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&  
DUNLEVY  
ATTORNEYS AND  
COUNSELORS AT LAW

**You Must be Fully  
Vaccinated to go on this  
Camping Adventure!**

**The OSHA ETS—Mandatory  
Vaccination/Testing  
Coming Your Way Very  
Soon...**

Presented by: Adam W. Childers

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World Ready

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**Adam W. Childers**

- Trial lawyer and litigator in the firm's Oklahoma City office
- Labor & Employment Practice Group Co-Chair
- \*Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Adam W. Childers, or another licensed attorney.

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**Our Trail Map for this Presentation**

OSHA and the ETS    Who is Covered?    What does it Require?    Unanswered Questions    Time to get Prepared

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### The Path Out of the Pandemic Initiative

- September 9, 2021—BIG NEWS
  - The Biden Administration makes big waves as part of the “Path out of the Pandemic”—6-pronged national strategy to combat C-19
  - Vaccine mandates had already been rolled out for government contractors
  - The announcement also made clear that the Centers for Medicare and Medicaid Services (CMS) in collaboration with the Centers for Disease Control (CDC) are expanding emergency mandatory vaccination policies from nursing homes to include hospitals, dialysis facilities, ambulatory surgical settings, home health agencies and more.

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### The Call to Action for “Large” Private Employers

- Cornerstone of the announcement—OSHA’s ETS
  - Applies to all private employers with more than 100 employees.
  - Estimated to impact 80 million workers, or two-thirds of the country’s workforce.
  - Emergency Temporary Standard (ETS)—process allows OSHA to enact regulations it can enforce immediately if a “grave danger” to worker safety is present.
  - Covered employers who ignore the standard could face OSHA citations and penalties of up to \$14,000 per violation.

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## So What is Required of Employers with More than 100 Employees?

- **Either** mandatory vaccination program for all employees; or
- Mandatory weekly testing of all unvaccinated employees

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## Which States are Covered?

- All employers covered by the OSH Act
  - Once issued, the ETS will have immediate effect in the 29 states (including Oklahoma) where federal OSHA has jurisdiction.
  - In states where the federal government does not have jurisdiction over workplace safety (OSHA-state-plan states such as California, Tennessee, North Carolina, and Kentucky) these agencies will have to adopt the ETS or "just-as-effective measures" within 15 to 30 days.

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## When will the ETS be Issued?

- Very, very soon....
  - September 10, 2021, DOL tele-conference said it was a "matter of weeks"
  - It has been a month and we are still waiting..
  - Regulations will be the key (echoes of our FFCRA experience in 2020)
  - After it is issued, OSHA might strive for a timeline of 75 days before it starts enforcing the ETS to remain consistent with the Biden administration's proposed deadline for federal workers to obtain the vaccine

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## How Long will the ETS Last?

- The ETS can remain in place for six months.
- After that it must be replaced by a permanent OSHA standard
- Subject to the formal rulemaking process involving a typical notice-and-comment period.
- The key here is that it is only for an emergent situation which is what justifies circumventing the normal rule-making process.

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## The Big Unresolved Questions

- How will the 100 employees be counted?
- On a September 10 webinar, Labor Department officials confirmed that the 100-employee threshold will be counted on a company-wide basis.
- That means companies which have multiple locations, some with less than 100 employees, are not necessarily relieved of the ETS requirements.
- The trend seems to be towards inclusion rather than exclusion.

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## The Big Unresolved Questions

- Will employers be required to collect vaccination cards from employees to prove vaccinated status?
- OSHA's record retention regulations require that employers preserve and maintain employee medical records for the duration of employment plus 30 years.
- September 10 DOL webinar confirmed final details will be included in the ETS

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## The Big Unresolved Questions

- What type of testing will be required?
  - Antigen? PCR?
  - Raises issues such as: cost, time off for results and delivery methods

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## The Big Unresolved Questions

- Who pays for the testing?
  - September 10 webinar—the pay details will be in the final ETS.
  - Some suggest that retailers will offer to sell rapid tests at cost for the next three months.
  - But, the question of who pays for testing remains unanswered.
  - Any testing protocols must comply with applicable wage and hour laws, which provide that time spent on receiving employer-required tests should almost always be treated as compensable.
  - Likely includes required testing occurring on employees' days off if such testing is necessary to perform their jobs safely and effectively.
  - Insurance may cover the cost of tests, several states have laws predating COVID-19 requiring employers to pay for mandatory medical tests or reimburse employees for any such testing.

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## The Big Unresolved Questions

- Will remote employees be counted and/or required to be vaccinated?
  - September 10 DOL webinar—these workers are not in close contact with others and therefore will not be part of the 100-employee count or the mandatory vaccination/testing program.

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## The Big Unresolved Questions

- Will the ETS be stopped by legal action?
- Lawsuits are definitely in the works from a variety of states, including Oklahoma
- Challenges will come in a variety of different forms including:
  - Can a "Grave Danger" be proven?
  - Is the 100-employee threshold arbitrary and not designed for maximum protection?
  - Injunction standards—Imminent harm? Public interest? Etc.
  - Has OSHA unlawfully exceeded its rule-making authority?
- The ETS goes into effect immediately (enforcement issues) so we could see appellate court review and potential SCOTUS involvement before it is all said and done.

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## The Big Unresolved Questions

- Will OSHA be able to/want to enforce the ETS while it is tied up in litigation?
- No indication that OSHA will be staffing up its enforcement personnel
- Significant risk of pockets of employers purposefully failing to comply?
- Whistle-blower threat from employees of such companies?
- Political drama

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## What Should You be Doing to Prepare for the ETS?

- Get reliable data regarding the vaccination status of your workplace.
- Conduct an employee vaccination survey.
- The EEOC has indicated that it is generally lawful for employers to ask employees about COVID-19 vaccination status.
- Have to be careful, though—good to have legal review of the vaccination survey to avoid traps regarding confidentiality.

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## What Should You be Doing to Prepare for the ETS?

- Once the data is gathered and reviewed, it's time to decide
  - Mandate vaccines?
  - Or mandate testing?
  - Pros and cons for both sides, but make that decision on an informed basis now, not on the run
  - And communicate with and educate the workforce

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## What Should You be Doing to Prepare for the ETS?

- Develop accommodation policies
  - Will the ability to test instead of getting jabbed be the accommodation? Stay tuned...
  - But you will still need to prepare for the numerous religious and medical accommodation requests that will be coming your way.

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## What Should You be Doing to Prepare for the ETS?

- Develop methods for tracking results
  - It will be a logistical test for employers to confidentially gather, track, and administer payments for the testing.
  - Get ahead now and work on finding vendors, programs, and methods for achieving these goals.

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## What Should You be Doing to Prepare for the ETS?

- Get ready for that inevitable visit from OSHA!
- OSHA investigators will ask for your COVID-19 response plan and training records, so have them ready and in order.
- If not already in place, develop a COVID-19 policy and communicate its requirements to your employees.
- Train managers and supervisors on what to do and say if OSHA arrives for an inspection.
- At 14K fine per violation, and an appetite for making an example, this is serious stuff.

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## Big Finale...

We know that until further answers arrive, all of this feels difficult, if not impossible to navigate. So, never forget, when preparation for the unknowns of the OSHA ETS keep you up at night, you can always give a call to these guys...

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## These Folks!



Jaycee Booth   Michael W. Bowling   Tanya S. Bryant   Katie Campbell   Adam W. Childers   Leonard Court   Allen L. Hutson



Caroline Lindemuth   Raylee Starnes   Michael R. Pacewicz   Randall J. Snapp   Mary P. Snyder   Evan Way   Madalene A.B. Witterholt



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