

OSHA and COVID-19: Another Emergency Temporary Standard

President Biden announced in a September 9 speech that the federal Department of Labor's Occupational Safety and Health Administration (**OSHA**) is developing a second emergency temporary standard to address the problem of COVID-19 in the American workplace (**New COVID ETS**).

This was one in a series of measures the President outlined as part of his "Path Out of the Pandemic." Some of those other measures likely will overlap with the New COVID ETS for some employers—for instance, federal contractors. [Click here](#) for the White House webpage that outlines those additional measures.

As momentous as the New COVID ETS will be for employers nationwide, the President's comments about the New COVID ETS took up only 100 words out of a 3,600-word speech, and it offered few details of what he expects to find in the new emergency standard—and left many important questions unanswered.

NO IMMEDIATE STEPS REQUIRED

The President's statement itself imposes no immediate legal obligations or penalties as far as private employers under the OSH Act. It is simply an announcement that he has directed OSHA to promulgate the New COVID ETS, and provides a few details of what he expects it to contain.

However, as outlined by the President, the New COVID ETS would mandate that all employers with 100 or more employees and who are covered by the OSH Act must in turn require their employees to receive a COVID vaccine or show a negative COVID test at least weekly. The same employers also must allow paid time off for workers to get vaccinated. That's all the President has said, and that's all we know as far as specific content.

WHEN WILL THIS HAPPEN?

The President did not give a deadline or timeframe for the New COVID ETS, but it is likely to take weeks or months to be issued. Though it is a simple directive on its face, there are complex issues that OSHA will have to work out in preparing the ETS. Moreover, even though it is an emergency standard, OSHA still must build a basis for meeting the statutory criteria for emergency standards, and that takes time.

Recall that in January the President directed OSHA to issue a COVID ETS (**First COVID ETS**), and he imposed a March 15 deadline for action on that. However, OSHA did not issue the First COVID ETS until June, and even then, it applied only to healthcare settings—considerably narrower than anticipated ([click here](#) for our Client Alert). That ETS was lengthy and complex, but it received little of the backlash, and none of the court challenges, that had been anticipated (it was challenged, but only that it was too narrow).

However, if the New COVID ETS toes the line the President has drawn, it will be considerably broader and certainly more heavy handed, so it is more likely to draw court challenges from employers and others who already are declaring their opposition to such a broad mandate—and that could mean further delay.

UNANSWERED QUESTIONS

There are many issues lurking in the interstices of the President's broad new mandate, and employers simply have to wait to see how OSHA works them out. Here are a few of the key questions.

Who Can Opt Out? Will the "negative test" alternative be open to all employees, or just those who have legal protection from a mandatory vaccine, such as those with affected disabilities or who have religious objections?

Who Is Covered? How will OSHA count the 100-employee threshold? For instance, will the threshold apply across an enterprise of related companies, so that more employers will be covered, or will it apply to establishments with 100 or more employees, which would reach fewer employers. OSHA inspects employers on an "establishment" basis, but also does not hesitate to cross company boundaries to cite multiple employers who have contributed to a single hazard, and sometimes will combine related companies as one employer, so there is some basis for either end of that spectrum and for anything in between.

What Are The Penalties? OSHA's current penalty structure allows up to \$13,653 per instance of alleged violation, but query whether each non-compliant employee will be a separate instance, so the maximum penalty will be multiplied by the number of such employees? Moreover, will OSHA issue "Willful Citations" for violation of the New COVID ETS? That would authorize penalties of up to \$136,532 for each instance. In that scenario, OSHA could impose penalties in excess of \$1 million for an employer with ten or more non-compliant employees.

What About Healthcare? Will the New COVID ETS amend the First COVID ETS, which came up short of requiring covered employers to mandate vaccines, or will it simply overlap with the earlier ETS, or perhaps steer clear of the healthcare rule altogether? On its face, the President's statement would suggest one of the first two of those options, but if so, that imposes a not-insubstantial burden—some would say penalty—on employers who have been scrambling over the past few months to devise and implement policies to comply with the First COVID ETS.

What About State Plans? How and when will this apply in the twenty-two private-sector State Plan States—that is, those authorized by federal OSHA to administer their own state agencies to regulate workplace safety? When the First COVID ETS was issued, OSHA directed all State Plan States to adopt the federal ETS or implement their own, but even in doing so, it further delayed the adoption of the ETS in those states by weeks or months.