

# EMPLOYMENT LAW ALERT

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BY: KIMBERLY B. MALERBA, ESQ.

NICOLE E. OSBORNE, ESQ.

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RUSKIN MOSCOU FALTISCHEK P.C.

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## VACCINE MANDATE: COMING SOON TO A LARGE EMPLOYER NEAR YOU

On November 5, 2021, the Occupational Safety and Health Administration (“OSHA”) published its long awaited Emergency Temporary Standard (“ETS”) requiring employers with at least 100 employees to implement a vaccine mandate or testing policy at their worksites. Employers must comply with many of the requirements of the ETS within 30 days, and require employees to be vaccinated or submit to weekly testing by January 4, 2022.

### Covered Employers

The ETS covers employers with 100 or more employees at any time in which the ETS is in effect. Therefore, once in effect, employers that presently have 100 or more employees must comply with the ETS. If an employer currently does not have 100 or more employees but later increases hiring and meets the 100-employee threshold, the company would be required to immediately comply with the ETS.

For determining whether an employer meets the 100 or more employee threshold, an employer must count all employees across their U.S. locations, including part-time employees, regardless of the employee’s vaccination status or where they work. An employer does not need to count independent contractors for the calculation of the number of employees.

The ETS does not apply to:

- Workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors; or
- Healthcare employers that participate in Medicare and Medicaid programs subject to the Emergency Temporary Standard for healthcare employers (Subpart U – 29 CFR §1910.502).

The ETS also does not apply to the employees of a covered employer who:

- Do not report to a workplace where co-workers or customers are present;
- Work exclusively from home; or
- Work exclusively outdoors.

### Mandatory Vaccination Policy

Covered employees must institute either a mandatory vaccination policy or a weekly testing policy. Among other requirements, a mandatory vaccination policy must include a process for requesting accommodations for individuals who are unable to get the vaccine for the following reasons: (i) a vaccine is medically contraindicated; (ii) a medical necessity requires delay in vaccination; or (iii) an

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individual is legally entitled to accommodation under federal civil rights laws, as the individual has a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement. Additionally, employers must maintain a roster of vaccinated employees, and maintain the roster as a confidential medical record.

This policy must be distributed to employees in a language and at a literacy level that each employee can understand. Along with providing the company's policies and procedures created to comply with the ETS, employees must also be informed about the [CDC's Key Things to Know About COVID-19 Vaccines](#), OSHA's prohibition against retaliation for reporting workplace illnesses or injuries, OSHA's whistleblower protection, and the criminal penalties associated with knowingly supplying false statements or false documentation.

### **Determining Vaccination Status**

Pursuant to the ETS, employers must require vaccinated employees to provide proof of vaccination status. The ETS sets forth the following as acceptable proof of vaccination status:

- The record of immunization from a healthcare provider or pharmacy;
- A copy of the COVID-19 Vaccination Record Card;
- A copy of medical records documenting the vaccination;
- A copy of immunization records from a public health, state, or tribal immunization information system; or
- A copy of any other official documentation that contains the type of vaccine administered, dates of administration, and the name of the health care professional or clinic administering the vaccine.
- A signed and dated attestation from the employee is only acceptable when an employee has lost or is otherwise unable to produce other acceptable proof of vaccination. The attestation must include the following:
  - Confirmation of their vaccination status;
  - "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."

Any proof obtained by an employer regarding an employee's vaccination status must be maintained as a confidential medical record.

### **Paid Time Off for Vaccination**

According to the ETS, employers must provide up to four hours per dose of paid time off for employees to be vaccinated. For New York employers, this requirement will not impose any increased burden, as the State imposed this obligation on employers in March 2021 to provide employees with up to four hours of paid time off to obtain each dose of the vaccine.

The ETS also requires reasonable time and paid sick leave to recover from the side effects of the vaccine. Employers may apply any available paid sick leave an employee has for the time necessary to recover from the vaccine. However, if an employee has exhausted their paid time off, or paid sick leave, the employee must be provided with additional paid time off for their reasonable time to recover.

## **Testing Requirements for Unvaccinated or Partially Vaccinated Employees**

Each employee who is not fully vaccinated and reports at least once every 7 days to a workplace where customers or coworkers are present must be tested at least once every 7 days and provide test result documentation. If an employee fails to provide test result documentation, the employee must be removed from work and only return once they have appropriate test result documentation (i.e., a negative test).

If an employee does not report to a workplace where co-workers or customers are present at least once every 7 days, then the employee must be tested within 7 days prior to returning to the workplace and must provide documentation of a negative test result upon return to the workplace.

For a test result to be considered appropriate under the ETS, the test must be:

- cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the U.S. Food and Drug Administration (FDA) to detect current infection with the SARS-CoV-2 virus (e.g., a viral test);
- administered in accordance with the authorized instructions; and
- not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

## **Employee Notification to Employer of a Positive COVID-19 Test**

Employers must require each employee to promptly notify the employer of a positive COVID-19 test result, and the employer must immediately remove the employee upon such notification. An employee will only be allowed to return to work after:

- Receiving a negative test result on a confirmatory COVID-19 Nucleic Acid Amplification Test (NAAT) following a positive test on an antigen test, or
- Completing the CDC's criteria in "[Isolation Guidance](#)" for return to work; or
- Recommendation by a licensed health care provider.

While employers are not required to provide time off for the time an employee is removed from work pursuant to the ETS, under New York law, employers may be required to provide employees paid time off pursuant to [New York's Paid Leave for COVID-19](#), if applicable.

## **Other ETS Requirements**

In addition to the above, the ETS also sets forth requirements relating to masking, record keeping, and reporting COVID-19 fatalities and hospitalizations. Note, these requirements are under the ETS, and do not minimize or eliminate other obligations that employers may have under the NY HERO Act or other applicable laws, rules or regulations.

### **Masking**

Employers must ensure that employees who are not fully vaccinated wear a face covering when: (1) indoors; or (2) when occupying a vehicle with another person for work purposes. Face coverings must cover the nose and mouth and must be replaced when wet, soiled, or damaged. Employers may not prohibit vaccinated employees or customers from wearing masks.

## **Reporting COVID-19 Fatalities and Hospitalizations**

Employers must report work-related COVID-19 hospitalizations to OSHA within 24 hours of learning of the hospitalization. Employers must also report work-related COVID-19 fatalities within 8 hours of learning of the fatality. The report to OSHA must be made regardless of the time between when the workplace related incident occurred and when the hospitalization or fatality occurs.

## **Record Keeping**

Employers must be prepared to provide employees, employees' representatives, or the Assistant Secretary with documentation relating to their vaccination policy and other ETS requirements as follows:

- Individual vaccine information and test results – to the employee, and anyone having the employee's written consent, by the end of next business day after the request.
- Aggregate number of fully vaccinated employees at a workplace and the total number of employees at the workplace – (i) to any employee or employee representative by end of the next business after the request; or (ii) to the Assistant Secretary of OSHA within 4 business hours of the request.
- Employer's written vaccination policy – to the Assistant Secretary of OSHA within 4 business hours of the request.
- All other records and documents – to the Assistant Secretary of OSHA by the end of the next business day after the request.

Covered employers must take immediate steps to begin to comply with the various requirements of the ETS, including creating a compliant policy regarding mandatory vaccination or testing. As additional rules and regulations are expected to be promulgated, it is important for employers to remain aware of their obligations and ensure their policies and procedures are compliant with the ETS.

### **For more information, please contact:**

**Kimberly B. Malerba, Esq.**  
**516.663.6679**  
**kmalerba@rmfpc.com**

**Nicole E. Osborne, Esq.**  
**516.663.6687**  
**nosborne@rmfpc.com**