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**MANDATORY COVID VACCINES AND PAID LEAVE.  
DOES IT APPLY TO YOUR BUSINESS? MAYBE ...**

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Ever since President Biden announced last September that his administration would instruct the Occupational Safety and Health Administration (OSHA) to promulgate an emergency temporary standard (ETS) requiring employers with 100 or more employees to require their employees to be vaccinated, lawyers and human resource professionals debated whether such an ETS would become a reality. It has. On November 4, 2021, OSHA's COVID ETS rule was published in the Federal Register <https://www.federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard>. OSHA also issued an FAQ which you may access here <https://www.osha.gov/coronavirus/ets2/faqs>.

Although many states have filed lawsuits to enjoin OSHA<sup>1</sup> from enforcing its ETS, for now, an employer employing 100 or more employees needs to focus on complying with the new ETS requirements or face potential financial liability in the form of monetary penalties (fines) regardless of the fact that lawsuits to enjoin the enforcement of the ETS have been filed.

Simply put, under the ETS, if your business employs 100 or more employees you are required to have a roster of all employees evidencing their vaccination status by December 5, 2021. If an employee claims a medical or religious exemption, a record of same needs to be maintained. While remote worker count in the total 100 number, they are exempt from the vaccination requirement. Caution! Remote means minimal contact with other employees. Thereafter, covered employers are required to have vaccine verification evidence for all employees who are required to have the COVID vaccine by January 4, 2022.

The ETS also imposes a paid leave requirement. Here is the question: when does an employer have to pay employees to obtain a vaccine? It depends. If the employee goes for the vaccine during working hours, the employer is required to provide up to four hours of paid leave (in addition to any accrued paid time off, if any) subject to actual time, note though that computation of actual can be complicated regarding paid time

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<sup>1</sup> The Fifth Court of Appeals for Texas, Louisiana and Mississippi entered an injunction on or about November 6, 2021 staying enforcement.

off during working hours. Surprisingly, there is no present requirement for an employer to compensate an employee for time spent during off hours to obtain the vaccine.

Another aspect of this new ETS relates to an employer's obligation for paid leave when an employee suffers an adverse reaction to the vaccine and needs time off. While the present status of the law may change, presently, an employer may require that an employee suffering from an adverse reaction to a COVID vaccine use accrued, but unpaid time off or take unpaid time off. Stay tuned though. The US Department of Labor (DOL) may chime in soon and issue supplemental regulations on this aspect of the ETS and impose its own regulations on employers regarding paid leave. Additionally, the DOL may address the cost issue as same relates to the vaccine and required testing.

What does an employer need to do if an employee is not vaccinated? The ETS requires that unvaccinated employees be tested every seven (7) days and provide a verification of the negative test result. Note that all evidence of a negative COVID test is a confidential medical record that needs be maintained separately from an employee's file. Another issue that will surely arise is who pays for the cost of the weekly COVID tests for the unvaccinated employee. For now, the cost of the test is borne by the employee. Stay tuned though, the DOL could adopt a rule that requires the employer pay for the cost.

While it is true that many lawsuits have already been filed to enjoin this ETS from being enforced, covered employers need to implement compliance strategies by adopting policies and tracking methodologies now as the future of this ETS is unknown.

We are here to help your organization with any questions that you may have.

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*A note to the reader: This article is intended to provide general information and is not intended to be a substitute for competent legal advice. Competent legal counsel should be consulted if you have questions regarding compliance with the law.*

Questions regarding the content of this article may be e-mailed to Christina Harris Schwinn at [christinaschwinn@paveselaw.com](mailto:christinaschwinn@paveselaw.com). Ms. Schwinn is a partner and an experienced employment and real estate attorney with the Pavese Law Firm, 1833 Hendry Street, Fort Myers, FL 33901; Telephone: (239) 336-6228; Fax: (239) 332-2243. To view past articles written by Ms. Schwinn please visit the firm's website at [www.paveselaw.com](http://www.paveselaw.com).

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