Supplemental Q&A Response

Question: Have there been other ETS issued, and what happens when they are not transferred into a formal standard after six months?

Response: OSHA has probably issued less than 15 emergency temporary standards (ETS) in the last 50 years, with two having been issued this year, the first dealing with COVID in the Health Care Industry, and the second was the COVID issued on vaccinations and testing. Most ETSs have been struck down by the courts over the issue of grave harm. ETSs generally run six months during which OSHA will be working on a permanent standard to replace the ETS. The six months is not a “hard” date and can be extended, but OSHA is required under the OSH Act to convert an ETS into a permanent standard.

Question: What recommendations do you have for managing temporary or seasonal employees? What about those employees who come from a staffing agency? Are there different expectations for managing subcontractors?

Response: Temporary employees hired from a staffing agency are covered under the ETS by the staffing agency and not the host employer. As a host employer, in my opinion, the host employer should require that the staffing agency employees be fully vaccinated. Temporary employees hired by the employer that do not come through a staffing agency are considered the host employer’s employees as are seasonal employees. If the total employee count including the seasonal employees and the temporary employees for the host employer exceeds 100 employees then the host employer would be covered by the ETS and the employer will need to mandate vaccination or testing on a weekly basis.

Question: Are the religious and medical exemptions consistent across the executive order that covers federal contractors? Are these individuals required to be tested weekly?

Response: Both the ETS and the Executive Order require vaccination of the employees. For the Executive Order, all employees have to be vaccinated regardless of how many employees are employed by the company. The Executive Order does not provide for weekly testing in place of the vaccination. The religious and medical exemption is applicable under both the Executive Order and the ETS. For further information on the religious exemption, I would suggest referring to the EEOC link in the slides.
Question: Are there specific requirements for types of tests (e.g. PCR or antigen)? Are antibody tests approved as testing? Do they need to be maintained ongoing or is the current week acceptable?

Response: OSHA has said that employers can accept any FDA approved test. Even over the counter FDA tests are approved, although OSHA requires that over-the-counter tests be conducted and read out in the presence of a witness. Tests have to be done weekly or every 7 days.

Question: If someone tests positive and is removed from the workplace, is the employer required to cover time off?

Response: No.

Question: Are employers required to accept all of the identified types of “proof” of vaccination? For example, does the employer have to honor a written attestation of vaccination?

Response: As outlined in the slide, there are 6 “proofs of vaccination” that OSHA has said are acceptable for an employer to use to verify the vaccination status. As to the written attestation, OSHA has just said that that is one form of vaccination proof that the employer can accept. OSHA did not weigh in on whether or not the employer has to accept that.

From the Standard:

The employer must require each vaccinated employee to provide acceptable proof of vaccination status, including whether they are fully or partially vaccinated. Acceptable proof of vaccination status is:

(i) The record of immunization from a health care provider or pharmacy;
(ii) A copy of the COVID-19 Vaccination Record Card;
(iii) A copy of medical records documenting the vaccination;
(iv) A copy of immunization records from a public health, state, or tribal immunization information system; or
(v) A copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s);
(vi) In instances where an employee is unable to produce acceptable proof of vaccination under paragraphs (e)(2)(i) through (v) of this section, a signed and dated statement by the employee:
   (A) Attesting to their vaccination status (fully vaccinated or partially vaccinated);
   (B) Attesting that they have lost and are otherwise unable to produce proof required by this section; and
   (C) Including the following language: “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.”
Question: Can an employer mandate weekly testing instead of mandating vaccines to avoid processing religious or medical exemption forms?

Response: OSHA has been really clear under the ETS that one must either be vaccinated or tested weekly, and those not vaccinated must wear a mask. Section (d)(1) in the ETS covers this policy -- The employer is exempted from the requirement in paragraph (d)(1) of this section only if the employer establishes, implements, and enforces a written policy allowing any employee not subject to a mandatory vaccination policy to choose either to be fully vaccinated against COVID-19 or provide proof of regular testing for COVID-19 in accordance with paragraph (g) of this section and wear a face covering in accordance with paragraph (i) of this section.

Question: Have fines been established at this point? What other enforcement response could be possible (i.e. shutdowns, etc.)?

Response: The fines associated with any violations of the ETS will follow the classification process and procedures outlined in OSHA’s Field Operations Manual - https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-164_1.pdf

Question: Can you clarify whether already given paid time off is sufficient or if an employer needs to provide additional paid time off for vaccination?

From the OSHA FAQs: https://www.osha.gov/coronavirus/ets2/faqs -- “The maximum of four hours of paid time that employers must provide for the administration of each primary vaccination dose cannot be offset by any other leave that the employee has accrued, such as sick leave or vacation leave. OSHA is concerned that employees forced to use their sick leave or vacation leave for vaccination would have a disincentive to gaining the health protection of vaccination.”

Response: The OSHA FAQ is spelling out that an employer cannot use an employee’s accrued sick leave or annual leave to cover the time for an employee to go and get the vaccine. The employee has to be paid up to 4 hours at their normal hourly rate to go and get the vaccine and then return to work. OSHA is also stating that the employer is only obligated to pay up to 4 hours.