GUARDIANS OF THE QUALIFIED:
CLARIFYING DISABILITY & RELIGIOUS ACCOMMODATIONS

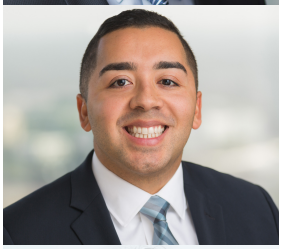
Overview of Accommodations

The genetic lineages of novel coronavirus disease 2019 (COVID-19 or SARS-CoV-2) have been emerging and circulating around the world since the beginning of the COVID-19 pandemic. In addition to disrupting lives, world economies, transport, and travel, the different variants have been wreaking havoc on return-to-work initiatives.

But as the talking tree Groot said in Guardians of the Galaxy, "I am Groot," which we interpret as "life finds a way." And as employers require employees to return to the office, whether it be full time or some hybrid option, employers, too, must find a way to navigate the myriad issues that are sure to arise. Undoubtedly, some employees may be eager to return to the office. Others, however, are reluctant. To continue working remotely, employees may cite a number of reasons, including anxiety about mass transit, fear of contracting the virus, concern that an immunocompromised immediate family member could become exposed to the virus, and, as we have already seen, medical or religious objections to the COVID-19 vaccine.

To avoid running into a knotty situation, let's review the basics.

In its Technical Assistance Questions and Answers entitled "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," last updated on October 28, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) made clear that an employer may require COVID-19 vaccines for employees and exclude from the workplace those with COVID-19 or symptoms associated with COVID-19. That is so because their presence could pose a direct threat to the health or safety of others.



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Federal and state laws require employers to reasonably accommodate requests to be exempt from the COVID-19 vaccine, which, in essence, means exemption from return-to-office mandates either because of (1) a medical reason that rises to the level of a "disability" under federal, state, or local law, or (2) a "sincerely held religious belief," practice, or observance.

It is important to note that the federal employment law landscape is expansive and complex, especially when it comes to COVID-19. The following federal laws may provide employees with protections:

- the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 (which include the requirement for reasonable accommodation and nondiscrimination based on disability, and rules about employer medical examinations and inquiries);

- Title VII of the Civil Rights Act of 1964 (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy-related conditions);
- the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older);
- the Genetic Information Nondiscrimination Act; and
- other federal, state, or local laws.

In addition to an exception from the COVID-19 vaccine requirements, an employee may also seek an accommodation from the employer's return-to-work policies. If an employee can show that the employee is disabled or has a sincerely held religious belief that would prevent the employee from being vaccinated against COVID-19, then the employer must provide an effective reasonable accommodation, unless doing so would impose an "undue hardship" on the operation of the employer's business or operations.

If an employer believes that it cannot satisfy the employee's requested accommodation or prefers an alternative, then the employer must discuss the difficulties that the request would pose for the employer and suggest potential alternatives that may address the employee's accommodation needs. This is referred to as the "interactive process." The employee should continue the dialogue until the request for reasonable accommodation can be granted or denied. It is important to note that an employer may, under certain circumstances, seek additional information from the employee to determine whether the employee in fact has a disability that requires accommodation, or that the employee in fact has a sincerely held religious belief.

Once the interactive process is complete, it is best practice for the employer to memorialize in writing whether any accommodation has been granted or denied, and provide a copy of the written decision to the employee who requested the accommodation.

Frequently Asked Questions

Medical Accommodations

1. What does the ADA require?

The ADA requires employers to provide "reasonable accommodations" to "qualified employees with disabilities" to allow those employees to perform the "essential functions" of their positions, unless doing so would cause "undue hardship" to the employer. Once the employer is or should be aware that the employee may have a disability that impairs their ability to perform their job, the employer must initiate the dialogue which constitutes the "interactive process" to determine whether any reasonable accommodations are available.

2. What is a disability?

Not everyone with a medical condition is protected from discrimination. To be protected, a person must be qualified for the job and have a disability as defined by the law.

A person can show that he or she has a disability in one of three ways:

- A person has a disability if they have a physical or mental condition that substantially limits a major life activity (for example, walking, talking, seeing, hearing, or learning, or operation of a major bodily function).
- A person has a disability if they have a history of a disability (for example, as cancer that is in remission).
- A person has a disability if they are subject to an adverse employment action and are believed to have a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor (even if they do not have such an impairment).

3. What does it mean to be a "qualified" employee under the ADA?

To be a "qualified individual" under the ADA, an employee must have the "requisite skill, experience, education, and other job-related requirements" of the position and be able to perform the "essential functions" of the position, with or without reasonable accommodations. Employees experiencing disabilities are entitled to reasonable accommodations (if needed) to perform their essential job functions. If an individual is unable to perform an essential job function even with a reasonable accommodation, by definition the person is not "qualified" for the position.

4. What is the "essential function" of a position?

The term "essential function" means the fundamental job duties of the position, not an employee's marginal duties. An employer may consider a function essential because, among other reasons, (a) it is the reason that the position exists; (b) only a limited number of employees can perform that function; or (c) it is a specialized function and the employee was hired because of their expertise or ability to perform that function. Essential functions may or may not include those specified in the written job description, or the duties that occupy a majority of the employee's time.

5. What is the interactive process?

As soon as the employer learns that an individual may need an accommodation, an employer must engage in an "interactive process" to determine the appropriate accommodation. As part of the interactive process, the employer:

- should document in writing its awareness of the possible need for, or receipt of the request for, accommodation;
- may request medical documentation of the employee's condition as it relates to job duties, if the disability or need for accommodation is not known or obvious; and
- must confer with the individual, and perhaps their healthcare provider, to discuss their job-related limitations and potential accommodations. This includes the employee's preferred accommodation(s).

6. When does an accommodation pose an undue hardship under the ADA?

Under the ADA, undue hardship means that the accommodation would cause "significant difficulty or expense" for the employer. In other words, the accommodation would be too difficult or too expensive to provide, in light of the employer's size, financial resources, and the needs of the business. An employer may not refuse to provide an accommodation just because it involves some cost or other burden. At the same time, an employer does not have to provide the exact accommodation the employee or job applicant wants. If more than one accommodation works effectively, the employer may choose which one to provide.

7. What are "reasonable accommodations" under the ADA?

Under the ADA, reasonable accommodations are any change in the work environment (or in the ways things are usually done) to enable a person with a disability to apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment. Examples include:

- acquiring or modifying equipment or devices;
- job restructuring;
- part-time or modified work schedules;
- reassignment to a vacant position;
- adjusting or modifying examinations, training materials, or policies;

- providing readers and interpreters; and
- making the workplace readily accessible to and usable by people with disabilities, including making the workplace accessible for wheelchair users or providing a reader or interpreter for someone who is blind or hearing impaired.

8. What are NOT "reasonable accommodations" under the ADA?

Some accommodations are, by their nature, not reasonable and never required. Examples include:

- eliminating essential job functions;
- creating a new job;
- transferring another employee against their will;
- jeopardizing employee safety or health;
- violating union contract or seniority rules; and
- lowering work-performance standards.

9. What types of undue-hardship considerations may be relevant to determine whether a requested accommodation poses "significant difficulty" during the COVID-19 pandemic?

According to the EEOC, an employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult during the COVID-19 pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be working remotely. In addition, it may be significantly more difficult during the COVID-19 pandemic to provide employees with temporary assignments, remove marginal functions, or readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, then employers and employees should work together to determine whether there may be an alternative that could be provided that does not pose such problems.

Before the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components).

But according to the EEOC, the sudden loss of some or all of an employer's income stream because of the COVID-19 pandemic is a relevant consideration. Another relevant factor is the amount of discretionary funds available at this time—when considering other expenses—and whether there is an expected date that current restrictions on an employer's operations will be lifted or new restrictions will be added or substituted. It is important to keep in mind that these considerations do not mean that an employer can reject any accommodation that costs money; an employer must still weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, during the COVID-19 pandemic, there may be many no-cost or very low-cost accommodations.

10. Can an employer ask disability-related questions or require a medical exam during the employment application process or interview phase?

The ADA places strict limits on employers when it comes to asking any job applicants to answer disability-related questions, take a medical exam, or identify a disability. For example, an employer may not ask a job applicant to answer disability-related questions or take a medical exam before extending a job offer. An employer also may not ask job applicants if they have a disability (or about the nature of an obvious disability).

But an employer may and should ask job applicants whether they can perform the job and how they would perform the job, with or without a reasonable accommodation.

11. Can an employer ask disability-related questions or require a medical exam after a job offer for employment?

After a job is offered to an applicant, the law allows an employer to condition the job offer on the applicant answering certain disability-related questions or successfully passing a medical exam, but only if all new employees in the same type of job have to answer the questions or take the exam.

12. Can an employer ask disability-related questions or require a medical exam after a person has started working as an employee?

Once any employee is hired and has started work, an employer can ask disability-related questions or require a medical exam only if the employer needs medical information or documentation to support an employee's request for an accommodation or if the employer believes that an employee is not able to perform a job successfully or safely because of a medical condition.

Employers should remember that they are required to keep all medical records and information confidential and in separate medical files, and may disclose medical information only to those who have a legitimate reason to know.

13. What is "long COVID?"

Although many people with COVID-19 get better within weeks, some people continue to experience symptoms that can last months after first being infected, or may have new or recurring symptoms at a later time.

14. Does the EEOC recognize "long COVID" as a disability?

Yes, the EEOC recognizes that "long COVID" may be a disability under the ADA and Section 501 of the Rehabilitation Act in certain circumstances.

The U.S. Department of Health and Human Services and U.S. Department of Justice recognize long COVID as a disability under Title II (state and local government) and Title III (public accommodations) of the ADA, Section 504 of the Rehabilitation Act, and Section 1557 of the Patient Protection and Affordable Care Act if it substantially limits one or more major life activities.

15. Is an employee automatically disqualified for a job because they use opioids or because they used opioids in the past?

The ADA allows employers to terminate an employee and take other employment actions against the employee based on *illegal* use of opioids, even if the employee does not have performance or safety problems. Also, employers are allowed to disqualify an employee if another federal law requires them to do so.

But if an employee is not disqualified by federal law and their opioid use is legal, an employer cannot automatically disqualify the employee because of opioid use without considering whether there is a way for the employee to do the job safely and effectively. An employer, however, does not have to lower production or performance standards, eliminate essential functions (fundamental duties) of a job, pay for work that is not performed, or excuse illegal drug use on the job as a reasonable accommodation.

16. Could an employee get a reasonable accommodation because of an addiction to opioids?

Yes, opioid addiction (sometimes called "opioid use disorder" or "OUD") is itself a diagnosable medical condition that

can be a disability under the ADA. An employee may be able to get a reasonable accommodation for OUD. But an employer may deny the employee an accommodation if the employee is using opioids *illegally*, even if the employee has an OUD.

17. Could an employee get reasonable accommodations for a medical condition related to opioid addiction?

Yes, if the condition is a disability. Medical conditions that are often associated with opioid addiction—for example, major depression and post-traumatic stress disorder (PTSD)—may be disabilities.

18. If an employer has several qualified applicants for a job, does the ADA require that the employer hire the applicant with a disability?

No. An employer may hire the most qualified applicant. The ADA only makes it unlawful for the employer to discriminate against a qualified individual with a disability on the basis of disability.

However, when an employee is medically released to return to work after a disability could not be reasonably accommodated, the employer must offer that employee any vacant position for which that employee is qualified, with or without reasonable accommodation.

19. Is an employer obligated to provide a reasonable accommodation for an individual if the employer is unaware of their physical or mental impairment?

No. An employer's obligation to provide reasonable accommodation applies only to known physical or mental limitations. But this does not mean that an applicant or employee must always inform the employer of a disability. If a disability is obvious, e.g., the applicant uses a wheelchair, the employer knows of the disability even if the applicant never mentions it.

20. When must an employer consider reassigning an employee with a disability to another job as a reasonable accommodation?

When an employee with a disability is unable to perform their present job even with the provision of a reasonable accommodation, the employer must consider reassigning the employee to an existing position that the employee can perform with or without a reasonable accommodation. The requirement to consider reassignment applies only to employees, not to applicants. An employer is not required to create a position or transfer another employee to create a vacancy. An employer is also not required to promote an employee with a disability to a higher-level position.

21. What if an applicant or employee refuses to accept an accommodation that the employer offers?

The ADA provides that an employer cannot require a qualified individual with a disability to accept an accommodation that is neither requested nor needed by the individual. But if a necessary reasonable accommodation is refused, the individual may be considered not qualified because they refused to cooperate with the accommodation.

22. Does the ADA require employers to have telework programs?

No. The ADA does not require an employer to offer a telework program to all employees. But if an employer offers telework, it must allow employees with disabilities an equal opportunity to participate in such a program.

In addition, the ADA's reasonable-accommodation obligation—which includes modifying workplace policies—might require an employer to waive certain eligibility requirements or otherwise modify its telework program for someone with a disability who needs to work at home. For example, an employer may generally

require that employees work at least one year before they are eligible to participate in a telework program. If a new employee needs to work at home because of a disability—and the job can be performed at home—then an employer may need to waive its one-year rule for this individual.

23. May permitting an employee to work at home be a reasonable accommodation, even if the employer has no telework program?

Yes. Changing the location where work is performed may fall under the ADA's reasonable-accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework. An employer, however, is not obligated to adopt an employee's preferred or requested accommodation and may instead offer alternate accommodations as long as they would be effective.

24. May an employer make accommodations that enable an employee to work full time in the workplace rather than grant a request to work at home?

Yes, the employer may select any effective accommodation, even if it is not the one preferred by the employee. An employer can provide a number of reasonable accommodations to permit an employee to remain in the workplace. For example, an employee with a disability who needs to use paratransit asks to work at home because the paratransit schedule does not permit the employee to arrive before 10 a.m., two hours after the normal starting time. An employer may allow the employee to begin his or her eight-hour shift at 10 a.m., rather than grant the request to work at home, if this would work with the paratransit schedule.

Religious Accommodations

1. What is a religious belief?

Title VII of the Civil Rights Act protects all aspects of religious observance and practice, as well as belief, and defines religion very broadly for purposes of determining what the law covers.

A religion may be a theistic (i.e., those including a belief in a God) or nontheistic comprehensive belief system that addresses fundamental questions of existence and morality. Personal preferences and political, social, and cultural philosophies do not qualify as religious beliefs. On the other hand, a religion need not be traditional, old, logical, or formally organized (e.g., Christianity, Judaism, Islam, Hinduism, and Buddhism) as long as it occupies that space in the believer parallel to that filled by God. And the individual believer's belief, observance, and practice need not be officially recognized by any particular organized religion.

An employee's belief or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or if few—or no—other people adhere to it.

2. When is a religious belief sincerely held?

Sincerity is subjective, so in most circumstances an employer should presume the employee's belief is sincerely held. A believer does not forfeit their religious rights because they sometimes violate their own beliefs. But factors that may undermine an employee's credibility include: (a) actions markedly inconsistent with a professed belief; (b) an attractive accommodation likely sought for secular reasons; (c) suspect timing of the request (such as immediately following the same request for a different reason); or (d) other reason to believe the accommodation is not sought for religious reasons.

3. When must a religious belief, observance, or practice be accommodated?

A religious accommodation is a modification to the work or the work environment that allows the employee to comply with their religious beliefs. Reasonable accommodation should

be granted for terms and conditions of employment that conflict with an employee's religious beliefs, observances, or practices unless the accommodation creates an "undue hardship."

4. When does an accommodation pose an "undue hardship"?

Under Title VII, an accommodation would pose an undue hardship if it would cause more than *de minimis* cost on the operation of the employer's business or operations. Note that this is a lower standard for an employer to meet than undue hardship under the ADA which is defined in that statute as "significant difficulty or expense."

The following factors are relevant to determine whether an accommodation presents an undue hardship: the type of workplace; the nature of the employee's duties; the identifiable cost of the accommodation in relation to the size and operating costs of the employer; the number of employees who will in fact need a particular accommodation; increased risk of harm to the employee or others; increased security risk; increased burden on other employees; and conflict with union seniority rules.

Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business or operations. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work. An employer can also consider whether the proposed accommodation conflicts with another law.

To prove undue hardship, the employer will need to demonstrate how much cost or disruption a proposed accommodation would involve. An employer cannot rely on potential or hypothetical hardship when faced with a religious obligation that conflicts with scheduled work, but rather should rely on objective information. A mere assumption that several people with the same religious practices as the individual being accommodated may also seek accommodation is not evidence of undue hardship.

If an employee's proposed accommodation would pose an undue hardship, the employer should explore alternative accommodations.

5. May employees be exempted from a COVID-19 vaccination requirement because of their sincerely held religious beliefs?

Yes, an employee may be entitled to a reasonable accommodation when the vaccination conflicts with their religious beliefs. Here are a few pointers:

- The burden is on the employee to request an accommodation for their religious belief, observance, or practice. This is accomplished by merely informing the employer that there is a conflict between their religious beliefs and the vaccination requirement.
- The employer should assume that the request is based on a sincerely held religious belief, absent an objective basis for questioning the sincerity of the belief.
- If the employer has an objective basis to question the employee's sincerity, the employer may make a limited factual inquiry and request supporting information from the employee.
- The employer may ask the employee how the vaccination requirement conflicts with their religious belief.
- The employer need not provide an accommodation that creates an undue hardship—e.g., impairs safety, diminishes efficiency, or burdens other workers.

- The employer may select from multiple reasonable options and need not provide the specific accommodation requested.
- The employer may impose other reasonable health and safety restrictions to address the risk of transmission.
- The employer may reasonably grant some requests and deny others on a case-by-case basis.
- Each accommodation request must be considered based on the circumstances at hand.
- Employers should confer with the requesting employee to find an effective and agreeable solution.

6. What are some examples of requests for accommodation of a "religious" belief or practice?

Requests for accommodation of a "religious" belief or practice could include, for example:

- a Catholic employee requesting a schedule change so that they can attend church services on Good Friday;
- a Muslim employee requesting an exception to the organization's dress and grooming code to allow them to wear a headscarf, or a Hindu employee requesting an exception to allow them to wear a bindi (religious forehead marking);
- an atheist asking to be excused from the religious invocation offered at the beginning of staff meetings;
- an adherent to Native American spiritual beliefs seeking unpaid leave to attend a ritual ceremony; or
- an employee who identifies as Christian but is not affiliated with a particular sect or denomination requesting accommodation of their religious belief that working on the Sabbath is prohibited.

7. How does an employer learn that accommodation may be needed?

An employee (or applicant) who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work.

Employer-employee cooperation and flexibility are important in seeking a reasonable accommodation. If a reasonable accommodation is not immediately obvious, the employer should discuss the request with the employee to determine what accommodations might be effective.

If the employer requests additional information reasonably needed to evaluate the request, the employee should provide it. For example, if an employee has requested a schedule change to accommodate daily prayers, the employer may to ask for information about the religious observance, such as time and duration of the daily prayers, to determine whether the proposed accommodation can be granted without posing an undue hardship on the operation of the employer's business or operations.

8. Does an employer have to grant every request for accommodation of a religious belief, practice, or observance?

No. Title VII requires employers to accommodate only those religious beliefs that are religious and "sincerely held," and that can be reasonably accommodated without an undue hardship (more than a *de minimis* burden or cost). Although there is usually no reason to question whether an employee's practice is religious or sincerely held, if the employer has a bona fide doubt about the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice at issue is religious and sincerely held, and gives rise to the need for the accommodation.

The following factors could undermine an employee's assertion that the employee sincerely holds the religious belief:

- whether the employee has behaved in a manner markedly inconsistent with the professed belief;
- whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons;
- whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and
- whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

But employers should keep in mind that none of these factors are dispositive. For example, although an employee's prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held. In addition, an employer should not assume that an employee is insincere simply because some of the employee's practices deviate from the commonly followed tenets of his or her religion.

9. Does an employer have to provide an accommodation that would violate a seniority system or collective bargaining agreement (CBA)?

No. A proposed religious accommodation poses an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona fide seniority system or CBA. But the mere existence of a seniority system or CBA does not relieve the employer of the duty to attempt to accommodate an employee's religious practices; instead, the question is whether an accommodation can be provided without violating the seniority system or CBA. An employer could allow coworkers to volunteer to substitute or swap shifts as an accommodation to address a scheduling need without violating a seniority system or CBA.

10. What if coworkers complain about an employee being granted an accommodation?

Religious accommodations that infringe on coworkers' ability to perform their duties or subject coworkers to a hostile work environment will generally constitute undue hardship; but general disgruntlement, resentment, or jealousy of coworkers typically will not. Undue hardship requires more than proof that some coworkers complained; a showing of undue hardship based on coworker interests generally requires evidence that the accommodation would actually infringe on the rights of coworkers or cause disruption of work.

11. What are common methods of religious accommodation in the workplace?

Under Title VII, an employer or other covered entity may use a variety of methods to provide reasonable accommodations to its employees. Some common methods include:

- scheduling changes, voluntary substitutes, and shift swaps;
- changing an employee's job tasks or providing a lateral transfer;
- making an exception to dress and grooming rules;
- using the work facility for a religious observance;
- making accommodations related to payment of union dues or agency fees; and
- making accommodations for prayer, proselytizing, and other forms of religious expression (e.g., limited to use of a phrase or greeting).

OSHA Issues Emergency Temporary Standard on COVID-19 Vaccinations and Testing Mandates for Employers with 100 or More Employees

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See our related article, Employers Stay Ready: OSHA's Vaccine-or-Test Mandate Stalls After Federal Appeals Court Challenge, for updated information on the status of the OSHA ETS.

On November 4th, the Occupational Safety and Health Administration (OSHA) of the Department of Labor (DOL) announced the anticipated adoption of an Emergency Temporary Standard (ETS) requiring all employers of 100 or more employees to mandate COVID-19 vaccination or regular testing of all workers.

OSHA's announcement can be found here: https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf.

SUMMARY

By December 5, 2021, all employers of 100 or more employees must adopt a written policy that requires either:

1. all employees to be vaccinated (except for those with medical or religious exemptions who must wear masks and be tested weekly for COVID-19) (a "Mandatory Vaccination Policy"), or
2. all employees to be vaccinated OR wear masks and test weekly for COVID-19, regardless of why they are unvaccinated (a "Vaccinate or Test Policy").

Employees must be required to comply by January 4th. Employers may adopt different policies for different departments or work groups.

PREEMPTION

OSHA's ETS preempts all state and local standards on the topic, including any state or local order prohibiting vaccination mandates. The 22 states with their own OSHA-approved workplace safety and health programs may adopt rules at least equivalent to this ETS, if approved by OSHA. See https://www.osha.gov/stateplans/. This includes Alaska, California, Oregon, and Washington.

COVERED EMPLOYERS

The ETS covers all employers of 100 or more employees, except federal contractors/subcontractors and healthcare industry employers already covered by other OSHA standards mandating vaccinations with no alternative for regular testing. It also doesn't apply to state and local governments that are subject to state plans, provided those states are required to adopt requirements for state and local governments that are at least as protective as the ETS. Employers must count all their employees wherever situated, including currently employed temporary and seasonal employees. An employer is covered if it employs 100 or more employees during the period the ETS is effective, regardless whether they are full-time or part-time.

COVERED EMPLOYEES

While all the employer's employees count toward the 100-employee threshold, the vaccination policy need not be applied to those employees who do not report to a workplace where others are present, who work strictly from home, or who work strictly outside.

EFFECTIVE DATES

Although the ETS is effective on November 5th, it gives covered employers until December 5th (30 days) to adopt their preferred written policy. Employees must be required to comply with those requirements by January 4, 2022. January 4th is also the new date for federal contractors to comply with their vaccination mandates.

POLICY AND COMMUNICATIONS

Again, covered employers will have until December 5, 2021 to adopt a policy. OSHA has provided samples of both options, and additional resources, that are available on it's website at: https://www.osha.gov/coronavirus/ets2.

Employers are also required to provide employees information about the ETS and access to the policy adopted "in a language and at a literacy level its employees will understand." If the policy itself does not include it, then employees must also be provided with (1) the CDC's "Key Things to Know about COVID-19 Vaccines;" (2) information about the available protections against retaliation and discrimination; and (3) information about "laws that provide for criminal penalties for knowingly supplying false statements or documentation." Again, versions of these documents are included in the resources available on the website.

EXEMPTIONS

Employers' policies should exempt from any mandatory vaccination requirement employees who fall into one or more of the following categories: (1) where vaccination is medically contraindicated (for example, where they may be allergic to any of the ingredients or suffered a prior reaction), (2) where medical necessity requires a delay in vaccination, or (3) where the employee is legally entitled to a reasonable accommodation due to a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement. The OSHA website provides a link for accommodation resources here: https://askjan.org/topics/COVID-19.cfm.

Disclaimer: This article is not legal advice. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps businesses must take under applicable laws.

VACCINATION VERIFICATION

Covered employers must obtain verification of employee vaccinations, and the ETS prescribes the acceptable forms: (1) the COVID-19 vaccination card; (2) a medical record of the vaccination; (3) a public health record of the vaccination; or (4) an attestation by the employee that meets specific standards outlined in the ETS and only when the employee has lost or is unable to obtain other proof. Employers need not re-verify for employees who provided proof of vaccination before November 5, 2021, even if that proof would not meet current ETS requirements.

Employers must retain employee proof of vaccination (which must be filed in the confidential medical folder as with other employee medical information) and maintain a written record of vaccinated and un-vaccinated employees.

COST AND PAID TIME OFF

Vaccinations are still readily available at no-cost to employees and this rule doesn't confer any obligation on employers to pay for vaccination even should that change. However, employers must provide up to four hours of paid time off (including travel time) necessary for an employee to receive each vaccination dose. Other accrued leave may not be used for that purpose. In addition, employers must provide reasonable paid time off for those suffering vaccination side effects that prevent them from working. Sick leave and other accrued paid leave may be used for this purpose.

Under the ETS, employers need not pay for the cost of weekly testing, unless another law or contract requires it.

TESTING

Employees who are not vaccinated but who report to a workplace where others are present must be tested at least every seven days and provide test results to the employer. Test methods must be FDA approved. Employees who do not comply must be removed from the workplace. An employee returning to the workplace from a leave or from remote work must provide a test result from with seven days prior to the date they return to work.

Employees who test positive or have been diagnosed with COVID-19 must be (a) required to notify the employer and (b) excluded from the workplace in accordance with current CDC guidelines, and are not subject to further testing for 90 days.

Test results are to be kept by the employer as confidential medical records, which also have special retention rules.

MASKS AND FACE COVERINGS

Masks or other acceptable face coverings must be worn by unvaccinated employees when indoors or in vehicles with others, except when they are alone in a room, removing the mask for a security check, or eating or drinking. Employers may not prohibit any employee or visitor from wearing a face covering or a respirator.

Disclaimer: This article is not legal advice. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps businesses must take under applicable laws.

DISCIPLINE

As with any safety policy, the vaccination policy must be enforced. Enforcement may require employee discipline or discharge. In unionized workplaces, collective bargaining agreements might apply to discipline under the policy.

RECORDS

Employers must keep as confidential medical records all proof of vaccinations and testing results, and provide employees with access to their own records of vaccination and testing upon request.

TRANSPARENCY OF VACCINATION STATUS

Employers must be able to produce records showing the aggregate number of fully vaccinated employees at the worksite and the total number of employees at the worksite, within four hours of a request by OSHA. This same information must be provided no later than the next business day to employees and employee representatives who request it.

REPORTING WORKPLACE INFECTIONS

Employers must report workplace infections which lead to hospitalization within 24 hours, and fatalities within eight hours.

CONCLUSION

OSHA has yet to address the extension of this ETS to smaller employers, but suggested it may still do so, or possible booster shot requirements.

We hope that this snapshot of the key considerations and potential takeaways that we have outlined above is helpful to employers as they navigate these challenging issues. As always, employers should call on us if they have questions or need assistance with evaluating their approach to vaccination and implementing related policies and practices.

About the Authors

Amy Robinson represents public and private employers throughout Washington, Oregon, and Alaska in a broad range of workplace-related issues. She provides experienced counsel on compliance challenges and disputes covering the entire employment life cycle from hiring to separation, including employee classification, wage and hour issues, employee leaves and protected activities, disability and accommodation, and discrimination, retaliation, and harassment prevention. Amy is also adept at guiding employers through policy and handbook development, as well as drafting, negotiating, and enforcing employment-related contracts, such as noncompete, nonsolicitation, and nondisclosure agreements.

Richard Lentini's practice emphasizes employment and labor law, often focused on discrimination or harassment, employment policies and agreements, union representation and labor practice issues, workplace injuries, and safety.

Employers Stay Ready: OSHA's Vaccine-or-Test Mandate Stalls After Federal Appeals Court Challenge

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November 17, 2021 Update

After One Appellate Court Says No Más to OSHA's Enforcement and Implementation of Emergency Temporary Standard, A New Appellate Court Enters the Ring

On Friday, November 12, after considering expedited briefing, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit issued a 22-page order continuing its initial November 6, 2021, stay of the U.S. Occupational Safety and Health Administration's (OSHA) COVID-19 Emergency Temporary Standard (ETS or as referred to by the Fifth Circuit, the "Mandate"). The case was filed by various covered private employers, states, religious organizations, and individuals seeking a temporary stay of the ETS. The appellate court's stay is in effect pending judicial review to determine if the court should issue a permanent injunction of the ETS. The court's order effectively nullifies the ETS because OSHA is barred from both enforcing and implementing it.

What Does the November 12 Order Say?

The court explained that the statute that allows OSHA to bypass typical notice-and-comment proceedings for six months and instead be issued with immediate effect only if OSHA has reasonably determined "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1). It outlined several reasons why it found that the challengers were likely to succeed with arguing OSHA had not effectively done so here:

First, the court questioned whether COVID-19—"however tragic and devastating the pandemic has been"—"poses the kind of grave danger § 655(c)(1) contemplates." It also was fairly pointed in suggesting that the slow response by OSHA, even since President Biden issued the charge to create the ETS, was a contradiction to its arguments about the urgency and necessity of the ETS now.

Second, regarding the necessity of the ETS, which the court referred to as a "one-size-fits-all sledgehammer," the court expressed skepticism that the rule, as posed,

could survive constitutional scrutiny, noting that in its 50-year history, OSHA had issued just 10 ETSs, of which six were challenged in court and only one survived to enforcement. The court also took issue with what it saw as a tenuous link between the decision to set the threshold at employers with over 100 employees and the "alleged" hazard presented by COVID-19.

Third, citing Supreme Court precedent from 1905 and 1922, the court questioned whether the ETS had overstepped into an area that has thus far been clearly reserved for states' police powers.

What Should Employers Do Now?

In a statement following the Nov. 12 filing, OSHA stated on its website that enforcement activity around the ETS would be effectively paused amid the proceedings: "While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation." Given that we don't yet know whether and to what extent those dates may be moved, if the ETS is allowed to proceed, the prudent and able employer, however, may want to proceed with evaluating options and strategies to comply in short order if it does, even if the pressure is potentially off to do so by December 5th.

Employers should also keep in mind that the Fifth Circuit's order does not affect:

- the Centers for Medicare and Medicaid Services' (CMS) interim final rule for healthcare workers, which incorporates a vaccine mandate that will apply to covered Medicare and Medicaid-certified providers and suppliers, also by January 4, 2022;
- President Biden's Executive Order 14042 on mandatory vaccinations for federal contractors, now with an extended compliance date of January 18, 2022; or
- States' plans, if any, to implement and enforce their own mandates modeled after the ETS.

When Will We Have More Answers?

While there is no certainty, we will likely have more answers in the coming weeks. Just yesterday, the U.S. Judicial Panel on Multidistrict Litigation ("JMPL") selected the U.S. Court of Appeals for the Sixth Circuit, based out of Cincinnati, Ohio, to preside over the consolidated petitions for review of the ETS filed in 12 U.S. circuit courts of appeal. The JPML's consolidation order, which combined a number of petitions for review, came after a "lottery" was held to determine which federal appeals court would be the deciding court.

Overall, this lottery pick favors the ETS's challengers, but the three-judge panel that initially hears the case will be selected randomly and could view the ETS in a different light than the Fifth Circuit.

But employers should keep in mind that even if the Sixth Circuit views the ETS more favorably, we may not know the ending of this workplace story—that is, whether the ETS was a proper exercise of OSHA's authority—until the U.S. Supreme Court chimes in.

Our COVID-19 team will continue to monitor developments related to the ETS and provide timely updates as new rulings are issued.

Original Article

As every large employer should know by now, on November 4, 2021, Occupational Safety and Health Administration (OSHA), Department of Labor (DOL), announced the much-anticipated Emergency Temporary Standard (ETS). The interim rule, which was officially published on November 5, would require large employers (100 or more employees) to develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead adopt of a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination. While the ETS is effective on November 5, 2021, it gives "covered employers" until December 5, 2021, to adopt their preferred written policy. Employees must be required to comply with those requirements by January 4, 2022. For more information on the ETS, please read OSHA Issues Emergency Temporary Standard on COVID-19 Vaccinations and Testing Mandates for Employers with 100 or More Employees, where my colleagues Amy Robinson and Rick Lentini have discussed the key provisions of the newly issued ETS.

This much-anticipated announcement sent employers and their attorneys in action to develop workplace policies, including vaccine-or-testing and return-to-work policies.

What Changed?

Two days later, on November 6, a three-judge panel on the United States Court of Appeals for the Fifth Circuit, granted a stay of the ETS—that is, it put the interim rule on hold pending further litigation.

The Fifth Circuit wrote that "Because the petitions give cause to believe there are grave statutory are constitutional issues with the Mandate, the Mandate is hereby STAYED pending further action by this court." The stay order is not a final ruling on the validity of the ETS but will halt its implementation at least temporarily.

On November 8, the U.S. Department of Justice (DOJ) responded, signaling that it will not seek immediate review from the U.S. Supreme Court, which could be because the ETS's provision does not kick in until January 4. Citing 12 legal challenges to the ETS in six federal Circuit Courts, filed by 26 states and several private employers and organizations, and an appellate procedure rule regarding multi-circuit litigation involving review and enforcement of agency order, 28 U.S.C. § 2112[1], the DOJ's letter states that the DOJ expects a "multi-circuit lottery" to take place on or about November 16, 2021. In the DOJ's view, this process will result in the following: (1) the random selection of a single Circuit Court and (2) the consolidation of all legal challenges into one case. The designated Circuit Court will then be responsible for deciding these petitions and considering—or reconsidering—any stay orders. In addition, in a separate 28-page filing, the DOJ argued that the ETS was necessary to protect American workers from COVID-19, which the DOJ called a "workplace hazard," and is well-grounded in law.

In the coming days and weeks, we should see additional rulings from the federal courts of appeal. And until there is a final court order, the fate of the ETS is unknown. Even though OSHA must wait to enforce the ETS until a stay is over, the status of the stay could change at a moment's notice.

[1] This federal law requires agencies, boards, commissions, and officers to notify a court of appeals panel when one of their orders is challenged in at least two federal courts of appeal within ten days of its issuance.

What Should Employers Do Now?

At this time, employers should consider continuing to prepare for the ETS, because it will likely take weeks for employers to comply with the upcoming deadlines in the ETS and OSHA may not look kindly on non-compliant employer who waited to implement the mandate-or-test rule until there was a final court ruling.

Stay Tuned

Also unknown is how, if at all, this stay will impact the states from moving forward with their own plans to adopt equivalent, or greater, protections in those states with approved OSHA state plans. Recall, under the ETS as initially proposed those states had 30 days from November 5, 2021 to adopt their own plan.

Our COVID-19 team will continue to monitor and report on developments with respect to the pandemic and will post updates on the firm's COVID-19 Resource Center as additional information becomes available. If you have questions about how to ensure that your policies comply with the various applicable laws, please visit our COVID-19 Resource Center or contact a member of our Team.

About the Author

Iván Resendiz Gutierrez is a litigation and appellate attorney on the firm's appellate, education, and employment and labor relations practice teams. Iván advises employers, including higher education institutions, on knotty employment-related issues, including discrimination, harassment, retaliation, novel coronavirus disease 2019 (COVID-19) issues, including vaccine and face covering laws and regulations and unemployment insurance benefits, and wage and hour compliance, and on preparing employment documents such as employment agreements, handbooks, and other workplace policies.