employer has already obtained proof of vaccination, including an attestation of vaccination status, before November 5, 2021, and in obtaining that proof, the employer has documented such status, it will meet the ETS’s proof of vaccination
Importantly, after November 5, 2021, an employer may not accept an employee attestation of vaccination unless the employee is unable to produce proof of vaccination. In that case, an employee should provide a statement detailing the type of vaccination administered, date(s) of administration, and the name of the healthcare professional or vaccine clinic site to the best of the employee’s recollection. It must also state that the employee has lost or is otherwise unable to produce proof of vaccination, and include the following language: “I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.”

Lastly, employers are only required to obtain proof of fully vaccinated status, as that term is currently defined under the rule. “Fully vaccinated” is not limited to the three vaccines commonly administered in the United States – Pfizer-BioNTech, Moderna, and J&J. The definition also includes those vaccines (i) authorized for emergency use by the FDA; (ii) listed for emergency use by the World Health Organization (WHO); or (iii) administered as part of a clinical trial at U.S. site, if the employee meets certain other conditions. “Fully vaccinated” also includes situations where the employee is vaccinated by “any combination of two doses of a COVID-19 vaccine that is approved or authorized by the FDA, or listed as a two-dose series by the WHO . . . .” Importantly, although booster shots and additional vaccination doses are becoming increasingly common, employers, at this point, are not required to obtain additional verification records for those types of injections.

VII. Employers Using the Test-Out Option Must Implement a Robust Testing Regime.

For those employers permitting testing, OSHA provides that an approved COVID-19 test under the ETS must meet the following requirements:

1. The test is cleared, approved, or authorized, including in the Emergency Use Authorization, by the FDA to detect a current COVID-19 infection (i.e. a viral test);

2. It is administered in accordance with the authorized instructions; and

3. It is not to be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor (such as tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled 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).

PCR (and other types of NAAT tests) and antigen (rapid) diagnostic tests are permissible under the rule, but antibody tests are not (as they do not diagnose an active COVID-19 infection).

OSHA provides different testing frequency requirements for employees who enter the workplace at least once a week, and for those who enter the workplace on a less frequent basis.
frequent basis. First, employees who report to a workplace (where other individuals also report or frequent) must:

1. Be tested for COVID-19 at least once every 7 days; and

2. Provide documentation of the most recent COVID-19 test result to the employer no later than the 7th day following the date on which the employee last provided a result.

Employees who do not report to a workplace (where other individuals also report or frequent) during a period of 7 or more days must:

1. Be tested for COVID-19 within 7 days prior to returning to the workplace

2. Provide documentation of that test result to the employer upon return to the workplace.

If the employee does not produce a negative result, he or she must remain away from the workplace until they produce one.

Employers must suspend weekly testing for 90 days where the employee has received a positive COVID-19 test, or has been diagnosed with COVID-19 by a licensed healthcare provider.

Employers are not prevented from testing more frequently. Further, for employers adopting the test-out option, rather than a mandatory vaccine policy, the ETS imposes specific additional testing requirements that apply to employees who are in the process of becoming fully vaccinated: employees who are partially vaccinated must undergo weekly testing until they are fully vaccinated. Specifically, employees who received the J&J vaccine must undergo two weeks of testing after the single shot; employees who received the Pfizer vaccine must undergo five weeks of testing (3 weeks between shots and 2 weeks following the second shot); and employees who received the Moderna vaccine must undergo six weeks of testing (4 weeks between shots and 2 weeks following the second shot).

The ETS states unequivocally that employers are not required to “pay for any costs associated with testing.” Why? “The agency does not believe it appropriate to impose the costs of testing on an employer where an employee has made an individual choice to pursue a less protective option [than vaccination].” However, the rule is also quick to note that employers may be required to pay under other applicable laws, rules, regulations, or collective bargaining agreements. That said, nothing in the ETS prohibits employers from paying for costs associated with employee testing.

**VIII. Employers Using the Test-Out Option Must Implement a Face Covering Requirement.**

Under the ETS, covered employers must require unvaccinated employees to wear face coverings when indoors, or when in a vehicle with another person for work purposes. The ETS does not contain a face covering requirement for vaccinated employees. However, consistent with current CDC guidance, OSHA does strongly
encourage mask wearing by vaccinated employees in areas of substantial or high transmission, when indoors and when in crowded outdoor areas, and by customers and visitors to workplaces. Moreover, some state and local executive orders or regulations require masks when indoors even for the fully vaccinated, and accordingly, employers should consider continued compliance with any stricter requirement. In any event, Employers may not prohibit or prevent any vaccinated employee, customer or visitor from wearing a face covering at a workplace.

A “face covering” is defined as a covering that:

1. Completely covers the nose and mouth;

2. Is made with two or more layers of a breathable fabric that is tightly woven (i.e., fabrics that do not let light pass through when held up to a light source);

3. Is secured to the head with ties, ear loops, or elastic bands that go behind the head. If gaiters are worn, they should have two layers of fabric or be folded to make two layers;

4. Fits snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and

5. Is a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings.

Unvaccinated employees do not need to wear a face covering in the following scenarios:

1. The employee is alone in a room with floor to ceiling walls and a closed door;

2. The employee is actively eating or drinking; or

3. The employee needs to temporarily remove the face covering for personal identification purposes in order to comply with safety/security requirements (e.g. a security checkpoint where the employer needs to match an I.D. picture to the employee’s face).

The ETS also makes clear that employers are not required to pay for costs associated with face coverings, but as with testing, the ETS similarly references other laws or rules that could impose a payment obligations (for example, applicable law in certain states which requires employers to provide face coverings at no cost to employees).

IX. Employers Must Remove Infected Employees From the Workplace.

The ETS requires employers to establish procedures for the “prompt” notification of positive tests. More specifically, an employee must notify his or her employer of a positive COVID-19 test or diagnosis as soon as reasonably practicable if during working hours, and if not during working hours, then before the employee’s next scheduled shift. The employer’s procedure should also make it clear that if the
employee receives the positive test result while at work, they should minimize exposure to other employees as much as possible when notifying the employer. (If possible, an email or text notification policy may be best.)

Removed employees must remain away from work until:

1. The employee received a negative COVID-19 NAAT test;
2. The employee meets the CDC return to work “Isolation Guidance”; or
3. The employee receives and provides to the employer a return to work recommendation from a licensed healthcare provider.

Employers are permitted to require the employee to “work remotely or in isolation if suitable work is available and if the employee is not too ill to work.” Where this is not possible, OSHA encourages employers to “consider flexible and creative solutions, such as a temporary reassignment to a different position that can be performed by telework.” But if that employee is too ill to work, the employer should not require it and should permit the employee to utilize paid sick leave under the employer’s policies or consistent with applicable law or a collective bargaining agreement. However, employers do not have to permit the use of paid time off unless otherwise required by law or a collective bargaining agreement.

Unvaccinated workers who may have had contact with positive employees do not need to be removed from the workplace. The ETS does not, however, prevent removal of those employees, and suggests that its guidance is a “floor” for minimal safety procedures in this regard. Interestingly, no contact tracing is required after an employee tests positive, nor does the employer have to keep records of positive COVID tests. However, if the employer determines that a case is work-related, the employer must record that information on the appropriate OSHA forms, as we explain further below.

X. Employers Must Include Certain Exemptions to Their Vaccination Policies.

Employers must include exemptions to their mandatory vaccination policies if:

1. a vaccine is medically contraindicated for an employee;
2. there is a medical necessity for an employee that requires a delay in vaccination; or
3. an employee is legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely-held religious beliefs, practices, or observances that conflict with the vaccination requirement, absent undue hardship.

In these cases, such “exempt” employees who are not fully vaccinated still must test weekly and wear face coverings when at the worksite.

Employers must also make reasonable accommodations (absent undue hardship) for
any employee who, because of a disability or sincerely held religious belief, practice, or observance cannot be tested weekly or wear a face covering.

The ETS also acknowledge that a reasonable accommodation could remove the employee from the scope of the ETS, for instance by allowing the employee to telework full-time, although it is not required. But the ETS defers to the EEOC’s guidance on how to evaluate requests for relief from the ETS’s vaccination, testing, and masking requirements based on medical or religions accommodations. Our summary of the EEOC guidance was previously discussed in [this post](#).

**XI. Employers Are Subject to New Reporting and Recordkeeping Requirements**

The new requirements build upon existing OSHA reporting and recordkeeping regulations, and impose new ones, to collect information OSHA deems necessary to assess protection measures, the scope of COVID-19 workplace exposures, and to understand and control the spread of COVID-19 in the workplace.

First, the new requirements change the timing of covered employer reports of COVID-19 cases to OSHA. Previously, covered employers were only required to report in-patient hospitalizations that occurred within 24 hours of a work-related incident and to report fatalities that occurred within 30-days of the work related incident. The ETS eliminates the work-related incident time-reporting limitation and instead, employers must:

1. Report each work-related COVID-19 in-patient hospitalization to OSHA within *24 hours* of the employer learning about the in-patient hospitalization.
2. Report each work-related COVID-19 fatality to OSHA within *8 hours* of the employer learning about the fatality.
3. Continue to record employee in-patient hospitalizations and fatalities on the OSHA 300 log.
4. Report in-patient hospitalizations and fatalities either by (i) phone to the nearest OSHA Area Office, (ii) phone to OSHA’s toll-free number; or (iii) electronic submission on OSHA’s website.

Second, the new requirements mandate that employers maintain the following records of employees’ vaccination status:

1. Maintain a record of each employee’s vaccination status and preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated;
2. Maintain a roster of each employee’s vaccination status. The roster must list all employees and clearly indicate for each employee whether: (i) they are fully vaccinated, (ii) partially (not fully) vaccinated (i.e. they have only received one dose of a two dose vaccine), (iii) not fully vaccinated because of a medical or religious accommodation; or (iv) not fully vaccinated because they have not provided acceptable proof of their vaccination status (this renders the

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employee unvaccinated from OSHA’s perspective); and

3. Maintain employee vaccination records and the roster as confidential medical records in accordance with OSHA regulations. Vaccination records and the roster are not subject to OSHA’s retention requirements, but must be maintained and preserved while the ETS is in effect.

Third, the new rule requires that employers maintain records of employees’ COVID-19 test results beginning January 5, 2021. Employers must:

1. Maintain records of COVID-19 testing undergone by employees who do not receive vaccination. Employers must have records of each test result provided by each employee or results obtained during tests conducted by the employer;

2. Maintain the test results as medical records in accordance with OSHA’s regulations; and

3. As with employees’ vaccination records, testing results are not subject to OSHA’s retention requirements, but must be maintained and preserved while the ETS is in effect.

Employers are not required to establish or maintain records of employee notifications of a positive COVID-19 test or diagnosis by a medical provider. As noted above, however, if a positive COVID-19 diagnosis is work-related and results in hospitalization or a fatality, the employer must record that on the applicable OSHA forms. The employer must also maintain a record of the employee’s test result.

Employers must make records available to employees and their representatives (if any) by the end of the next business day after a request. The employee, and anyone with written authorized consent of that employee, must be able to examine and copy their vaccination and test result documents. Further, by the end of the next business day after a request, the employer must make available to the employee or representative the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace (these should not contain any personally identifiable information (PII) or employee medical information).

Employers must be able to provide the following information to OSHA’s Assistant Secretary:

1. Within 4 hours of a request, the employer must provide their written mandatory vaccination policy.

2. Within 4 hours of a request, the employer must provide the aggregate number of fully vaccinated employees at the workplace and the total number of employees at that workplace.

3. By the end of the next business day after a request, all other records and other documents required to be maintained by the ETS.

XII. OSHA Will Require Employers to Come Into Compliance
Quickly.

Employers should be aware of the following implementation timeline related to the new ETS:

1. November 5, 2021: OSHA officially publishes the ETS in the Federal Register and the rule goes into effect immediately.

2. December 5, 2021: Within 30 days of its publication, employers must:
   - adopt a vaccination policy in line with the ETS;
   - gather acceptable proof of each employee’s vaccination status and maintain a roster of the same;
   - start to provide “support” (i.e., paid leave) for employee vaccination;
   - require employees to promptly provide notice of a positive COVID-19 test or COVID-19 diagnosis (and ensure removal of any employee who received a positive COVID-19 test or COVID-19 diagnosis);
   - require unvaccinated employees to wear CDC-approved face coverings at the workplace (including in a vehicle with other employees);
   - provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation; and
   - make available records of employee vaccination and testing.

3. January 4, 2022: Within 60 days of its publication, employees subject to a vaccination requirement must be fully vaccinated and employers must begin weekly testing of unvaccinated employees as a condition of entering the workplace. Employers must also begin to require all new employees to be vaccinated as soon as practicable.

Employers should also be aware that on the same day OSHA released its ETS, the Centers for Medicare & Medicaid Services (CMS) at the Department of Health and Human Services announced the details of its separate requirement that health care workers at facilities participating in Medicare and Medicaid become fully vaccinated. That rule will apply to more than 17 million workers at approximately 76,000 health care facilities, including hospitals and long-term care facilities. Like the ETS, the White House announced a vaccination compliance deadline of January 4, 2022. The White House also announced that it has pushed back the vaccination compliance deadline for employers covered under the Federal Contractor Executive Order from December 8, 2021 also to January 4, 2022 in an effort to streamline the implementation of vaccination requirements.

Employers should also pay close attention to further developments in the coming days and weeks that may impact compliance deadlines and obligations:
1. Court challenges may stay the rule or parts of the rule from going into effect.

2. OSHA has 6 months to decide whether to make the ETS permanent (including whether to make any modifications to the rule). OSHA is taking comments from the public for a 30-day period to help it make that decision, including whether the rule should: (i) apply to smaller employers; (ii) permit employees with prior infections to be subject to its requirements; (iii) eliminate the test-out option; and (iv) require additional safety measures, including physical distancing. It may also modify the rule as necessary before that time if conditions on the ground change.

3. Many states have State OSHA Plans. Those states must adopt and approve plans that are “at least as effective” as OSHA’s standards and rules within 30 days. But several states could refuse to adopt such plans (which has happened with respect to the Healthcare ETS) or conversely, adopt plans that go further than the OSHA ETS. Employers in these states where the ETS does not become immediately effective should watch closely to see what standards, if any, are issued; whether they differ or build on the ETS; and what different obligations they place on employers.

XIII. Employers May Be Subject to Penalties for Non-Compliance

OSHA notification to an employer of non-compliance is expected to result from either a complaint filed by a worker or from inspections the agency plans to conduct at workplaces. Penalties are going to be commensurate with the penalties in place for violation of other standards set forth by OSHA. If, upon inspection, an employer fails to produce records showing compliance, OSHA has up to six months to issue a citation with a corresponding penalty for the violation. OSHA penalty amounts are currently capped at $13,653 per serious violation, and $136,532 per willful or repeated violation. And, per the ETS, OSHA is expressly authorized to issue a separate penalty for each instance of noncompliance.

XIV. Where Do Employers Go From Here?

While the new OSHA rule may seem overwhelming to many employers, particularly given the rapid manner in which it will take effect, employers’ approaches to implementation should be no different from any other novel employment-related regulatory scheme. Toward this end, we suggest that employer compliance stakeholders follow their customary compliance process and give due consideration to the following items:

1. First, and fundamentally, does the ETS apply to your business? If your business has a total of 100 or more U.S. employees company-wide, the answer is clearly yes. But the answer can often be more complicated for those who work in joint employer settings.

2. Then, if you are a covered employer, determine which employees are subject to the ETS? Some of your employees may be excluded because they work “at home” or “alone” or “exclusively outdoors.” As part of this inquiry, employers who still have not returned their employees to their regular worksites should consider...
the impact their return to work directives might have on applicable compliance deadlines.

3. Has your business already adopted a mandatory vaccination policy for employees? If so, review that policy carefully and consider whether it needs to be updated to comply with the new rule. And if you haven’t adopted a policy, you will need to decide whether to adopt a mandatory vaccination policy or provide a test-out option. Further, will your policy go beyond the rule’s minimum requirements? For example, will you extend it to contractors performing services onsite? How will you deal with vendors and visitors who are onsite? Being clear and precise will add much needed clarity for your workforce.

4. How will you verify your employees’ vaccination status consistent with the ETS’ provisions? For employers that have already obtained vaccine records, ensure that those are in good order; for employers that have not required vaccination or testing to date, begin creating verification procedures and collecting all necessary information.

5. If a test-out option is adopted, what steps will your business take to implement an appropriate testing regime, face covering requirements, and processes for employee removal (including considering whether you will permit employees to work from home or pay them when they are unable to work)? Further, where testing is adopted, confirm whether applicable state law or collective bargaining agreements require the business to reimburse employees for the cost of weekly testing or consider whether the business should voluntarily bear that financial cost. Conducting an analysis of the cost of weekly testing for employees that have not been vaccinated may help to inform the overall approach your business takes regarding whether to institute a mandatory vaccination policy.

6. How will you comply with the paid time off portion of the rule? What parameters will you establish to ensure that your business is providing reasonable support to assist with vaccination efforts? How will you align your existing leave policies with the new requirements?

7. How will your business process disability and religious-based accommodation requests?

8. How will you develop and distribute all information required to be provided to employees, including your policies and procedures and other information required by the ETS?

9. How will you address an employee’s delay in compliance with, or violations of, the policy? Will you discipline (including terminate) those who refuse vaccination where no test-out option is provided, or who refuse to adhere to testing and masking requirements properly?

10. How will your business effectively train managerial and supervisory staff? And, given the broad applicability of this rule, how do you plan to educate all employees on the requirements imposed (testing and/or vaccination)?