

Client Alert **Employment and Labor**

Employers Face Upcoming Effective Dates Requiring Action While Legal Challenges Continue

After nearly two years of living with the COVID-19 virus, federal, state, and local authorities are continuing to implement, among other requirements, new vaccination mandates with the hope of curtailing the spread of the virus, including the fast-spreading Omicron variant. But these mandates continue to face legal challenges. We summarize the current status of two of these initiatives below, which include important updated deadlines. Given the evolving situation, however, it remains to be seen whether these dates will be subject to further change.

OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard

As more fully described in [our prior alert](#), the Occupational Safety and Health Administration (“OSHA”) issued a [COVID-19 Vaccination and Testing Emergency Standard](#) (“ETS”) which includes minimum vaccination, vaccination verification, face covering, testing and notice requirements. The ETS applies to all companies employing 100 or more individuals, with the exception of those employers that are federal contractors, subcontractors, or healthcare institutions.

In light of multiple legal challenges, which were consolidated in the United States Court of Appeals for the Sixth Circuit, the enforcement dates under the ETS were delayed. On December 17, 2021 the Sixth Circuit rescinded a temporary restraining order blocking the implementation of the ETS. As updated by OSHA, employers must now abide by all

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non-testing requirements of the ETS by **January 10, 2022**. These requirements include providing all of the following information to their employees:

- Information related to the ETS, including the workplace policies and procedures established to implement the ETS;
- The CDC document entitled, “Key Things to Know About COVID-19 Vaccinations,” found [here](#);
- Information protecting employees against retaliation and discrimination; and
- Information about laws that provide criminal penalties for knowingly supplying false statements or documents “submitted for purposes of complying with policies required by OSHA’s Vaccination and Testing ETS.”

According to the ETS, employers can require vaccinations, subject to exceptions for religious and medical exemption accommodations, but are not mandated to do so. By **February 9, 2022**, employers must require weekly testing of their employees who are not vaccinated. Employees are considered fully vaccinated two weeks after receiving all doses required from a primary vaccination (i.e., two doses of the Pfizer or Moderna vaccine, or one dose of the J&J vaccine). For employees who are not yet vaccinated, employers must provide a reasonable time of up to four hours of paid time off for each dose and, if need be, allow for use of existing sick leave balances to recover from any vaccination side effects.

On its website, OSHA has issued template policies both for [mandatory vaccines](#) and the [vaccine/weekly testing option](#), which may be customized.

Employers who do not comply could face citations and penalties for non-compliance of up to \$13,653 per violation and additional penalties and citations for willful or egregious failures to comply.

Although the updated enforcement dates have been set, the legal challenges continue. As of this writing, the Supreme Court has received over a dozen emergency petitions to overrule the Sixth Circuit’s decision lifting the prior stay of the ETS and to invalidate the mandate. The Supreme Court has bypassed its standard procedures and has scheduled oral arguments for January 7, 2022 on the challenges to the ETS.

New York City Vaccination Requirement for the Private Sector

Starting **December 27, 2021**, all private sector employers with one or more employees located within New York City must comply with Mayor Bill de Blasio’s “Key to NYC” program. Under the Order of the New York City Commissioner of Health and Mental Hygiene to Require COVID-19 Vaccination in the Workplace (the “Order”), all employees

in New York City who perform work within the workplace or interact with the public in the course of conducting business must provide or have provided proof that they have received at least one dose of a COVID-19 vaccine, unless they are approved for a medical or religious accommodation. Employees must provide proof of having received their second dose (if Pfizer or Moderna) no later than 45 days after receiving their first dose. By the effective date, each covered employer is required to publicly post a [certification](#) of compliance.

Notably, employers in New York City who are subject to OSHA's ETS must also comply with this Order and require vaccinations, unless an employee receives an exemption as a reasonable accommodation for a documented medical or religious reason. According to the City's published [FAQ](#), the testing alternative provided by OSHA's ETS will not be acceptable for those employers.

Further, to comply with the Order, businesses must complete one of the following requirements:

- Keep a copy of the employee's proof of vaccination, which includes either (1) a CDC vaccination card, (2) a New York City vaccination record or other official immunization record, (3) the digital vaccine card on CLEAR Health Pass, or (4) the Excelsior Pass that is associated with an employee's vaccination record, or a record of an approved reasonable accommodation, including when granted, the basis for such accommodation and supporting documentation;
- Create a record that includes the (1) employee's name; (2) vaccination status; (3) date of each vaccination dose, if any; and (4) any record of an authorized reasonable accommodation with supporting documentation; or
- For those employers not keeping a record or proof of vaccination, check proof of vaccination each day and keep a record of each verification.

Employers who refuse to comply will be subject to a fine of \$1,000, with escalating penalties if violations persist. It remains unclear whether Mayor-Elect Eric Adams will enforce this Order once he takes office on January 1, 2022. Additionally, a number of lawsuits have been filed challenging the implementation of Mayor de Blasio's vaccination mandate.

Takeaways

Although we enter the new year with continued uncertainty about what mandates will actually be implemented and enforced, it is critical for employers to determine which mandates apply to their businesses based on their location, workforce numbers, and industry, as well as to prepare and implement required policies. We are monitoring all of these developments and are available to provide guidance through this very difficult process.

Sills Cummis clients and interested employers are welcome to join us for our complimentary COVID Reboot Webinar on January 13, 2022 from 8:30 a.m. to 10:30 a.m., where we will discuss COVID related topics, including the status of all of the foregoing and best compliance practices. For additional information on how clients and other businesses can register for this webinar, please reach out to your Sills Cummis relationship attorney or Ashley Evaristo, Senior Marketing Coordinator, at aevaristo@sillscummis.com.

Attorneys in our Employment and Labor Law Practice Group can assist employers regarding the issues raised in this alert.

Jill Turner Lever, Esq.

Client Alert Issue Co-Author; Of Counsel, Employment and Labor Practice Group
jlever@sillscummis.com | (973) 643-5691

Rachel N. Laurel, Esq.

Client Alert Issue Co-Author; Associate, Employment and Labor Practice Group
rlaurel@sillscummis.com | (973) 643-4970

Patricia M. Prezioso, Esq.

Chair, Employment and Labor Practice Group
ppezioso@sillscummis.com | (973) 643-5041

David I. Rosen, Esq.

Member, Employment and Labor Practice Group
drosen@sillscummis.com | (973) 643-5558

Grace A. Byrd, Esq.

Of Counsel, Employment and Labor Practice Group
gbyrd@sillscummis.com | (973) 643-6792

Jordan E. Pace, Esq.

Of Counsel, Employment and Labor Practice Group
jpace@sillscummis.com | (973) 643-4295

Stacy L. Landau, Esq.

Associate, Employment and Labor Practice Group
slandau@sillscummis.com | (973) 643-5782

Amy H. Sachs, Esq.

Associate, Employment and Labor Practice Group
asachs@sillscummis.com | (973) 643-4134