

Federal Appeals Court Stays OSHA Vaccine Mandate Emergency Temporary Standards: Cal/OSHA Poised to Act

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By: Kimberly Lucia and Lissa Oshei

On November 4, 2021, the federal Occupational Safety and Health Organization (“OSHA”) issued its long-awaited rule mandating that large employers require employees to either be fully vaccinated or to undergo regular testing for COVID-19. It was set to go into effect on December 4, 2021. However, on November 6, 2021, the federal Fifth Circuit Court of Appeals issued a stay citing “grave statutory and constitutional” issues with the Emergency Temporary Standards (“ETS”). While the matter may take some time to wind its way through the federal courts, the question remains – what will Cal/OSHA do?

California has its own state OSHA program, which means that California employers are not subject to the requirements of federal OSHA or the new vaccine mandate ETS. However, as a state-authorized program, Cal/OSHA is required to adopt standards at least as effective as those issued in a federal OSHA ETS within thirty (30) days of publication of the ETS. Under normal circumstances, that would mean Cal/OSHA has until December 4, 2021 to conform its rules to the federal ETS.

The question is, what will Cal/OSHA do now that the federal OSHA ETS is subject to a stay? Given Cal/OSHA’s prior actions, Cal/OSHA may move forward with incorporating a vaccine mandate regardless of the federal stay. Cal/OSHA’s next regularly scheduled meeting is November 18, 2021. Outlined below is a summary of the now stayed federal OSHA ETS, which may ultimately be a preview for what to expect from Cal/OSHA in the coming weeks.

Overview of Federal OSHA ETS

The Mandate: Vaccinate or Test and Mask

Vaccination Requirements

The ETS requires employers with 100 or more employees to adopt a policy which ensures that all employees are fully vaccinated (absent a valid medical or religious accommodation). The ETS does not apply to employees who work entirely from home, those who do not work where

others are present, or those who work “exclusively outdoors,” as that term is defined by the ETS. Nor does it apply to healthcare settings, which are subject to their own ETS.¹

“Fully vaccinated” means at least two weeks after either:

- completing primary vaccination with at least the minimum recommended interval between doses, if applicable, with a vaccine that has been:
 - Fully approved by the FDA;
 - Authorized for emergency use by the FDA;
 - Listed for emergency use by the World Health Organization (“WHO”);
 - Administered as part of a clinical trial in the United States (subject to certain other requirements); or
- receiving the second dose of 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. The second dose of the series must not be received earlier than 17 days (21 days with a 4-day grace period) after the first dose.

Employers must collect and maintain proof of vaccination. Acceptable proof includes a physical or digital copy of a vaccine card; a record of immunization from a health care provider, pharmacy, or governmental immunization system; or any other official document containing the dates of administration and the names of the health care provider and clinic that administered the vaccine. If an employee lost their vaccine card or other record of immunization, then the employer can accept a self-attestation, which must include specific language set forth in the ETS. Under this standard, the self-attestation forms currently utilized by many employers in California would not be sufficient.

Employers must also maintain a list of all employees with each employee’s vaccination status – fully vaccinated, partially vaccinated, not vaccinated due to religious or medical accommodation, or not fully vaccinated due to failure to provide proof of vaccination status. Booster shots are not included in the definition of “fully vaccinated.” Therefore, it is unnecessary for employers to collect proof of additional doses of the vaccine.

The employee roster and all vaccination records are medical records that must be maintained as separate, confidential medical files in accordance with federal law.

Testing and Masking Alternative²

Any employee who is not fully vaccinated prior to the effective date of the ETS must undergo weekly COVID-19 testing. Test results must be submitted to the employer every seven (7) days. If an employee is not in the workplace on a weekly basis, the employee must test within seven (7) days prior to returning to the workplace. If an employee fails to submit timely proof of a

¹ The California Department of Public Health instituted its own vaccine mandate for the healthcare industry on September 28, 2021, which requires employees to be fully vaccinated by November 30, 2021.

² Under the federal ETS, testing is not required until thirty (30) days after the anticipated effective date of December 4, 2021.

negative test, then the employee cannot come into work until the employee submits sufficient test results.

Generally, a test cannot be a home test that is self-administered and self-read unless the testing and reading is overseen by the employer or telehealth proctor (i.e., someone trained in observing sample collection and providing instruction on collection).

Although the federal ETS states that employers are not required to cover the cost of COVID-19 testing for unvaccinated employees, employers may be required to cover that cost under a different law or under a collective bargaining agreement. Therefore, absent contrary authority from Cal/OSHA, the cost of obtaining a test is very likely a reimbursable business expense under California Labor Code § 2802.

As with proof of vaccination, employers must maintain copies of employees' test results, and these records must be treated as confidential medical records.

Employees who are not fully vaccinated must also wear face coverings unless:

- alone in a room with floor to ceiling walls and a closed door;
- eating or drinking (for a limited time only);
- wearing a respirator or facemask; or
- the employer can show that wearing face coverings is infeasible or creates a greater hazard that would excuse compliance (e.g., where it is important to see the employee's mouth due to their job duties, or when use presents a risk of serious injury or death to the employee).

Paid Time Off for Vaccination and Recovery

Employers must also provide employees with a reasonable amount of paid time off, up to four (4) hours of pay at the employee's regular rate of pay, to obtain a vaccine. Employers are not permitted to require employees to utilize their own vacation, sick leave, or personal leave banks for these purposes. Employers do not, however, have to provide paid time off for employees who choose to get vaccinated outside of working hours. Nor do they have to pay for the costs of transportation to obtain the vaccine (e.g., mileage, public transit costs).

Employers must also provide employees a reasonable amount of paid time off or sick leave to recover from any side effects of the vaccine. Employers can require employees to utilize accrued paid time off (PTO) or sick leave for this purpose. However, they cannot force employees to use accrued vacation or to borrow against future paid leave. According to OSHA's FAQ, a reasonable amount of time off to recover from side effects is up to two (2) days.

It is important to note that, under California law and what may ultimately appear in the Cal/OSHA ETS, any time spent receiving a mandated vaccine is likely considered "hours worked" for which employers must compensate employees.

Educational Requirements

Employers must provide employees with information regarding the ETS and any policies or procedures adopted for compliance, including:

- the process used to determine vaccination status;
- the time and paid leave they are entitled to for vaccinations and recovery;
- procedures for providing notice of a positive COVID-19 test; and
- testing and face covering procedures and requirements.

Employers must also provide employees with the document entitled “*Key Things to Know About COVID-19 Vaccines*,” available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>, as well as information regarding the prohibition on discharging or discriminating against an employee for reporting work-related injuries or illnesses, for exercising rights under the ETS or those afforded by the OSH Act, including the right to file an occupational safety or health complaint. Employers must also inform employees of the potential for assessment of criminal penalties associated with knowingly supplying false statements or documentation (e.g., submission of a counterfeit vaccine card or test record).

This information must be provided in the language and at the literacy level the employee understands. Employers can provide this information through email communications, printed fact sheets, or during discussions at regularly scheduled meetings.

In addition, within one (1) business day of a request by an employee, employers must provide information regarding the aggregate number of employees in the workplace and the aggregate number of employees who are fully vaccinated.

Handling Positive COVID-19 Tests

Employers must remove any employee from the workplace who tests positive until specific return to work criteria are met. However, unlike Cal/OSHA’s current ETS, unvaccinated employees who are “close contacts” need not be removed from the workplace unless they also test positive for COVID-19. The federal ETS also does not require exclusion pay for employees who test positive. However, the current Cal/OSHA ETS does require exclusion pay for work-related exposures. Read more about the current version of Cal/OSHA’s ETS in our prior [alert](#).

OSHA Reporting Requirements

The federal ETS also requires employers to report work-related deaths and in-patient hospitalizations to OSHA. In other words, where the employer believes or has knowledge that an employee contracted COVID-19 in the workplace, the employer must make a report to OSHA by telephone to the nearest OSHA Area Office or by electronic submission through www.osha.gov.

Conclusion

States with their own OSHA programs, like California, are free to implement requirements that are more restrictive than federal OSHA. As a result, if and when OSHA's ETS takes effect, the most restrictive and most employee-protective rules will apply in California. In the meantime, Cal/OSHA could take preemptive action by amending its own ETS to bring it into alignment with the federal mandate. We are monitoring this situation and hope to have more details about Cal/OSHA's action plan in the coming weeks.

If you have questions, please contact an attorney in our Employment Law group by phone at (916) 321-4444 or via email.

Kimberly Lucia	klucia@boutinjones.com
Lissa Oshei	loshei@boutinjones.com
Gage Dungy	gdungy@boutinjones.com
Jim McNairy	jmcnairy@boutinjones.com
Bruce Timm	btimm@boutinjones.com
Andrew Ducart	aducart@boutinjones.com
Errol Daus	edaus@boutinjones.com
Kendall Fisher-Wu	kfisher-wu@boutinjones.com

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