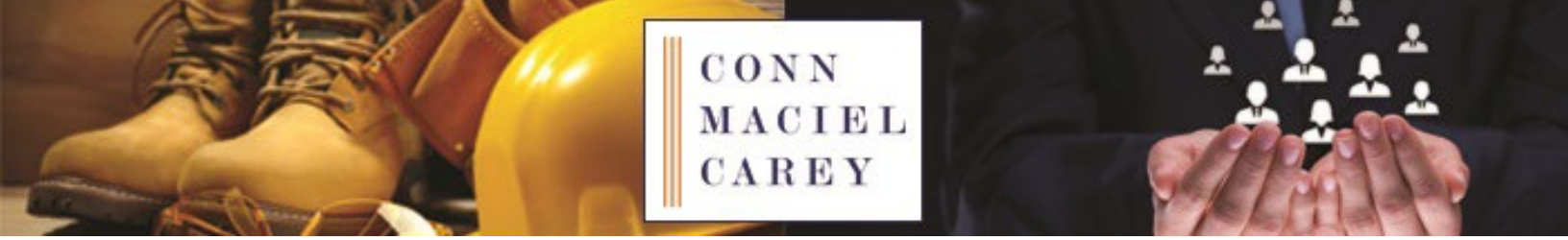

Q&A – Dec. 20, 2021
OSHA's COVID-19 Emergency Rulemaking for Vaccination, Testing, and Face Coverings

Q. ***What is the current status of the ETS?***

A. On December 17, 2021, the Sixth Circuit dissolved a nationwide stay of OSHA's Vaccinate-or-Test ETS that had been issued by the Fifth Circuit in November 2021. Back in November, the Fifth Circuit ordered that no further steps to implement or enforce the ETS be taken by OSHA until further court order. After the Fifth Circuit issued the Stay, the various lawsuits that had been filed challenging the ETS were consolidated, including the matter in which the Fifth Circuit ordered the Stay, and were pending before the US Court of Appeals for the Sixth Circuit. The Sixth Circuit's three-judge panel assigned to the matter evaluated the four-factor test to determine whether a stay pending judicial review is merited for the ETS. In a 2-1 decision, Judge Stranch, who wrote the majority opinion, explained the Court's decision and ultimately concluded that "[t]he harm to the government and the public interest outweighs any irreparable injury to the individual petitioners who may be subject to a vaccination policy[.]"

After the Sixth Circuit issued its opinion, the Dept. of Labor immediately issued a statement that OSHA is moving forward with implementing and enforcing the ETS, but also provided some enforcement relief. Specifically, OSHA states that "to account for any uncertainty created by the stay" OSHA will exercise enforcement discretion to not cite companies for a few additional weeks for non-compliance with the ETS between now and a series of new January/February compliance deadlines if the employer can demonstrate that it is making good faith efforts to come into compliance. Specifically, the key first date by when employers must have everything but testing in place is **January 9th** followed by implementation of the testing program for unvaccinated workers by **February 8th**.

Note that within an hour of the Sixth Circuit's decision, numerous parties filed emergency applications with the US Supreme Court requesting the Supreme Court reissue a stay of the ETS. The Supreme Court is expected to address the status of the ETS within the next two weeks.

Q. ***How does the decision to dissolve the Fifth Circuit's Stay impact upcoming deadlines for compliance and employers' obligations under the ETS?***

A. Below are the updated deadlines for obligations under the ETS based on OSHA's December 17, 2021 update from OSHA that it will exercise enforcement discretion and not issue citations for noncompliance until these dates for those employers exercising reasonable, good faith efforts to comply with the ETS:

- PTO to get vaccinated begins on **January 9th**
- PTO to recover from adverse effects from the vaccines begins on **January 9th**
- Removal from work of COVID-19 positive workers begins on **January 9th** (although this should be done now, as we have been doing throughout the pandemic)
- Face coverings must be worn by all non-fully vaccinated workers (or those whose status you do not yet know) begins on **January 9th**
- Confirm vaccination-status by **January 9th** to be permitted to report to work without proof of a negative test in February
- Have process in place and begin verifying negative test results weekly to report to work beginning on **February 8th**

Q. ***Does this standard immediately apply to State OSHA plans, or do they need to promulgate their own emergency standard?***

A. State Plan states will need to produce their own standard, though for many state plans this often means adopting the Federal OSHA standard verbatim. According to OSHA's policies on emergency standards, "State Plans are required to have an ETS that is at least as effective as an ETS issued by Federal OSHA 30 days following publication." If a State Plan fails to adopt this ETS, or a comparable standard, such failure to act will result in a determination by Federal OSHA that the State Plan is not at least as effective as Federal OSHA. When Federal OSHA determines that a State Plan is no longer fulfilling its statutory responsibilities under the OSH Act by failing to meet Federal requirements under Section 18 for continued approval, Federal OSHA may commence proceedings to ensure adequate protections for covered workers within the state. For State Plans covering the private sector that have final approval, this may include OSHA's reconsideration and possible revocation of the State Plan's final approval status, to reinstate concurrent federal enforcement authority as necessary within the State Plan. For State Plans covering the private sector without final approval, OSHA may revise the State Plan's Operational Status Agreement to provide for federal enforcement activity. It is unclear how the previous Stay of the ETS may impact these timelines.

Q. ***How does the ETS intersect with competing or conflicting state laws or resistance by State OSH Plan agencies?***

A. In the very first FAQ included in OSHA's specific guidance on the ETS, OSHA asserts:

> *This ETS preempts States, and political subdivisions of States, from adopting and enforcing workplace requirements relating to the occupational safety and health issues of vaccination, wearing face coverings, and testing for COVID-19, except under the authority of a Federally-approved State Plan. In particular, OSHA intends for the ETS to preempt and invalidate any State or local requirements that ban or limit an employer's authority to require vaccination, face covering, or testing. State and local requirements that prohibit employers from implementing employee vaccination mandates, or from requiring face coverings in workplaces, serve as a barrier to OSHA's implementation of this ETS, and to the protection of America's workforce from COVID-19.*
>
> *To ensure that the ETS supplants the existing State and local vaccination bans and other requirements that could undercut its effectiveness, and to foreclose the possibility of future bans, OSHA clearly defined the issues addressed by the ETS in section 1910.501(a). OSHA's authority to preempt such State and local requirements comes from section 18 of OSH Act, and from general principles of conflict preemption. As the Supreme Court has explained, under section 18, once OSHA promulgates federal standards addressing an occupational safety and health issue, States may no longer regulate that issue except with OSHA's approval and the authority of a Federally-approved State Plan. Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992); see 29 U.S.C. 667.*

A state can avoid preemption ONLY if it submits and receives federal approval to operate a State OSH Plan agency, and those agencies are required to adopt an ETS that is "at least as effective" as the Federal standard. So, for State Plan states, the state OSH agencies will need to adopt amendments that reflect these new vaccination and testing requirements as explained in the prior FAQ.

Q. *What does the ETS require?*

A. Although there are several related obligations and nuances to the different subsections of the ETS, the 8 core requirements are:

1. **PTO for vaccination** – Up to 4 hours of paid time off, including travel time, at the employee's regular rate of pay per dose for employees to get vaccinated (only for vaccinations that occur after the effective date of the ETS – Nov. 5, 2021)
2. **PTO to recover from vaccination** – A reasonable amount of time off and paid sick leave to recover from side effects experienced following any vaccination dose (other than booster shots) for recovering from adverse effects of the vaccines
3. **Implement a soft-vaccine mandate, which requires vaccination or testing to report to work** – A soft-vaccine mandate, under which an employee may only report to the workplace after demonstrating:
   - Proof of being fully vaccinated; or
   - Proof of a negative COVID-19 test result from within the last week for those who decline vaccination or to share vaccination status.
4. **Face coverings for unvaccinated workers** –For employees who decline vaccination, ensure they wear a face covering that fully covers the nose and mouth at all times while working indoors, with some exceptions, and when occupying a vehicle with another person for work, regardless of the levels of community transmission.
5. **Prompt notice and removal from work for COVID-19+ cases** – Require each employee to promptly notify the employer when they receive a positive COVID-19 test or are diagnosed with COVID-19 by a licensed healthcare provider AND immediately remove such employees from the workplace and keep them removed until the employee:
   - Receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if the employee chooses to seek a NAAT test for confirmatory testing;
   - Meets the return-to-work criteria in CDC's "Isolation Guidance"; or
   - Receives a recommendation to return to work from a licensed healthcare provider
6. **Prepare a *written* vaccination, testing, and face covering policy** – Policy must include how the employer will address each of the requirements of the standard including:
   - Vaccination requirements
   - Testing requirements
   - Removal and return-to-work criteria
   - Face covering requirements
7. **Information to Provide to employees** – Employers must inform each employee about:
   - The requirements of the ETS as well as any employer policies and procedures established to implement the ETS;
   - COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated, by providing them a copy of this document: "Key Things to Know About COVID-19 Vaccines"
   - The requirements of 29 CFR 1904.35(b)(1)(iv), which prohibits the employer from discharging or in any manner discriminating against an employee for reporting a work-related injuries or illness, and section 11(c) of the OSH Act, which prohibits the employer from discriminating against an employee for exercising rights under the OSHA Act, including the ETS;
   - The prohibitions of 18 U.S.C. 1001 and of section 17(g) of the OSH Act, which provide for criminal penalties associated with knowingly supplying false statements or documentation.
8. **Enhanced reporting requirements for COVID-19 cases** – Covered employers must report ***all*** work-related COVID-19 fatalities to OSHA within 8 hours of learning of the reportable case AND work-related COVID-19 in-patient hospitalizations within 24 hours of learning of the reportable case.

Q. ***Which employers are covered by the ETS and how should an employer determine whether it meets the threshold number of employees for coverage?***

A. The ETS only covers employers with 100 or more employees. The number of employees is determined on a firm-wide or corporate-wide basis, i.e., not at the individual location or establishment level. The count should be based on the number of employees at all establishments under a single corporate entity The employee count is to include part-time employees, seasonal employees, and all employees hired directly by the employer regardless of their work location (home-based, outdoors, etc.). Temporary employees sourced through a staffing agency assigned to a host employer will NOT be included in the calculation, nor are independent contractors.

For multi-employer worksites, such as a construction site, each employer represented—the host employer, the general contractor, and each subcontractor—must count only their own employees to determine coverage under the ETS. Each employer's count must include all employees directly employed by the corporate entity, regardless of whether they are spread out over multiple construction sites.

The 100-employee threshold is based on the number of employees as of the effective date of the standard (Nov. 5, 2021). However, if an employer has less than 100 employees on November 5, 2021 but will be increasing its workforce to 100 or more employees during the life of the ETS, that employer would be covered by the ETS as soon as the 100-employee threshold is met. Once the 100-employee threshold is met, the ETS applies to the company for the duration of the ETS, even if the employee count dips below 100 employees again.

Q. ***Which employees/workplaces are NOT covered by the ETS?***

A. The ETS does NOT apply to:

- Workplaces covered by OSHA's earlier COVID-19 emergency temporary standard for healthcare (even though that ETS is set to expire in a few weeks
- Workplaces that are covered by the federal contractor vaccine-mandate under the Safer Federal Workforce Task Force COVID-19 Guidance for Federal Contractors and Subcontractors
- Employees who do not report to a workplace where other individuals (e.g., coworkers or customers) are present
- Employees working from home
- Employees who work exclusively outdoors

Note that these employees must still be included in the employee count to determine ETS coverage.

Q. ***Does the requirement of the ETS apply to employees who work outdoors?***

A. No, if they work **exclusively** outdoors as defined by the ETS. As a threshold matter, even if a particular employer is covered by the standard, and even if you have to "count" every employee towards the 100-employee threshold, the substantive requirements of the standard do not apply to employees who work exclusively outdoors under 29 CFR 1910.501(b)(3)(iii). Per OSHA guidance, in order to qualify as work performed exclusively outdoors, employees must:

- work outdoors on all days (i.e., an employee who works indoors on some days and outdoors on other days would not be exempt from the requirements of [the] ETS);
- not routinely occupy vehicles with other employees as part of work duties; and
- work outdoors for the duration of every workday except for de minimis use of indoor spaces where other individuals may be present – such as a multi-stall bathroom or an administrative office – as long as the time spent indoors is brief, or occurs exclusively in the employee's home (e.g., a lunch break at home).

OSHA does not define de minimis in the ETS or its guidance, but we think there is a good argument to be made that if the time spent indoors is cumulatively less than 15 minutes per day (making it impossible to experience or cause a close contact to occur), that should be considered "de minimis."

Q. ***How does this new ETS apply to employees working remotely, i.e., those who are not reporting to the employer's brick and mortar workplace with other co-workers?***

A. OSHA has created an exception to the requirements of the ETS for workers who work "remotely," specifically those employees who do not report to a workplace where other individuals such as coworkers or customers/the public are present or work from home. In explaining this exception, OSHA states that it "would apply to work in a solitary location, such as a research station where only one person (the employee) is present at a time. In that situation, the employee is not exposed to any potentially infectious individuals at work." Telework activities are similarly not covered by the ETS on the same basis. Accordingly, employees in this circumstance are not subject to the requirements of the ETS (though, they must still be counted for purposes of the 100- employee threshold as previously stated).

Q. ***How is "fully vaccinated" defined by the ETS?***

A. The ETS defines "fully vaccinated" as two weeks after receiving a single dose vaccine or after receiving the second dose of a two-dose vaccine. And the ETS expressly accepts not only the US FDA-approved vaccines, but also those vaccines that are listed for emergency use by the World Health Organization or administered as part of a clinical trial at a US site, if the recipient is documented to have primary vaccination with the active (not placebo) COVID-19 vaccine. Because the CDC has not (yet) changed its definition of "fully vaccinated" to account for vaccine boosters, the ETS does not mandate a booster shot to be "fully vaccinated." Even though it's not required by the ETS, we certainly recommend keeping documentation of employees' booster shots in your employee vaccine status records.

Q. ***Does the ETS provide for a natural antibody exemption to vaccination/testing requirements?***

A. No, the ETS does not provide a blanket exemption from vaccination or testing requirements for those individuals who have had and recovered from COVID-19. Therefore, an employee previously infected with COVID-19 but who has not been vaccinated must be treated the same as any other unvaccinated employee, and either receive a vaccination or undergo weekly COVID-19 testing and wear a face covering in the workplace. However, the ETS does permit workers who test positive for COVID-19 or are diagnosed with COVID-19 by a licensed healthcare provider to forego weekly testing for a 90-day period after receipt of the positive test or COVID-19 diagnosis. The rationale for the testing exemption after the first 90 days of a COVID-positive diagnosis, is the high likelihood of false positive result that does not indicate active infection.

Q. ***If an employee is claiming a medical or religious exemption to vaccination, what form of documentation or proof would be deemed acceptable to substantiate the claim?***

A. **<u>Medical/Disability Accommodation Requests</u>**

Employers have the flexibility to establish their own processes that permit employees to request a medical exemption from the COVID-19 vaccination requirements. Some best practices are as follows:

- Ensure all documentation confirming recognized clinical contraindications to COVID-19 vaccinations for employees seeking a medical exemption are signed and dated by a licensed practitioner who is not the individual requesting the exemption and is acting within their respective scope of practice based on applicable state and local laws.

- This documentation should contain all information specifying which of the authorized COVID-19 vaccines are clinically contraindicated for the staff member to receive and the recognized clinical reasons for the contraindications.
- An employer can require a statement by the authenticating practitioner recommending that the staff member be exempted from COVID-19 vaccination requirements and explaining the reasons for that recommendation.

Religious Accommodation Requests

Employers also have the flexibility to establish their own processes that permit employees to request a religious exemption from the COVID-19 vaccination requirements. Requests for religious exemptions should be documented. At the very least, an employer should require an employee to submit, in writing, that: (1) he has a sincerely held belief that prohibits him from receiving the vaccination; and (2) that belief is religious rather than secular or scientific in nature.

If an employee requests a religious exemption based on a personal philosophy, does not readily demonstrate that their belief is sincere or religious in nature, or makes a religious exemption request that is too generalized to understand, such as a statement that "my religion" prohibits vaccination, you may legitimately ask for more information about or question the claimed religious belief, such as:

- Request additional information about the employee's belief system, the nature and tenets of their asserted beliefs, and how they follow the practice or belief.
- Review written religious materials describing the belief or practice.
- Obtain a supporting statement from a religious leader or another member of their community who is familiar with the employee's belief system.

Once an employee makes a request for accommodation and provides the necessary documentation, an employer must engage in the interactive process and provide an accommodation unless it would be an undue hardship on the employer. The undue hardship analysis is individualized and would have to be performed in response to each request for accommodation and based on the type of accommodation request. The undue hardship standard is different for a request based on disability under the ADA and a request based on religion under Title VII. Under the ADA, the standard is "significant difficulty or expense," while the bar under Title VII is lower – more than a de minimis cost.

Q. ***What does the ETS require as far as the timing of weekly testing?***

A. For the testing component of the rule, an employee who reports to a workplace where other individuals such as coworkers or customers are present, at least one day every seven days, must:

- Be tested for COVID-19 at least once every 7 days; and
- Provide documentation of the most recent COVID-19 test result to the employer no later than the 7th day following the date on which the employee last provided a test result.

An employee who does not report to such a workplace during a period of seven or more days (e.g., teleworking for two weeks prior to reporting to a workplace with others) must:

- Be tested for COVID-19 within 7 days prior to returning to the workplace; and
- Provide documentation of that test result to the employer upon return to the workplace.

If an employee does not provide documentation of a COVID-19 test result as required above, the employer must keep that employee removed from the workplace until the employee provides a test result.

Q. ***What forms of testing are acceptable to meet the weekly testing requirement for ETS compliance?***

A. PCR, Rapid Antigen tests, and NAATs are acceptable but antibody tests are not. The ETS provides three criteria:

- Cleared, approved, or authorized (including EUA) by FDA to detect current infection with SARS-CoV-2 virus
- Administered in accordance with the authorized instructions
- Not both self-administered and self-read, unless observed by the employer or an authorized telehealth proctor.

The FDA authorizations for specific tests can be found at these links: FDA approved antigen-diagnostic-tests and FDA approved molecular-diagnostic-tests. Under the ETS, there are four acceptable testing methodologies - some where the employer is involved, and others where third parties provide oversight or proctoring:

- Tests with specimens collected at home or on-site that are processed by a laboratory (individually or pooled)
- Proctored over-the-counter (OTC) tests
- Point of care (POC) tests
- Tests where specimen collection and processing are either done or observed by an employer that has a CLIA certification

Q. ***Can an employer use pool testing to meet the requirements of the ETS?***

A. In the Preamble to the ETS, as well as in a FAQ, OSHA explains that an employer can meet the weekly testing requirement under 1910.501(g)(1) using what it refers to as "pooling," "pool testing," or "pooled testing." Pooling is combining the same type of specimen from several people and conducting one laboratory test on the combined pool of specimens. If this approach is used and the test result comes back negative, then per OSHA's guidance in the Preamble, all the specimens in the test can be presumed negative and the documentation of that negative test result can serve as the necessary documentation for each employee included in the pool for the week. It the result of the test is positive, each of the original specimens collected for the pool must be tested individually to determine which specimens are positive or negative. And if the original specimens are insufficient for certain workers, those workers would need to be immediately re-swabbed and tested. Where the pooling results in a positive test result, the employer would have to maintain the individual test results from the subsequent individual specimen testing for each employee included in the pool.

Potential advantages of this are that it could preserve testing resources, reduce the amount of time required to perform testing of large groups, and lower the overall cost of testing, particularly if the results are generally coming back negative. However, OSHA does specify in the Preamble that only certain tests have been authorized to be used for pool testing and the testing must follow CDC and FDA procedures in how it is implemented (as should every other test used for weekly testing).

Q. ***Testing availability is a huge concern. If an employer is not able to obtain a sufficient number of COVID-19 tests and/or employees are not otherwise able to access COVID-19 testing or promptly receive testing results, would employers have to bar workers if they don't provide a test result?***

A. As an initial matter, OSHA has asserted its belief that there will be adequate testing resources to meet the needs of the ETS. The Biden Administration has outlined specific steps taken to ensure that there are sufficient testing resources available to meet the needs of weekly testing. For example, the Biden Administration has procured "nearly $2 billion in rapid point-of-care and over-the-counter at-home COVID tests" and plans to "ensure a broad, sustained industrial capacity for COVID-19 test manufacturing." Moreover, several retailers now sell at-home rapid tests generally available to the public.

To the extent employers or employees cannot feasibly access testing despite good faith efforts, OSHA expressed that it would exercise some enforcement discretion; i.e., if an employer can show a good faith effort to procure tests, it would likely be able to rely on the guidance provided by OSHA on this issue in its FAQs. Specifically, in FAQ 6.L, OSHA explains that if an employer is unable to comply due to inadequate test supply or laboratory capacity, it would look at the employer's good faith efforts in attempting to comply with the standard. OSHA would likely expect to see evidence of the effort made to obtain testing, and if that is demonstrably infeasible, would expect to see implementation of interim, alternative measures; e.g., use of more substantial respiratory protection, greater use of remote work, further isolating/distancing workers unable to provide test results, etc. See OSHA FAQ 6.0.

Q. *Who will be responsible to pay for the weekly testing for an employee who declines vaccination?*

A. Under the ETS, the cost burden for weekly testing of unvaccinated workers does **not** fall to the employer. The ETS explicitly states that it "does not require the employer to pay for any costs associated with testing." However, the Rule does contain an important caveat: costs of testing may be the responsibility of the employer if required by "other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements." And, of course, the ETS explains that makes clear that it does not prohibit an employer from paying for testing.

Per that important exception in the ETS, many employers may have to pay the costs associated with testing required by the ETS despite the ETS's explicit statement. For instance, if weekly testing is an accommodation to a vaccine mandate, then the employer must likely bear the costs for that testing. Generally, under the Americans with Disabilities Act and Title VII of the Civil Rights Act, which govern disability and religious accommodations respectively, the employer bears the cost of an employee's reasonable accommodation. Thus, to the extent an employer determines that weekly testing is a reasonable accommodation to vaccination, they would likely have to pay for costs associated with that weekly testing. Note that testing is not the only accommodation an employer can opt for in this circumstance. Upon evaluating whether testing is a reasonable accommodation, an employer may determine that testing creates an undue hardship and thus, not be required to provide testing as a reasonable accommodation.

There are also several states that have laws prohibiting employers from requiring that employees bear the cost burden for medical testing and/or medical evaluations. For example, in Virginia there is a generally applicable law that prohibits any employer from requiring that an employee pay for the cost of a medical examination or furnishing medical records required by the employer as a condition of employment. See § 40.1-28 of the Code of Virginia. Kentucky, California, Illinois, and several other states have similar laws. It's unclear at this time how each individual state will interpret these laws in the context of the ETS, particularly as the Federal Government is the entity mandating COVID-19 testing, but the law may require employers pay in these states. Notably, some states, like North Dakota, have already started to address the cost burden issue created by these laws in the context of the ETS. North Dakota has proposed an exception to its law for medical exams required to comply with federal law, among other things.

In addition to these types of state laws, some states also have their own OSHA state plans and can decide how to implement the requirements of the ETS if the way it is implemented by the state is "as effective as" the Federal ETS. This gives OSHA state plan states some discretion in the form it passes its own ETS, including whether to put the cost burden of weekly testing on the employer. It's likely that at least some of the OSHA state plan states, like California OSHA ("Cal/OSHA"), will shift the cost burden to the employer. Based on the way Cal/OSHA has implemented its own COVID-19 emergency temporary standard, we anticipate that California employers are going to be responsible to pay for testing, and that employers will also be expected to pay for the time employees spend getting tested. Under Cal/OSHA's existing COVID-19 ETS, when employees are required to be provided testing by the employer (e.g., in the context of a close contact exposure at work or an outbreak in a discrete work area), California employers are required to "make COVID-19 testing available at no cost, during paid time…." Under the Cal/OSHA ETS, the employer may make such testing available in the workplace or offsite, but where the employer sends an employee for testing offsite, the employer must pay the employee's wages for time spent being tested (including time traveling to/from the testing site) as well as reimburse the employee for any related travel expenses, i.e., mileage reimbursement if driving personal vehicle or cost for public transportation.

Finally, employers may be responsible for costs associated with weekly testing under a collective bargaining agreement or if the individual employer decides to take on the cost burden to more effectively control how the testing requirement is implemented for its employees.

Q. ***If employers use over-the-counter ("OTC") tests to meet the weekly testing requirement, must they observe the employee administering the test or reading the test results or both?***

A. Likely both. Under 1910.501(c), OSHA defines COVID-19 test as "a test for SARS-CoV-2 that is…(iii) not self-administered and self-read unless observed by the employer or an authorized telehealth proctor." Although the language in Section (iii) could be interpreted to mean that employers need only observe either an employee's administration of the test or the reading of a test result, it seems that OSHA meant employers must observe both the administration and reading of the test. And this interpretation is important in evaluating whether using OTC tests is a viable option for an employer.

The bolded language following the confusing "Not both self-administered and self-read" language supports the reading that both specimen collection (i.e., administration) and processing (i.e., reading) must be observed by the employer. The ETS preamble, further clarifies this interpretation.:

> "[t]o be a valid COVID-19 test under [the] standard, a test may not be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. OSHA included the requirement for some type of independent confirmation of the test result in order to ensure the integrity of the result given the ['] many social and financial pressures for test-takers to misrepresent their results ['] . This independent confirmation can be accomplished in multiple ways, including through the involvement of a licensed healthcare provider or a point-of-care test provider. If an over-the-counter (OTC) test is being used, it must be used in accordance with the authorized instructions. The employer can validate the test through use of a proctored test that is supervised by an authorized telehealth provider. Alternatively, the employer could proctor the OTC test itself."

First, allowing an employee to self-administer a test, while having an employer observe the reading of the test result (or vice versa), could still frustrate OSHA's purpose for the requirement. That is, if an employee self-administers, he might do so incorrectly (perhaps purposely), in which case, even if the employer observes the reading of the test result, that reading could be inaccurate. Similarly, if an employer observes only the employee's administration of the test, and confirms that the employee administered correctly, but allows the employee to read the test result on his/her own, the employee could (intentionally or unintentionally) convey inaccurate results. As such, the only true "independent confirmation of [a] test result in order to ensure the integrity of the result" is for an employer to observe both the administration and reading of the test.

Also, the use of the word "proctor" is telling because proctoring in the context of COVID-19 testing typically refers to the process by which a telehealth provider instructs the person taking the test, in a step-by-step manner, on how to conduct the test. For example, FDA EUA letters for certain tests specifically state that they must "be performed only with the supervision of a telehealth proctor." Typically, the packaging and the instructions indicate that the person taking the test should not open the box until instructed to do so by the proctor and the proctor provides real-time instructions to complete the test, observing the testing process. At the end, the person taking the test is provided with an email of the results. Although an employer's obligation in this context is technically to observe, not proctor, it can be inferred that OSHA intended employers' observation of testing to encompass the same role as that of a telehealth provider (i.e., administration and reading).

Additional language in the preamble, particularly the excerpt highlighted below, seems to suggest that the "either/or" reading (i.e., that employers need only observe either an employee's administration or reading of a test) is not what was intended:

> Employers have the flexibility to select the testing scenario that is most appropriate for their workplace…**Other employers may simply require that employees perform and read their own OTC test while an authorized employee observes the administration and reading of the test to ensure that a new test kit was used and that the test was administered properly (e.g., nostrils were swabbed), and to witness the test result. Due to the potential for employee misconduct (e.g., falsified results), tests that are both self-administered and self-read are not acceptable unless they are observed by the employer** or an authorized telehealth proctor.

Thus, based on the guidance provided, for an OTC self-administered and self-read test to meet the weekly testing requirement under the ETS, an employer must observe both the administration of the test and reading of the result.

Q. ***What documentation is required to verify vaccination status?***

A. Employers must maintain a record of each employee's vaccination status and must preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated. The employer must maintain "a roster of each employee's vaccination status." The ETS provides that all employers must determine employees' vaccination status, and that the "must require each vaccinated employee to provide acceptable proof of vaccination status…." Acceptable proof of vaccination status is:

1. the record of immunization from a health care provider or pharmacy;
2. a copy of the COVID-19 Vaccination Record Card;
3. a copy of medical records documenting the vaccination;
4. a copy of immunization records from a public health, state, or tribal immunization information system; or
5. a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s)."

Self-attestation is not outright excluded under the ETS. The rule provides that "in instances where an employee is unable to produce acceptable proof of vaccination as listed above, an employer can accept a signed and dated statement by the employee:

- attesting to their vaccination status (fully vaccinated or partially vaccinated);
- attesting that they have lost and are otherwise unable to produce proof required by this section; and
- including the following language: *'I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.'"*

The self-attestation should include the employee's best recollection about the type of vaccine administered, the date(s) of vaccination, and the name of the healthcare provider or site administering the vaccine(s).

An important caveat to all of this is that if an employer ascertained employee vaccination-status prior to the effective date of the ETS through any other form of attestation or proof, and retained records of that ascertainment, the employer is exempt from these verification requirements for each employee whose fully vaccinated status has been documented prior to the effective date of this section.

Each covered employer must also generate and maintain a roster of each employee's vaccination status. The roster must list all employees and clearly indicate whether they are (a) fully vaccinated, (b) partially vaccinated, (c) not fully vaccinated because of a medical or religious accommodation, or (d) not fully vaccinated because they have not provided acceptable proof of their vaccination status.

Q. ***Does an employer requiring an employee to share his/her vaccination status violate HIPAA regulations?***

A. No, for most employers. The HIPPA privacy standard prohibits the release of protected health information by healthcare providers, health plans, and healthcare clearinghouses to third parties without the consent of the patient. HIPPA does not regulate whether an individual can be required to answer questions by his/her employer about his/her own vaccination status, or any other health issue. There are limits under the ADA about health-related information that employers may request from their employees, but EEOC has verified that during this pandemic, because of the direct threat to the workplace that spread of COVID-19 presents, employers may lawfully request/require information about employees' vaccination status under the ADA. That being said, information about an employee's COVID-19 vaccination, as well as the results of testing, would be considered confidential medical information under the ADA, and the ADA requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination and testing results. TO preserve confidentiality, such documentation must be stored separately from the employee's personnel files and access to that documentation must be limited.

Q. ***What information is required to be included in documentation collected and maintained for weekly testing results?***

A. Documentation of testing results must contain the following information:

- Information that identifies the worker (i.e., full name plus at least one other identifier, such as date of birth)
- Specimen collection date
- Type of test
- The entity issuing the result (e.g., laboratory, healthcare entity)
- Test results

If the employer observes its employees completing OTC tests to meet the weekly testing requirement, they will still need to document the results of the testing with all this same information.

Q. ***What documentation is required to verify a negative COVID-19 test result?***

A. As we anticipated, the rule does NOT allow self-attestation for negative test results. As we noted above, a COVID-19 test cannot be self-administered and self-read without independent confirmation/observation of the result by the employer or a healthcare provider. OSHA cites the "many social and financial pressures for test-takers to misrepresent their results" as justification for requiring independent confirmation of results.

Like verifying vaccination statuses, employers are expected to observe in some form a test result, and the ETS outlines methods for which employers can independently confirm the results of COVID-19 testing, including reliance upon testing by healthcare providers or requiring employees to conduct and read the test results under the observation of an authorized employee or telehealth proctor. Further "[e]xamples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens), proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer."

The ETS requires employers to specify in their Vaccination, Testing, and Face Covering Policy how testing will be conducted (e.g., testing provided by the employer at the workplace, employees independently scheduling tests at point-of-care locations, etc.) and how employees should provide their COVID-19 test results to the employer (e.g., an online portal, to the human resources department, etc). The second part is how employers will obtain the documentation necessary to verify the negative result, including ensuring that the information required to be in such documentation, as referenced above, is present.

Q. ***How long must an employer retain documents generated or obtained to verify vaccination status or test results?***

A. The ETS expressly excludes from OSHA's 30+ year record-retention requirement for employee medical records the records that are generated or obtained to prove compliance with the ETS (i.e., vaccination records, the vaccination roster, and documentation of negative test results). Interestingly, the way the ETS addresses this is by declaring all such records to be Employee Medical Records covered by OSHA's regulation for Access to Employee Medical Records (1910.1020) but declares that "these records … are not subject to the retention requirements of § 1910.1020(d)(1)(i) but must be maintained and preserved while [the ETS] remains in effect." In other words, they must only be maintained for the life of the ETS.

Because they are still considered employee medical records, they also need to be maintained as confidential, i.e., they must be retained in a file separate from an employee's general personnel file and access to such documentation must be limited (i.e., kept in a lockable file cabinet, electronically stored in password protected files, etc.).

Q. ***Does the ETS affect requirements for reporting COVID-19 cases to OSHA?***

A. Under the ETS, all covered employers are now required to report **all** work-related COVID-19 fatalities and in-patient hospitalizations of any employee, regardless of the amount of time between the exposure to COVID-19 in the work environment and the death or in-patient hospitalization. This differs from the current requirements for reporting under 29 C.F.R. 1904.39, which only requires reporting of an in-patient hospitalization that occurs within 24 hours of the work-related exposure that caused the hospitalization or a death that occurs within 30 days of the work-related exposure.

In other words, under the ETS, if an employee is hospitalized in the in-patient unit for COVID-19 or dies, and the employer determines the case is work-related, the employer must report the in-patient hospitalization even if it occurred more than 24 hours after the work-related exposure and the death even if it occurred more than 30 days after the work-related exposure.

Q. ***Does the OSHA ETS affect whether an adverse reaction to a mandated COVID-19 vaccine that meets OSHA injury and illness recording criteria be recorded on the employer's OSHA 300 Log?***

A. Although the ETS does not address recordability of COVID-19 vaccine reactions, OSHA has addressed this question through guidance. Earlier in the pandemic, OSHA issued a FAQ on this issue explaining that "OSHA is exercising its enforcement discretion to only require the recording of adverse effects to required vaccines at this time. Therefore, you do not need to record adverse effects from COVID-19 vaccines that you recommend, but do not require." We advocated hard to OSHA that this was a terrible policy decision, and that if the Administration wanted employers to really push for more employees to get vaccinated, and even to set vaccine mandates, they should remove disincentives like wrecking the DART rates of those employers who do mandate vaccines. Thankfully, OSHA saw the light and reversed that interpretation in an FAQ posted to its website.

OSHA's current FAQ provides:

> *"DOL and OSHA, as well as other federal agencies, are working diligently to encourage COVID-19 vaccinations. OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination, and also does not wish to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination through May 2022."*

The FAQ remains in effect; however, OSHA did not memorialize that interpretation n the ETS itself.

As a boutique law firm focused on Workplace Safety and Labor & Employment Law, Conn Maciel Carey LLP has been working with our clients since the beginning of this crises to develop customized COVID-19 Exposure Control Plans. In most cases, we hold a series of conference calls with leadership, HR, safety, and operations after which we provide a customized exposure control plan that will help protect employees and customers, and to provide a line of defense against all the regulatory and tort liability that is mounting every day. If you would like help developing such a plan, please contact any of the attorneys at Conn Maciel Carey.

For additional resources on issues related to COVID-19, please visit Conn Maciel Carey's COVID-19 Task Force Page for an extensive index of resources about HR, employment law, and OSHA regulatory related developments and guidance. Likewise, subscribe to our Employer Defense Report blog and OSHA Defense Report blog for regular updates about the Labor and Employment Law or OSHA implications of COVID-19 in the workplace. Conn Maciel Carey's COVID-19 Task Force is monitoring federal, state, and local developments closely and is continuously updating these blogs and the Task Force page.

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