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November 5, 2021

OSHA Releases Vaccination Mandate Rule

On November 4, 2021, OSHA released its much-anticipated COVID-19 vaccination emergency temporary standard. Here are the details:

- **January 4, 2022 Vaccination Deadline:** Under the rule, by January 4, 2022, private employers with 100 or more employees must ensure their workers are fully vaccinated against COVID-19 or require unvaccinated employees to test negative for COVID-19 once a week. (To be fully vaccinated by January 4th, non-vaccinated employees must begin the vaccination process in November or early December.) To enforce the requirement, covered employers must determine the vaccination status of each employee, obtain acceptable proof of vaccination, and maintain records of each employee's vaccination status. Covered employers must obtain this information and establish a vaccination policy by December 4, 2021 (so that unvaccinated employees have adequate time to be vaccinated by January 4, 2022).
- **Counting Employees:** Employers who have a total of at least 100 employees (full-time or part-time) firm- or corporate-wide at any time the ETS is in effect, are covered by the rule.
- **Remote Employees:** The vaccination (or testing) requirement does not apply to employees who work remote and are not around any coworkers or customers, nor does it apply to employees who work exclusively outdoors.
- **Paid Time Off for Vaccination:** Covered employers must provide employees with paid time off for the time it takes to be vaccinated and provide sick leave for workers to recover from any vaccination side effects.
- **Testing Costs:** In what appears to be an attempt to incentivize vaccination, under OSHA's new rule, employers do not have to pay for or provide testing for workers who decline vaccination but rather can require the unvaccinated workers to bear that cost themselves. The order notes that collective bargaining agreements or other circumstances may require otherwise.

- **Masks for Unvaccinated Workers:** Unvaccinated workers must also wear masks in the workplace. This piece of the ETS applies effective December 5, 2021
- **Preemption of Local Laws:** In an attempt to block OSHA's anticipated rule, some states have already passed laws (or their governors have issued executive orders) banning employer vaccine mandates. The ETS explicitly states that it preempts any state and local laws to the contrary.

In federal OSHA states, the rule is immediately effective, subject to the specific deadlines set forth in the rule, i.e., vaccination deadline, mask deadline, etc. For employers in states with OSHA state plans (which includes Utah), the state has 30 days to enact rules of their own that are at least as effective as the federal rule. The United States Department of Labor has previously suggested that it will revoke the state plans of those states that decline to adopt a corresponding rule.

As noted previously, litigation over OSHA's authority to issue this rule is expected. Multiple states have already brought suit challenging the rule. You can find more information (in particular, see OSHA's FAQs) regarding the new ETS on OSHA's website at <https://www.osha.gov/coronavirus/ets2>. Stay tuned for further developments.

Please visit www.moreton.com/news-events/ for more information and to view other client alerts. This Client Alert was written by Carolyn Cox, who provides our clients with compliance services. For additional questions, please contact Carolyn at 801-715-7110 or ccox@moreton.com.

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