



ATTORNEYS AT LAW

OSHA COVID-19 VACCINE MANDATE- December 3, 2021

Written by: Christopher M. Leddy, Esq., Partner

At present, OSHA’s Emergency Temporary Standard (“ETS”) which mandates that covered employers (employers with 100 or more employees corporate-wide, including full-time and part-time) develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead establish, implement, and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace, has temporarily been suspended while litigation surrounding its enforcement is determined by the courts.¹ However, dependent on the courts’ decision, OSHA intends on resuming the implementation and enforcement of the ETS following the courts’ determination. With that said, we are unsure at this time if or when the ETS will be put back in place, and as such, we believe it is imperative for staffing firms to be ready to comply with such should the ETS go back into effect.

For staffing firms, as stated above, all employees, regardless of full-time or part-time status, are counted toward the 100-employee threshold. This means that staffing firms must count all employees even if they are temporary, and must aggregate all employees at all locations where the staffing firm does business. The determination of whether a staffing firm falls within the scope of the ETS based on number of employees was to be initially made as of the effective date of the ETS (November 5, 2021). If the staffing firm had 100 or more employees on the effective date, the ETS would apply for the duration of the ETS. If a staffing firm had fewer than 100 employees on the effective date of the ETS, the ETS would not apply to that staffing firm as of the effective date. However, if a staffing firm subsequently hired or hires more workers and hits the 100-employee threshold, the staffing firm would then be expected to come into compliance with the ETS’s requirements for the duration of the ETS. For example, if a staffing firm had 103 employees on the effective date of the ETS, but then loses four within the next month, that staffing firm would continue to be covered by the ETS. Likewise, if a staffing firm had 90 employees on the effective date, but then increased its employees to 100 employees or more, the staffing would then have to comply with the ETS for the duration of the ETS even if the headcount later dropped below 100 employees.

Further, while fully remote workers do count toward the 100-employee threshold, they are not subject to vaccine or testing requirements.

¹ Note, on November 30, 2021, the Centers for Medicare and Medicaid Services (“CMS”) interim final rule (“vaccine mandate”) requiring healthcare worker vaccinations was also enjoined nationwide. Also, on November 30, 2021, a federal judge in Kentucky issued a preliminary injunction blocking the implementation of the vaccine mandate for federal government contractors and subcontractors for the states of Kentucky, Ohio, and Tennessee.

Please keep in mind that while staffing firms are required to determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status, these records are considered confidential medical information. In order to share any such information with a client, which should be limited to an attestation from the staffing firm, written consent must be obtained from the employee to do so. Further, the staffing firm should ensure that the client has strict confidentiality obligations with regard to maintaining and protecting the information.

Again, while the nation awaits the legal system's final resolution of the ETS, it is imperative that staffing firms be ready to comply, as there is no clear answer on when or if the ETS will go back into effect.

About Becker LLC: Becker LLC is a premiere mid-market firm recognized as a leader in the Staffing Industry. With offices in New York, California, Pennsylvania, and New Jersey, the firm provides forward-thinking, mission-critical advice to staffing industry entrepreneurs and management on high stakes, complex legal matters, as well as day-to-day matters and long-term plans. The firm is proud to be a member of the following Staffing Associations: TechServe Alliance, SIA, ASA, ASG, TempNet, CSP, MSA, NJSA, NYSA and serves as general counsel to the Mid Atlantic Staffing Association.

For more information, call (973) 422-1100, visit us on the web: <https://www.becker.legal/>