OSHA's COVID-19 Vaccine or Testing Mandate For Employers With 100 Or More Employees

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Today's Topics

- *Breaking News*: Legal Update on Challenges to Emergency Temporary Standard (ETS)
- Understanding the ETS: Who does it cover, what does it do, when does it go into effect?
- Questions and Answers

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BREAKING: Fifth Circuit Temporarily Halts Enforcement Of The ETS

- Republican governors and attorneys general from more than 20 states filed lawsuits challenging the ETS on Friday, November 5, 2021, as soon as the order published in the Federal Register.
- Citing "grave statutory and constitutional issues" at issue in the ETS, the U.S. Court of Appeals for the Fifth Circuit (consolidating appeals within its jurisdiction) issued an order in *BST Holdings v. OSHA* on Saturday, November 6, 2021, which prevents (for now) the Biden Administration from moving forward with implementing the ETS.
- The Administration must submit a brief by today at 5:00 p.m., and the challengers' response is due at 5:00 p.m. tomorrow.
- Current status of ETS: **On hold**.

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So… What Now?

- As early as this week, the Fifth Circuit could lift the stay and reinstate (for now) the ETS…
- OR: The order could remain tied up in litigation for the foreseeable future…
- OR: The Supreme Court could swiftly weigh in, allowing the ETS to move forward, preventing it from ever taking effect, or splitting the baby by narrowing OSHA's mandate in some fashion

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Information Is Power

- Understand the rule
- Stay informed
- Be ready to act
- We are here to help

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Understanding The ETS

- Who: Who is—and is not—covered by the ETS?
- What: What does the ETS require covered employers to do?
- When: When do we have to do it by?
- Why: Understanding the penalties for non-compliance.

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WHO: Understanding The Scope Of Coverage

- The ETS applies to —
  - OSHA covered industries
  - Employers with 100 or more employees on or after November 5, 2021
  - Employees who face a "grave danger" of contracting COVID-19 in the workplace

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WHO: Understanding the Scope of Coverage

- The ETS does **NOT** apply to —
  - Workplaces covered by another federal Covid-19 rule —
    - new CMS mandate for facilities participating in Medicare/Medicaid
    - federal contractor mandate
    - OSHA healthcare ETS released in June
  - Employees who do not report to a workplace where other individuals are present
  - Employees who telework
  - Employees who work exclusively outdoors

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WHO: Understanding 100-Employee Threshold

- Includes all employees, across all U.S. locations, regardless of employees' vaccination status or where they perform their work (indoors, outdoors, from home etc.)
- Part-time employees count
- Independent contractors do not count
- Single, corporate entity with multiple locations must count all employees at all locations
- Franchises: Franchisor only counts corporate employees, Franchisee counts employees at individual location
- Staffing agencies: Only staffing agency counts jointly employed employees

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WHAT: Understanding The Requirements

- Employer must establish, implement, and enforce —
  1. A written mandatory vaccination policy; OR
  2. A written policy requiring either vaccination or providing proof of weekly COVID-19 testing and masking in the workplace

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WHAT: Mandatory Vaccine Policy (Option 1)

- Employer must require each employee to be fully vaccinated
  - Receive complete dose of an FDA-approved COVID-19 vaccine (but does not require a booster)
  - Exceptions —
    - Medical contraindications or medical necessity requires a delay in vaccination
    - Legally entitled to a reasonable accommodation under federal civil rights law because of a disability or sincerely held religious belief that conflicts with the vaccination requirement
- Employer must follow OSHA-approved guidance on determining and maintaining records of employee vaccination status
- Employer must provide paid time off to receive and recover from the vaccine

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WHAT: Vaccine or Testing (Option 2)

- Employees who report at least once every 7 days to a workplace where other individuals are present must be tested for COVID-19 at least once every 7 days and provide documentation of the test result no later than the 7th day following the date on which the employee last provided a test result.
- Employees who do not report at least once every 7 days must provide proof of a COVID-19 test within 7 days before returning to the workplace.
- The ETS does not require or prohibit employers to pay for any costs associated with testing.

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WHAT: Testing Protocols & Face Masks

- Employees must follow OSHA guidance for testing and producing test results
- Employers must maintain records of each test result and maintain those records as medical records, except that they are only required to be maintained and protected for the duration that the ETS is in effect
- The employer must ensure that each employee who is not fully vaccinated wears an OSHA-compliant face mask at all times, except in limited circumstances (described on page 61553 of the ETS).

WHEN: Important Dates & Deadlines

- **December 6** — Employers be in compliance with all requirements except for those related to testing protocols, and employees who are not fully vaccinated must wear masks in the workplace
- **January 4** — Employees must either be fully vaccinated or be in compliance with testing protocols
- An important note on records availability: At the request of OSHA, an employer must provide a copy of its written vaccination policy *within 4 hours*.

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WHY: Enforcement and Penalties

- OSHA has indicated that enforcement of the policy will largely be complaint-driven, but that the agency will also conduct random site inspections
- Citations with varying penalties and fines may be issued, depending on the severity of the violation
- Employees and employers each would be subject to penalties, including potential fines and jail time, for providing false information related to vaccination status or testing under 18 U.S.C. § 1001 and Section 17(g) of the Occupational Safety and Health Act

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Questions & Answers

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Here's What To Do Today:

- ✓Send communication to employees on current state of the ETS
- ✓For unionized companies: send a communication about the ETS and components subject to collective bargaining
- ✓Form an accommodation request committee
- ✓Decision-makers at your organization need to choose if you'll move forward with making a plan
  - ✓If yes, speak with your Miller Johnson lawyer about crafting the plan
  - ✓If no, decide, if, when and how you'll take action

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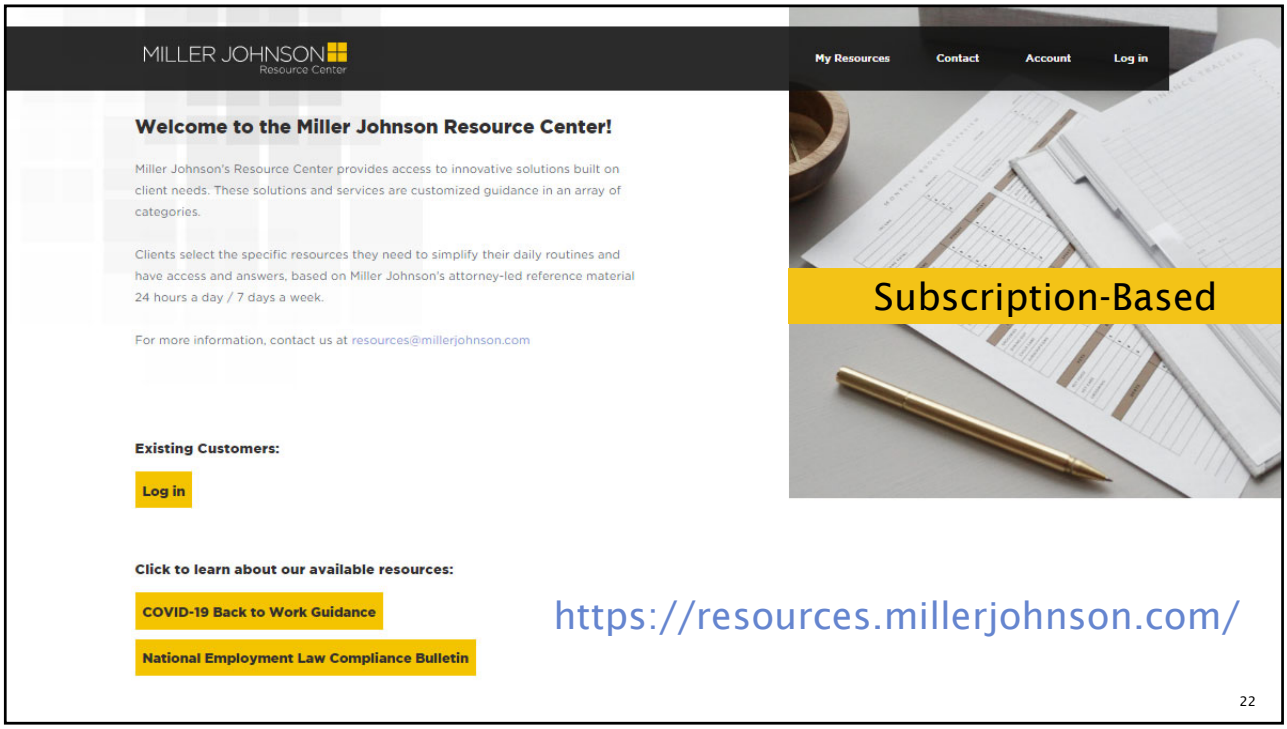

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