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CONSTRUCTION LAW

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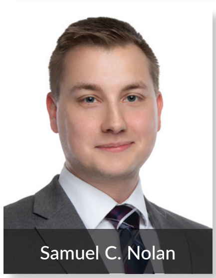
Withdrawal liability: Beware the hidden costs of leaving your multiemployer pension plan

Heather Stone Fletcher



Samuel C. Nolan

What is withdrawal liability?

Many employers with unionized employees contribute to a multiemployer pension fund under the terms of a CBA. But a large percentage of these multiemployer pension plans are not sufficiently funded, jeopardizing their ability to pay promised retirement benefits. In fact, one federal study found that between 80% and 99% of such plans are underfunded, with 10%-15% of plans at risk for insolvency. This makes them less attractive for employees, and increases the risk that employers will leave them in search of alternative retirement plans.

In order to stem the bleeding and discourage employers from fleeing these underfunded plans, Congress enabled plans to assess "withdrawal liability" for employers who completely or partially withdraw from a plan. Thus, when an employer leaves or ceases making contributions to an underfunded plan (a "complete withdrawal"), or significantly reduces its obligation to contribute to the plan (a "partial withdrawal"), the plan may require the employer to pay its pro rata share of the unfunded benefits for the plan, as of the day the employer withdraws. This can also occur when the employer experiences a significant or total reduction in its union workforce, even if the employer does not actively terminate its participation in the plan.

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Contract provisions to discourage inflated claims on private construction projects

Scott D. Cessar

Claims for additional compensation on construction projects are not uncommon. Many claims are well supported and meritorious and result in an adjustment to the contract. Some claims, however, while they may have merit as to entitlement, are greatly inflated as to costs. This is due to a mindset among some in the construction industry that it is an acceptable practice to submit claims with exaggerated costs for purposes of negotiating a compromise somewhere in the middle. These are the claims that stand the greatest chance of resulting in expensive and protracted litigation.

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Withdrawal liability: Beware the hidden costs of leaving your multiemployer pension plan

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Many employers in this situation are surprised to learn that they owe withdrawal liability, and most are alarmed at just how costly it can be. Depending on various factors, including the funded status of the plan, withdrawal liability can often range from hundreds of thousands to tens of millions of dollars. In addition, employers have to act relatively quickly to challenge the amount assessed, as the law provides only 90 days to submit a "request for review" to dispute the amount. As one might imagine, an unexpected assessment of withdrawal liability can be a nasty surprise.

What can employers do?

There is an exemption to withdrawal liability specific to the construction industry, but it requires that the employer cease its work in the area covered by the CBA for five years following the withdrawal. If the employer begins performing covered construction work in the same area within five years of withdrawing from the plan, it may be responsible for withdrawal liability. Given this condition, the construction exemption is not often applicable to employers who plan to continue operating after withdrawing from the plan.

Beyond that, as with many things, knowledge is power. An employer can request an estimate of withdrawal liability from the plan at least once a year, and we generally recommend that employers do so.

While employers may not be able to avoid withdrawal liability if they are determined to leave an underfunded plan, they may be able to take steps to reduce potential liability, and knowing the estimated withdrawal liability can help to ensure the employer is making an informed decision to withdraw. To that end, an employer who withdraws knowingly can engage counsel to negotiate and, in certain instances, challenge the total amount of liability. Given the large sums often involved in withdrawal liability assessments, and the short deadlines related to challenging the assessment, understanding your potential liability early can help to avoid or mitigate a major, expensive headache.

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Contract provisions to discourage inflated claims on private construction projects

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The practice of submitting inflated claims causes problems for owners faced with claims from general contractors and general contractors faced with claims from subcontractors. In addition, suppliers of equipment to both general contractors and subcontractors also find themselves sometimes in the position of having a large back charge due to alleged delivery delays or malfunctioning equipment that result in contractors seeking recovery of substantial delay and loss of productivity costs.

On federal government projects, inflated claims are constrained by the Contracts Disputes Act, which requires contractors to certify under oath all claims over $100,000. If a claim is determined to have been falsely certified, both the company and the representative that certified the claim may be held liable under the False Claims Act for civil penalties and damages of $5,000 to $11,000 per violation and up to three times the amount of the false claim. Also, 32 states have false claims acts that govern procurement between those states and private contractors.

Although state prompt payment acts, where enacted, may have prevailing party attorney's fee provisions, they generally do not have provisions, comparable to the False Claims Act, which potentially penalize the submission of inflated claims on private construction projects. Here are, however, two suggested contract provisions intended to discourage the practice of submitting inflated claims.

First, the changes clause of the contract should require, as does the Federal Contracts Dispute Act, for the contractor to certify all claims over, at least, $100,000. The following language, borrowing from the Contract Disputes Act, would compel such a certification:

> "All change order requests for amounts in excess of $100,000 must contain a certification under oath and signed by an authorized representative of the Contractor that the supporting data are accurate and complete to the best of its knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Owner is liable. Contractor agrees that provision of this certification constitutes an express precondition for submission of a Change Order and that the failure to provide such a certification shall constitute grounds for denial of the Change Order."

"Although state prompt payment acts, where enacted, may have prevailing party attorney's fee provisions, they generally do not have provisions, comparable to the False Claims Act, which potentially penalize the submission of inflated claims on private construction projects."

While it does not provide a direct financial consequence to submitting a false certification in support of an inflated claim, such as in federal contracting, requiring such a certification should cause a contractor some pause. From experience on federal projects, the certification process discourages the submission of frivolous or unwarranted claims. The certification process may also create potential credibility problems for the contractor that submits an inflated claim, files suit, and then later amends the claim to a more reasonable amount. He or she will be questioned at trial as to how he or she could attest under oath to a claim of X dollars pre-lawsuit and now the claim is one half of X dollars. There had better be a good explanation, or a skilled trial attorney will use these facts to impeach the credibility of the contractor and its claim.

Second, many construction contracts contain a provision by which the prevailing party may be awarded its attorney's fees and costs. The court is then left to determine which party is the prevailing party. Oftentimes, courts will be reluctant to award significant attorney's fees based on the justification that, although one party prevailed, it was a "close call." A tighter prevailing party attorney fee provision, as set forth below, however, should serve to discourage the filing of inflated claims and oblige courts to award more significant amounts of fees:

> "In any litigation, arbitration or proceeding brought under this Contract by either party, the prevailing party shall be awarded its reasonable attorney's fees, expert fees and costs. In determining the prevailing party, the court or arbitrator shall base its determination by comparing the largest total amount of the claim or claims requested by the Contractor at any point in the proceeding and without reference to any subsequent downward modifications by the Contractor, as compared to the total amount awarded to the Contractor."

The purpose of this bilateral attorney fee provision is to discourage the filing of the inflated claim that is then amended prior to trial to a more reasonable amount.

A more strident contract provision is a unilateral attorney fee provision under which only the Owner may recover its attorney fees and not the Contractor. Such a provision may even peg the amount of fees and costs recoverable by the Owner to the percentage recovery of the Contractor of its largest total amount claimed during the proceeding as follows:

> "In the event of litigation or arbitration arising out of this Contract, the Owner shall be awarded its reasonable attorney's fees, expert fees and costs as measured by a percentage of the Contractor's claims, based on the largest amount claimed during the proceeding, as a function of the total amount awarded to the Contractor. By example and for the avoidance of doubt, if the Contractor is awarded 60% of its claim, the Owner shall be awarded 40% of its attorney's fees, expert fees and costs."

This clause is a hammer clause, and the common law of some states may result in a challenge to its enforceability because it is unilateral. However, in view of the fact that construction contracts usually involve sophisticated parties dealing at arm's length, the odds are that the clause would be enforced. In addition, it is not highly likely that a contractor will want to fund a legal challenge to the enforceability of the clause on a somewhat esoteric legal issue that a court or arbitrator could defer until the end of the case.

In closing, if you are tired of exaggerated claims, there are ways to strengthen your contracts to discourage them and to penalize those who engage in the practice of presenting such claims.

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Limited judicial oversight of discovery disputes in arbitration

David Meredith

Parties to construction agreements often select binding arbitration as the preferred method of alternative dispute resolution despite little recourse if the arbitrator drops the ball while attempting to resolve discovery disputes.

Courts generally possess limited oversight of what takes place within the confines of an arbitration. In most instances, court intervention is limited to compelling arbitration in the first instance, issuing preliminary injunctions to preserve assets or property in dispute, appointing an arbitrator if the parties cannot agree to one, reviewing final awards, and confirming judgment. The courts will not typically intervene during an arbitration to weigh in on the merits of a claim or defense or to decide discovery disputes between the parties.

A recent case by the Nevada Supreme Court reiterates the deference courts will afford to arbitrators, even where significant discovery violations are evident. There, a subcontractor filed liens followed by a complaint against the developer in the trial court. The trial court proceedings were then stayed while the parties proceeded to arbitration.

During the arbitration, the developer retained a forensic accountant that discovered alleged fraudulent alterations to the subcontractor's financial records. In response, the arbitrator ordered an independent third-party specialist to perform a sweep of the subcontractor's computers, cell phones, and server. The specialist reported that the subcontractor intentionally complicated the sweep by upgrading software systems and purposely concealed data by refusing to allow the specialist to access a hard drive used by the employee who allegedly altered the financial records.

The developer filed a motion for discovery sanctions. The arbitrator responded by issuing a $130,000 sanction, but declined to strike the subcontractor's claims. When the subcontractor refused to pay the sanction, the developer filed a second motion for sanctions. The arbitrator again declined to dismiss the subcontractor's claims. Instead, the arbitrator ordered that the $130,000 sanction be deducted directly from one of the subcontractor's lien claims.

Not satisfied with the arbitrator's ruling, the developer filed a motion with the trial court for provisional relief pursuant to Nevada's Arbitration Act (based on the Revised Uniform Arbitration Act). The trial court granted the developer's motion, concluding that it had inherent authority to rule on discovery violations and that the Arbitration Act allows the trial court to provide provisional relief where an arbitrator is not able to act timely or cannot provide an adequate remedy with respect to an urgent matter.

On appeal, the Nevada Supreme Court reversed. The Court concluded that a plain reading of the Arbitration Act does not confer jurisdiction on a trial court to award potentially case-ending sanctions simply because the arbitrator declined to do so and that trial courts do not have inherent or rule-based power to sanction perceived discovery abuses occurring in an ongoing arbitration.

In so ruling, the Court reaffirmed the high degree of deference afforded to arbitration proceedings as is typical and confirmed that trial courts generally do not have authority to intervene in a binding arbitration to remedy alleged misconduct.

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Enforcing arbitration subpoenas inside and outside the United States—an uncertain proposition

Audrey K. Kwak

Obtaining discovery from a third party in connection with an arbitration hearing can often be critical to a party's case. Be forewarned, however—the power of an arbitrator to order that discovery is limited, particularly where a subpoena issues from a federal district outside the location of the underlying arbitration hearing itself.

Domestic Arbitration Subpoenas

Within the United States, the very power of an arbitrator to allow for pre-hearing nonparty discovery is a disputed question. The Sixth and Eighth Circuits generally allow pre-hearing nonparty discovery (regardless of where the nonparty is located), reasoning that the policies underlying the Federal Arbitration Act (FAA) require it. The Fourth Circuit also allows such discovery, but in a more limited fashion, allowing arbitrators to subpoena nonparty pre-hearing discovery "under unusual circumstances" and "upon a showing of special need or hardship."

In other circuits—the Second, Third, and Ninth—courts generally will not enforce arbitral subpoenas. These courts hold that the language of Section 7 of the FAA only gives an arbitrator the power to summon third-party witnesses to give testimony and provide documents in the context of a hearing. As a result, in these circuits, practitioners have successfully employed the tactic of setting a "pre-hearing" hearing before one or more arbitrators in which the testimony and documents can be provided.

The success of the pre-hearing hearing tactic, however, is vastly diminished where the third party is located outside the official "seat" of the arbitration. While one court in Pennsylvania has allowed for a pre-hearing to be held in a location other than the arbitration seat to collect third-party discovery, in the main, courts deciding the issue—including federal courts in New York, Georgia, Illinois—have refused to endorse the concept of a flexible "seat."

One recent example of this is a decision from the Northern District of California, *Jones Day v. Orrick, Herrington & Sutcliffe, LLP et al.* (N.D. Cal. Sept. 7, 2021). There, the court rejected Jones Day's motion to compel testimony from a third party at a pre-hearing hearing in San Jose, California in connection with an international arbitration seated in Washington, D.C. The court held that it lacked the authority to compel compliance with the arbitration summonses because the seat of the underlying hearing was Washington, D.C. Jones Day has appealed this decision.

International Arbitration Subpoenas

Outside the United States, companies involved in international construction projects often confront a similar, but different question—specifically, whether an arbitrator can issue third-party discovery subpoenas on parties in the United States to obtain document discovery for use in international private arbitrations. The answers to this question have been inconsistent, at best.

Under 28 U.S.C. § 1782 (Section 1782), a petitioner may obtain evidence through the federal district courts for use in a proceeding before a "foreign or international tribunal." The circuits have split on the question of whether a "foreign or international tribunal" can include a private arbitral body, or whether this term only encompasses governmental or intergovernmental arbitral tribunals.

The Second and Fifth Circuit Courts of Appeal have rejected the use of Section 1782 to obtain discovery in aid of private commercial arbitrations seated outside the United States, citing legislative history and the policy concern that allowing such discovery would diminish the efficiency and cost-effectiveness of arbitration.

By contrast, the Fourth (in the first *Servotronics, Inc. v. Rolls-Royce PLC* (4th Cir. Mar. 30, 2020) decision) and Sixth Circuit Courts of Appeal have permitted such applications, reasoning that "tribunal" has been understood to encompass privately contracted-for arbitral bodies. Both circuits also dismiss concerns with efficiency, citing the wide discretion that district courts enjoy to manage and shape discovery.

Ironically, in a decision involving the same parties and same arbitration proceeding confronted by the Fourth Circuit, the Seventh Circuit (in *Servotronics, Inc. v. Rolls-Royce PLC* (7th Cir. Sept. 22, 2020)) sided with the Second and Fifth Circuits, holding that a district court may **not** pursue discovery under Section 1782 for use in private international commercial arbitrations, citing legislative context, statutory language, and conflicts with the FAA's application to a subset of foreign arbitrations as justifications for its decision.

For a brief period of 2021, it appeared that the U.S. Supreme Court was poised to resolve this circuit split, but these hopes were dashed when the parties filed a stipulation to dismiss the case, which the Court did on September 29, 2021.

It bears noting that two additional circuits—the Third Circuit (rejecting discovery in aid of private commercial arbitration pending in Germany) and Ninth Circuit (allowing discovery in aid of private commercial arbitration pending in China)—currently have appeals pending before them in which this same question is before them. In view of the dismissal of *Servotronics*, these cases will have increased significance for parties seeking discovery in those circuits.

Practical Guidance

Given the continuing uncertainty in this area of the law, and the often vital importance of third-party discovery to domestic and international arbitrations, parties should keep these issues in mind when determining where to seat an arbitration and from where to issue a subpoena (assuming there are options, e.g., if a nonparty has multiple locations).

As ever, careful contract drafting can mitigate these uncertainties. Consider whether litigation should be made an available option, or whether an agreement can be reached to allow for limited discovery in arbitration. Similarly, consider including a provision allowing for automatic access to documents in the possession of third parties that would be relevant to the project, akin to an audit provision.

While tedious and complex, forethought in contracting can preempt the significant—and often expensive—discovery obstacles in the event an arbitrable dispute arises between the parties.

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Important guidance on critical changes to the interpretation and application of the Pennsylvania Steel Products Procurement Act

Scott D. Cessar

Owners, contractors, subcontractors, suppliers, architects, and engineers working on public projects in Pennsylvania should take immediate notice of the September 22, 2021, decision by the Pennsylvania Supreme Court interpreting the Pennsylvania Steel Products Procurement Act.

Under the Act, contractors are required to certify in writing and under oath to the owner that products, such as machinery and equipment, supplied on all state or local government-funded projects in Pennsylvania that include steel contain at least 75% domestic-made steel as opposed to foreign-sourced steel.

Engineers and architects on government-funded projects are tasked with reviewing these certifications for compliance. Failure to comply by providing incorrect certifications may result in penalties to contractors of forfeiture of payments for noncompliant products and, if willful, potential debarment for upwards of five years.

Over the years, however, there have been significant differences in opinion on what costs may be included in the determination of the steel products and on the appropriate method to calculate these percentages.

In a case involving a contractor located in Central Pennsylvania that supplied blowers to a wastewater treatment plant, the Supreme Court, in what it identified to be a case of "first impression" under Pennsylvania law, adopted a protectionist interpretation of the Act and set forth a conservative method of determining whether items of material or equipment meet the 75% domestic steel test.

First, the Supreme Court held that domestic overhead, such as charges for transportation, warehousing, and the like, should not be deducted from the cost of the foreign steel components of the product.

Second, the Supreme Court held that, in determining the ratio of domestic steel to foreign steel, the denominator should be the cost of the foreign steel used divided by the cost of all steel used. According to the Court, this properly places the burden on the supplier because it is in the best position to identify the origin of the steel and substantiate its costs.

The Supreme Court sent the case back to the lower court to calculate, based on its ruling, the percentages of domestic steel to foreign steel contained in the blowers at issue. The Supreme Court's opinion offered no guidance on whether its ruling has retroactive application. Certainly, all stakeholders on Pennsylvania construction projects—particularly suppliers and manufacturers—should take heed of this ruling in preparing future domestic steel certifications.

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Labor & Employment

ALERT

OSHA COVID Vaccine and Testing Emergency Temporary Standard

William S. Myers

The federal Occupational Safety and Health Administration **(OSHA)** on Thursday released its second emergency temporary standard **(ETS)** addressing COVID-19 in the workplace. The new rule is referred to as the **Vaccine ETS** to distinguish it from the COVID rule issued by OSHA in June, known as the **Healthcare ETS** (click here for our Client Alert on the Healthcare ETS). The Vaccine ETS was published in the Federal Register on Friday, giving it an effective date of November 5. However, as explained further below, employers have 30 days to comply with most provisions of the new ETS, and 60 days for others. Moreover, a federal appeals court on Saturday issued an order in one of the court challenges filed against the new ETS, delaying the start of the rule temporarily.

The new Vaccine ETS is one in a series of measures that President Biden announced on September 9 as part of his "Path Out of the Pandemic." Click here for the White House webpage that outlines those additional measures, including the new rules for federal contractors and healthcare providers. Click here to link to our Client Alert on the President's September 9 announcement.

Who is Covered by the Vaccine ETS?

The new ETS has some significant carve-outs for employers whose workplaces otherwise are regulated by OSHA. The **first** such exemption is for employers who have fewer than 100 employees company-wide. The **second** is for workplaces that are covered by President Biden's executive order mandating COVID vaccines for employees of federal contractors and subcontractors. **Third**, employees who work remotely or exclusively outdoors are exempt.

Fourth, the Vaccine ETS does NOT apply to employees covered by the Healthcare ETS. This may sound odd because the Healthcare ETS does not require vaccines for employees, but the vast majority of those workers are covered by a separate vaccine mandate in an Interim Final Rule just published by the Centers for Medicare and Medicaid Services for healthcare providers who participate in Medicare or Medicaid.

Key Definitions in the ETS

The Vaccine ETS defines nine terms for purposes of the new rule, some of which have a significant effect on the rule. For instance, "fully vaccinated," which is a central compliance criteria, does not include vaccine "boosters" or additional doses of a vaccine. This should give some comfort to those who were concerned about an open-ended mandate that could expand without agency action as such boosters are developed or come into use.

In addition, the definition of "mandatory vaccination policy," which refers to a core requirement of the rule, is the vehicle OSHA uses to introduce the exemptions employers not only **may** allow, but exemptions that employers **must** allow. This includes the accommodation rights for employees with objections based on disabilities or religious beliefs, which arise under the Americans With Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII). In addition, however, the definition also exempts employees for whom the vaccine is "medically contraindicated," which is broader than disability and avoids the need to prove an ADA disability to qualify.

Finally, "Workplace" is defined explicitly to exclude an employee's residence, which removes any question as to the carve-out discussed above for remote workers.

Key Employer Duties Under Vaccine ETS

There are nine key requirements imposed on employers by the Vaccine ETS, which range from establishing a written policy to requiring employees to report cases of COVID to ensuring that unvaccinated employees actually comply with the alternate testing and reporting requirements. Each requirement is discussed below.

Establish Written Vaccination Policy

The Vaccine ETS requires covered employers to "establish, implement, and enforce" a written vaccine policy for their employees. However, the rule allows employers to choose between two types of policies: a true vaccine mandate (that is, one that allows no exceptions other than as required by law) or an "employee-choice" policy (that is, one that allows any employee to choose whether to be vaccinated).

As already mentioned, the rule acknowledges the federal law duty to accommodate disabilities and religious objections in certain circumstances, and also requires an exemption for employees when a COVID vaccine is "medically contraindicated," and those requirements apply to both types of policies. However, the ETS goes further to permit an even broader policy that exempts any employee who chooses to opt out of the vaccine for any reason or for no reason. So long as the employer complies with the requirements for unvaccinated employees, discussed below, they may allow all employees to choose whether to be vaccinated.

Employers may differentiate between groups of employees based on the risk of COVID for their respective jobs. For instance, an employer may impose a mandatory vaccine policy on customer-facing employees, but have an "employee-choice" policy for all other employees.

As with the Healthcare ETS, OSHA has made development of a written vaccine policy much easier for employers by providing a sample policy that employers can download and conform to their particular company. Click here for the "mandatory policy" template, and click here for the "employee-choice policy" template.

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OSHA COVID Vaccine and Testing Emergency Temporary Standard

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Determine Vaccination Status of All Employees

Once the vaccine policy is established, an employer's next duty under the ETS is to determine the COVID vaccination status of all employees, including whether they have been "fully vaccinated." In doing so, the employer must require satisfactory evidence of vaccination, which can be in various forms listed in the ETS. If the employee no longer has any of the explicitly approved forms of proof, the employer may accept a written attestation from the employee, under oath, that states that the employee has been vaccinated.

All records reflecting vaccination status must be treated as confidential medical records. If an employee fails or refuses to provide proof of vaccination, the employer must treat that employee as unvaccinated. The employer must maintain a "roster of each employee's vaccination status." If the employer already has ascertained the vaccine status of employees before the effective date of the ETS through a form of proof not provided for in the ETS, the employer is exempt from the specific proof requirements.

Provide Support for Employee Vaccination

Covered employers are required to provide "support for employee vaccination." This comes in the form of allowing a reasonable amount of time *during the regular workday* for each employee to obtain the vaccine, including up to four hours of paid time to travel to the vaccine site, receive the vaccine, and return to work (for each dose). The employer also must allow reasonable paid time off for an employee to recover from the side effects of receiving either or both doses of the vaccine. The ETS does not set an amount of time that must be allowed for this, but simply states that it must be a reasonable time. OSHA's non-regulatory guidance, however, states that OSHA presumes that two days per vaccine dose would be a reasonable period for most cases.

If the employee chooses to get the vaccine outside of regular work hours, the employer does not have to pay the employee for that time. The employer also does not have to pay for travel costs to get the vaccine, but must pay for the vaccine itself, if there are charges. Moreover, the employer may NOT count the paid time for obtaining the vaccine against any other form of leave (such as vacation or sick leave). However, an employer may require employees to use other forms of accrued paid leave for the time needed to recover from vaccine side effects.

Ensure Unvaccinated Employees are Tested

Employers are required to "ensure that each employee who is not fully vaccinated" complies with the COVID testing requirements of the ETS. Those testing requirements depend on the employee's schedule of reporting to the physical worksite. If the employee reports at least once every seven days, then the employee must be tested at least once every seven days, and must provide documentation of the same to the employer. An employee who reports less frequently must be tested within seven days prior to coming to the worksite (and document the same). Employees who fail, including the documentation, must be excluded from the worksite until they comply.

Employers must maintain a record of all COVID testing pursuant to this rule, and all testing records must be kept as confidential medical records. However, due to the likelihood of false positives, employers may not require unvaccinated employees to undergo further periodic testing for 90 days following their last positive test or COVID diagnosis. Nonetheless, once the unvaccinated employee returns to work, and for the rest of that 90-day period, he or she must still satisfy the face covering requirements discussed below.

The ETS does not require employers to bear the cost of COVID testing required for unvaccinated employees. However, the ETS acknowledges that some employers may be required to bear these costs by virtue of state or local laws or collective bargaining agreements—but the ETS itself does not impose that burden.

Require Notification From—and Removal of—Employees With COVID

Employers must require employees to give notice of a positive COVID test or diagnosis by a healthcare provider—and remove the employee from the worksite until he or she meets return-to-work criteria specified in the rule. Note this is an **employer** requirement, as OSHA does not impose duties or corresponding penalties on **employees**.

Require Face Coverings for Unvaccinated Employees

The rule requires employers to "ensure that each employee who is not fully vaccinated wears a face covering" when indoors or when riding in a car with others for work. There are special rules for allowing more robust protective gear, such as N95 masks or other respirators, if employees so choose. In any event, the employer must see that the face covering fits properly and is replaced when needed. As with COVID testing, however, and unlike other protective gear under OSHA standards, the ETS does not require employers to pay for the face coverings—but again acknowledges they may have to do so under state and local laws or collective bargaining agreements.

Finally, if the employee chooses to wear a respirator, the employer must establish a Mini-Respiratory Protection Program and comply with the requirements of that program as set forth in the Healthcare ETS.

Provide Information to All Employees

Employers are required to provide certain information to employees to educate them regarding the benefits of COVID vaccines. In particular, employers must give each employee a document entitled "Key Things to Know About COVID-19 Vaccines," which is available by clicking here. Employers also must inform employees of their right to be free from retaliation for exercising their rights under the OSH Act and its standards and regulations. Finally, the employer must inform employees of the legal consequences of knowingly giving false documentation or statements in connection with an OSHA inspection or investigation.

Record and Report COVID Cases

As always, employers must record employee cases of COVID that are "work related," and report work-related cases to OSHA if the employee is hospitalized or dies as a result. The technical criteria for recording and reporting COVID cases are no different than for other illnesses, but as a practical matter some criteria are more difficult to determine with COVID, while others automatically are present. For instance, it is more difficult to determine if COVID is work related, but the employee automatically has "days away from work" because of the quarantine requirement. Click here for our 2020 Client Alert that describes the protocol for determining whether a COVID case is work related.

Make COVID Records and Information Available

Finally, the ETS requires employers to make certain COVID-related records and information available to employees who ask for them (by the end of the next business day) and to OSHA within four hours or by the end of the next business day, depending on what OSHA is requesting.

Preemption of Contrary State Laws and Rules

The opening section of the Vaccine ETS states that one of its purposes is "to preempt inconsistent state and local requirements relating to these issues," referring to "vaccination, vaccination verification, face covering, and testing requirements" relating to COVID-19. Moreover, OSHA's commentary accompanying the ETS makes clear that OSHA intends to completely supplant such efforts by state and local governments. However, the ETS does NOT preempt or supplant state and local laws that impose greater restrictions or requirements on employers for the purpose of enhancing workplace safety or public health, so long as they do not conflict with the ETS.

What About Employers in State Plan States?

The new ETS does not immediately apply in State Plan States, which are the 22 states authorized by OSHA to use their own state agencies and laws to regulate private-sector workplace safety and health (click here for OSHA's map of those states). However, as with the Healthcare ETS in June, OSHA is requiring those states to adopt the new Vaccine ETS or implement their own that meets the minimum requirements of the federal ETS. The main point here is that the compliance deadlines for those 22 State Plan States will be later than the federal OSHA compliance deadlines because those states will probably take 30 or more days to implement or adopt.

Effective Date and Compliance Deadlines

The Vaccine ETS became effective **November 5, 2021**, the date of its publication in the Federal Register. However, the ETS allows 30 days for employers to come into compliance with most of its requirements, which is **December 5, 2021**. The ETS also allows 60 days for employers to comply with the requirements relating to testing of unvaccinated employees, which is **January 4, 2022**.

Resources Available to Employers

OSHA's main webpage for the Vaccine ETS offers a number of useful resources, including sample employer policies, fact sheets on various topics, and a 28-minute online training webinar. Click here to visit that main page. OSHA's Frequently Asked Questions webpage also offers extensive guidance on all aspects of the Vaccine ETS, which can be found by clicking here.

This Labor & Employment Alert is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact a member of Eckert Seamans' Labor & Employment team, or any other attorney at Eckert Seamans with whom you have been working.

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Construction Law Group NEWS

Welcome

Dave Meredith has joined our Construction law practice group. Dave is a graduate of Michigan State and the Thomas M. Cooley Law School. He has over a decade's worth of experience working on complex construction matters involving owners, contractors, subcontractors, and suppliers in all phases of construction planning, counseling, and litigation and throughout the United States.

Also joining our group is **Scott Bowan**. Scott is a graduate of Cornell University and Yale Law School. He is also a former law clerk to a judge on the United States Court of Appeals for the Third Circuit. Scott has over two decades of experience in complex commercial litigation, with an emphasis on all aspects of insurance law.

Accolades

Members of the Construction law practice group were recognized in the 28th edition of The Best Lawyers in America©. **Scott Cessar** received a 2022 The Best Lawyers in America© recognition for Litigation – Construction. He previously was named the Best Lawyers® Construction "Lawyer of the Year" in Pittsburgh in 2021, 2017, and 2015. **Chris Opalinski** received a 2022 The Best Lawyers in America© recognition for Commercial Litigation and Litigation – Construction. He previously was named the Best Lawyers® Construction "Lawyer of the Year" in Pittsburgh in 2018 and 2012.

Chambers USA 2021 ranked Eckert Seamans as a leading law firm in several practice areas on a national and state level. Chambers & Partners is a prominent UK-based publishing organization that ranks lawyers and law firms based on robust editorial research and direct conversations with lawyers and clients. In Pennsylvania, the firm's Construction law practice group was recognized among the Commonwealth's top practices. **Scott Cessar** and **Chris Opalinski** were also selected individually for inclusion in *Chambers USA* 2021 as notable practitioners. An excerpt from the ranking follows below:

> *Well-respected construction practice, which represents clients such as public and private owners, suppliers, designers and sureties. Esteemed for its strength in construction disputes and also regularly advises on bidding and procurement, government contracts and regulatory compliance issues. Active in both national and international projects in the infrastructure, energy and education sectors. Sources say Eckert Seamans is "an excellent firm."*

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