

# THE EMPLOYER'S ADVISORY

PERIODICAL NEWSLETTER

HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES

PREPARED BY ATTORNEYS BETTY BECHTEL, KESLIE COOPER, CHRISTINA HARNEY,

MOLLY REINHARDT AND MICHAEL SANTO

December

BECHTEL & SANTO

2021

## 6<sup>th</sup> Circuit Court Removes Injunction on Immunization Requirement for Employers with over 100 Employees

As you've undoubtedly seen by now, on Friday, December 17<sup>th</sup>, a three-judge panel from the 6<sup>th</sup> Circuit Court of Appeals dissolved the injunction regarding OSHA required immunization for employers with more than 100 employees, which was set forth by OSHA in an Emergency Temporary Standard ("ETS"). While the case is slated for oral arguments at the United States Supreme Court on January 7<sup>th</sup>, this article will focus on what we know right now, as we await the Supreme Court's ruling.

In short, after the 6<sup>th</sup> Circuit removed the injunction, OSHA announced the following:

OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before **January 10** and will not issue citations for noncompliance with the standard's testing requirements

before **February 9**, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance."

This means that OSHA has not given employers a lot of time to get up to speed on the requirements. Those requirements are as follows:

- The ETS requires that employers that employ more than 100 employees require its covered employees to receive the COVID-19 vaccination or conduct a weekly negative test result on those not immunized.
- What employees aren't covered? (1) Employees who work, principally, from home; (2) Employees who work exclusively outdoors; and (3) Employees who do not report to a workplace where other individuals are present.

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THE EMPLOYER'S ADVISORY is published quarterly by BECHTEL & SANTO, 205 N 4<sup>th</sup> St Ste 401 Grand Junction CO 81501, (970) 683-5888. Legal editors are Betty Bechtel, Keslie Cooper, Christina Harney, Molly Reinhardt and Michael Santo. This publication is designed to provide information about legal issues facing employers, but not to provide legal advice with regard to specific circumstances. Readers with legal questions should address them to their legal counsel.

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- Unvaccinated employees who work remotely do not need to submit to weekly testing.

Employees who only come into work occasionally, do not need to be tested for COVID-19 on a weekly basis. But the employer must ensure the employee is tested for COVID-19 within seven (7) days prior to returning to the workplace. For example, if an unvaccinated office employee has been teleworking for two weeks but must report to the office on a specific Monday to copy and fax documents, that employee must receive a COVID-19 test within the seven days prior to the Monday and provide documentation of that test result.

The OSHA ETS also provides the following exemptions to the immunization requirements: (1) those for whom a vaccine is medically contraindicated; (2) those for whom medical necessity requires a delay in vaccinations; and (3) those who are legally entitled to a reasonable accommodation under federal civil rights laws because they have disability or sincerely held religious belief, practices, or observances that conflict with the vaccination requirements.

Remember, in reviewing these exemptions that Title VII defines “religion” very broadly. That is, it includes traditional, organized religions such as Christianity, Judaism, Islam, etc. and it also includes religious beliefs that are new, uncommon, not part of a formal church or sect, or only held by a small number of people. But social, political, or economic philosophies, or personal preferences, are not “religious” beliefs under Title VII.

But even if an organization determines that the employee meets one of these requirements, the employer is not required to provide an accommodation unless the organization also determines:

With respect to requests for a medical accommodation: Can the organization “reasonably accommodate” the individual request for a medical accommodation (i.e., not receiving the immunization) without causing a direct threat to the employee and/or others.

With respect to requests for a religious accommodation: Does the requested accommodation (i.e., not receiving the immunization) cost the organization more than a minimal cost or cause a direct threat to others?

Examples of burdens on business that are more than minimal include: violating a seniority system; causing a lack of necessary staffing; jeopardizing security or health; or costing the employer more than a minimal amount. Infrequent payment of overtime to employees who substitute shifts is not considered an undue hardship. Employers need to make this determination on a case-by-case basis.

Additionally, OSHA’s ETS does not require employers to pay for any costs associated with testing; though Colorado statute does require Colorado employers to pay for any costs for the testing. Additionally, as the weekly-testing requirement would likely be considered a “work requirement,” organizations would need to have employees track that time and pay the employee for all time connected with the testing, including, depending on the situation, travel to and/or from the testing facility.

In addition to the immunization/testing requirements, OSHA’s ETS requires organizations to implement a policy to identify:

- That all current employees must be vaccinated, with exemptions for the groups discussed above.
- Implement and enforce a written policy allowing any employee to choose either to be fully vaccinated against COVID-19 or provide proof of weekly testing.
- Paid time and sick leave for vaccination purposes of receiving the immunization and recovering from any effects;
- Notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace, disciplinary action for employees who do not abide by the policy; and
- Deadlines (e.g., for submitting vaccination information, for getting vaccinated), and procedures for compliance and enforcement, all of which are necessary components of an effective plan.

Finally, OSHA's ETS also requires employers to implement paid leave for employees. That is, employers cannot require employees to use personal, vacation, or sick time to get vaccinated and employers are required to provide reasonable time to each employee during work hours for each of their primary vaccination dose(s), including up to four (4) hours of paid time, at the employee's regular rate. The maximum of four hours of paid time that employers must provide for the administration of each primary vaccination dose cannot be offset by any other leave that the employee has accrued, such as sick leave, including for Colorado employers HFWA, or vacation leave. But an employer can

require the employee to use accrued paid sick leave when an employee is recovering from side effects following a primary vaccination dose.

Additionally, employers cannot require employees to use advanced sick leave to cover reasonable time needed to recover from vaccination side effects. So, an employer may not require an employee to accrue negative paid sick leave or borrow against future leave to recover from vaccination side effects. But the employer can require the employee to be back within a "reasonable time period," which the ETS provided no definitive time period for. Instead, the ETS identified that 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. When setting the cap, an employer would not be expected to account for the unlikely possibility of the vaccination resulting in a prolonged illness in the vaccinated employee (e.g., a severe allergic reaction). And employers are not required to reimburse for other expenses associated with getting vaccinated (e.g., gas, mileage).

Regardless of COVID-19 vaccination status, an employer must immediately remove from the workplace any employee who receives a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider and keep the employee removed until the employee: (1) receives a negative result on a COVID-19 nucleic acid amplification test (NAAT); or Meets the return-to-work criteria in CDC's "Isolation Guidance"; or (2) receives a recommendation to return to work from a licensed healthcare provider.

Only employees who are not fully vaccinated are required to wear a face covering under the standard when indoors and when occupying a vehicle with another person for work

purposes. Exceptions to the face covering requirement: (1) when an employee is alone in a room with floor to ceiling walls and a closed door; (2) for a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements; (3) when an employee is wearing a respirator or face covering; and (4) where the employer can show that the use of face coverings is infeasible or creates a greater hazard that would excuse compliance with this paragraph.

In sum, the OSHA’s ETS requires that employers ensure that any employees who have not been fully vaccinated and report to a workplace where other coworkers, customers, or others are present must: (1) be tested for COVID-19 at least once every seven 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 test result. Additionally, employers must also ensure that all unvaccinated employees wear a face mask while working indoors or while occupying a vehicle with another person for work purposes unless the employee is working alone in a room with floor to ceiling walls or windows and a closed door. Employees are also exempt from the masking requirement when wearing a respirator or facemask in accordance with other OSHA standards.

## Upcoming Seminar

On Wednesday, December 29, 2021, the Western Colorado Human Resources Association will present a seminar regarding updates regarding OSHA’s ETS and it will also address the sweeping changes to Colorado law regarding wage and leave requirements for all Colorado employers. Bechtel & Santo is excited for the opportunity to present at this seminar. The logistics for the seminar are:

<i>When?</i>	Wednesday, December 29, 2021
<i>Time?</i>	Noon to 1:30 p.m.
<i>Where?</i>	Zoom.
<i>Signup?</i>	<a href="http://wchra.org/">http://wchra.org/</a>