

OSHA Expected to Issue Emergency Temporary Standard Regarding the COVID-19 Pandemic

On September 9, 2021, President Joseph R. Biden announced a federal strategy to combat the COVID-19 pandemic. The administration's strategy is available at <https://www.whitehouse.gov/covidplan/>. As part of that strategy, the President is directing the Occupational Safety and Health Administration to develop an Emergency Temporary Standard (ETS) that will require all employers with 100 or more employees to (1) require vaccination against the SARS-CoV-2 virus that causes COVID-19, or (2) require unvaccinated workers to provide a negative COVID-19 test weekly. This article briefly examines OSHA's authority to issue ETS.

OSHA is a part of the federal Department of Labor established by the Occupational Safety and Health Act of 1970 (OSH Act). The OSH Act permits OSHA to establish national safety and health standards for safe workplaces. Usually, proposed regulations are subject to a notice-and-comment period, under which interested persons may submit written data or comments, or written objections to a proposed rule before the rule goes into effect. See 29 U.S.C. § 655(b). Section 6(c) of the OSH Act permits OSHA to publish ETS, which take immediate effect without a notice-and-comment period:

(c) Emergency temporary standards.

(1) The Secretary shall provide, without regard to the requirements of [the Administrative Procedures Act], for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with section 6(b) of this Act [subsec. (b) of this section], and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

29 U.S.C. § 655(c). ETS are effective for six months, under which time period OSHA must proceed with a formal rulemaking proposal. Section 6(b)(1) of the OSH Act requires OSHA to find that an ETS is necessary to prevent employees from exposure to toxic or physically harmful substances or agents or new hazards, and that the ETS is necessary to prevent that danger. In the past, OSHA has issued ETS to establish minimum exposure levels for asbestos, benzene, and other carcinogens. At least for such chemicals and products, courts have limited OSHA's ability to issue ETS to situations in which a grave danger exists, and not for stopgap measures. See *Asbestos Information Ass'n/N. Am. v. OSHA*, 727 F.2d 415, 423 (5th Cir. 1984). Notably, in 2020, OSHA declined a petition filed by labor

unions to issue an ETS to establish standards for workers from COVID-19. A court declined to compel OSHA to do so. See *In re AFL-CIO*, No. 20-1158, 2020 WL 3125324, 2020 U.S. App. LEXIS 18562 (D.C. Cir. June 11, 2020) (per curiam). Earlier this year, OSHA issued an ETS to protect healthcare and healthcare support service workers from occupational exposure to COVID-19. That ETS requires covered employers to develop and implement a COVID-19 plan to identify and control COVID-19 hazards in the workplace.

This article does not explore whether any ETS is likely to withstand court challenges. Until any ETS is published, it would be premature to do so. Nonetheless, employers should prepare to implement and comply with any expected vaccine and testing mandates. An ETS has the same effect as a regular OSHA regulation or standard. Thus, employers who fail to comply could be subject to civil penalties and employers who violate any ETS could be subject to civil or criminal penalties See 29 U.S.C. § 666.

We will continue to monitor this matter for OSHA's expected ETS. As always, we are available to discuss your questions or concerns. Please do not hesitate to contact us.

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