

Expected Challenges Facing OSHA's COVID-19 Vaccine Mandate For Large Employers

COVID19, Employment Law, OSHA / November 4, 2021

As part of his plan to combat the ongoing COVID-19 pandemic, President Biden previously announced that the Occupational Safety and Health Administration ("OSHA") would implement an emergency temporary standard ("ETS") requiring employers with 100 or more employees to mandate that all their employees either be fully vaccinated or produce a negative COVID-19 test at least once per week. That ETS was published today. See blog [OSHA Issues Emergency Temporary Standard For Private Employers With 100-Plus Employees – New Deadline: January 4, 2022.](#)

As anticipated, the ETS does cover employers with 100 or more employees, firm- or company-wide. Covered employers must develop, implement and enforce a mandatory COVID-19 vaccination policy, unless they adopt a policy requiring employees to choose either to get vaccinated or to undergo regular COVID-19 testing and wear a face covering at work.

OSHA doesn't often issue emergency standards and for good reason. Emergency standards are limited to situations by section 6(c)(1) of the OSH Act (the "Act") which requires the Secretary of Labor to issue an ETS in situations in where employees are exposed to a "grave danger" and immediate action is necessary to protect those employees from such danger. Congress waived the ordinary rulemaking procedures in the interest of "*permitting rapid action to meet emergencies.*"

The ETS is being challenged in the federal courts; in fact, fourteen Republican attorney generals announced their intent to do so in a September 16, 2021 letter to President Biden. Their challenge is expected to focus on the arguments that (a) OSHA did not establish that COVID-19 is a "grave danger" to employees that justifies the ETS; (b) COVID-19 is not a workplace substance, agent, or hazard under the Act; and (c) drawing the line at employers with more than 100 employees is arbitrary and OHSA has not shown that an emergency standard is necessary to mitigate the danger.

Similarly, more than 80 interest groups met with the White House's Office of Information and Regulatory Affairs and OSHA prior to the issuance of the ETS to voice their opposition thereto. Among the concerns voiced by such groups was OSHA's failure to conduct an economic feasibility analysis to justify an intervention in the American economy and employee's personal health decisions.

The interest groups' attack on the ETS based on the lack of an economic analysis derives from the Fifth Circuit's 1974 decision in *Florida Peach Growers Association, Inc. v. United States ' of Labor* in which the court stated that any ETS must balance the proposed emergency protections "effect upon economic and market conditions in the industry." The Fifth Circuit also stated that emergency standards are to be used only in "limited situations" and upon a showing by OSHA of a grave danger – COVID 19 in this case – will result in "incurable, permanent, or fatal consequences" to workers. The "grave danger" and "necessity" findings must be based on evidence of *actual*, prevailing industrial conditions, i.e., current levels of employee exposure to COVID-19.

OSHA may have an uphill battle to justify its "grave danger" and "necessity" findings in court.

In particular, OSHA has not attempted to explain why it has concluded that COVID-19 is a grave danger justifying emergency action to protect employees of employers with 100 or more employees, but not to those with fewer than 100 employees. Workplaces come in all shapes and sizes and include those that are outdoors, others where work is done in well-ventilated areas, work that requires personal protective equipment such as ventilators and masks, or in locations that can be modified to adapt to any of the above. What is the grave danger unique to all employers with 100 or more employees, the groups lining up to challenge the ETS will ask?

Recognizing the apparent weaknesses in its grave danger finding, OSHA, as part of the ETS, has requested comment from the public on whether the ETS should be extended to employers with less than 100 employees. OSHA has further carved out exceptions to the ETS including (i) workplaces already covered by President Biden's Executive Order regarding federal contractors; (ii) OSHA's June 2021 ETS pertaining to healthcare workers; (iii) workers who do not report where other individuals are present or who telework; and (iv) workers who perform their work exclusively outdoors.

In connection with the "necessary" finding, OSHA's almost year-long delay in issuing the emergency standard will likely be used as ammunition against it. As mentioned, the Act requires findings of a (i) "grave danger" and (ii) *immediate action is necessary* to protect those employees from such danger. In the case of COVID-19, the FDA first approved the use of the Pfizer vaccine on an emergency basis back on December 11, 2020, with the Johnson & Johnson and Moderna vaccines becoming widely available shortly thereafter. OSHA took no action to issue an emergency standard until September 9, 2021, when President Biden announced such a standard would be forthcoming. Even then, OSHA took over eight weeks to publish its proposed standard which establishes December 5, 2021, as the face-covering deadline and January 4, 2022, as the vaccination deadline. Given this time-lapse, which happens to coincide with the apparent ebbing of the Delta variant spike and the trending toward low death rates from COVID-19, a court reviewing any challenge to the ETS may determine that OSHA's "necessary" finding is not justified.

As a practical matter, it appears that the Biden Administration is trying to buy some time. An ETS that will not be enforced for months will likely prompt employers to start complying by developing, implementing, and enforcing a mandatory COVID-19 vaccination policy. Further, it is unlikely that a court would consider any challenge to the ETS until it becomes enforceable. During that time period, it is likely that vaccination rates will continue to rise while infection and death rates continue to decline. If so, the ETS may serve its policy objection even if it is subsequently determined to be unenforceable.

Finally, the new ETS also raises the issue of a potential conflict with approximately twelve states that have either issued an executive order and or passed legislation either prohibiting or limiting the scope of COVID-19 vaccination mandates. Given the ETS' option for weekly testing in lieu of the vaccine, it appears to be no conflict with such state rules. We will have to wait and see what the courts do.

For further analysis please contact the KRCL Employment group.

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