

SHEEHAN PHINNEY



# **OSHA ETS REVIVED**

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**January 4, 2022**

# SHEEHAN PHINNEY

## Agenda

OSHA ETS Litigation Status

OSHA ETS Requirements

Religious Accommodations

What to Do Now

# ETS Litigation Status

- Lawsuits . . . Lawsuits . . . and Lawsuits
- 5<sup>th</sup> Circuit granted “Permanent Injunction” . . .
  - “[G]rossly exceeds OSHA's statutory authority”
  - Imposes an undue financial burden on companies
  - Potentially violates the Commerce clause
- MDL Lottery – 6<sup>th</sup> Circuit
  - Split 2-1 decision reversed the 5<sup>th</sup> Circuit and lifted stay
  - Found OSHA had “demonstrated the pervasive danger that COVID-19 poses to workers—unvaccinated workers in particular—in their workplaces”

# Supreme Court

- SCOTUS will decide fate of OSHA 100 Employee ETS
- Accelerated Argument – January 7, 2022
- The Supreme Court has allowed private, local, and state mandates to take effect:
  - *Jacobson v. Massachusetts* (1905)
  - *John Does 1-3 v. Mills* (2021) (*certiorari* denied)
  - *Dr. A v. Hochul* (2021) (*certiorari* denied)
  - *Klaassen v. Trustees of Indiana University* (2021) (*certiorari* denied)
  - *Valdez v. Lujan Grisham* (*certiorari* denied)

# Compliance Deadlines

## Original

- December 5, 2021 - Compliance with all ETS obligations, except testing
- January 4, 2022 – Compliance with all ETS obligations, including testing

## Amended

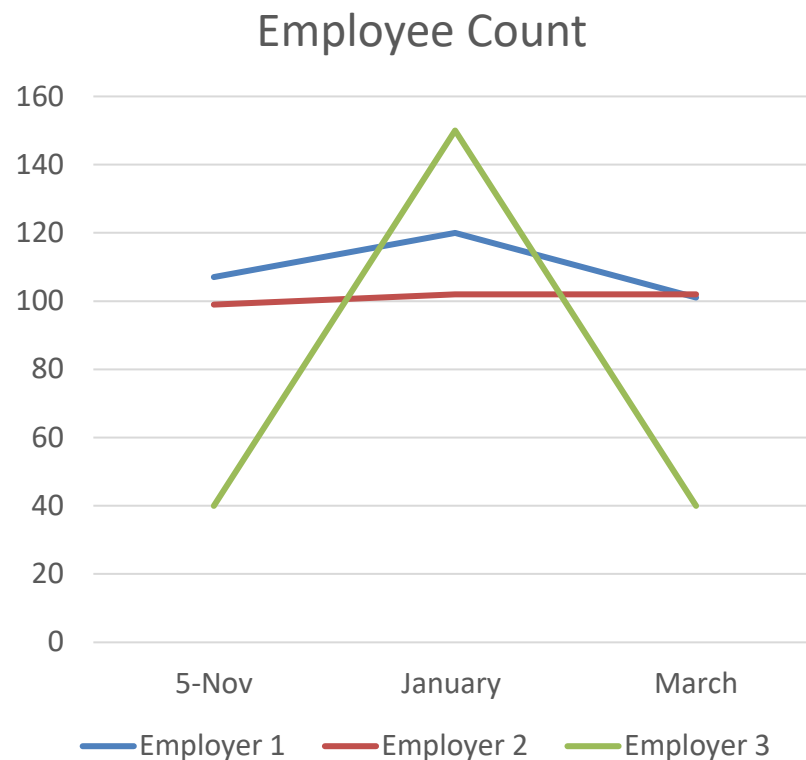
- Phase 1 - OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10, 2022
- Phase 2 – Fines for testing noncompliance commence February 10, 2022

## OSHA ETS

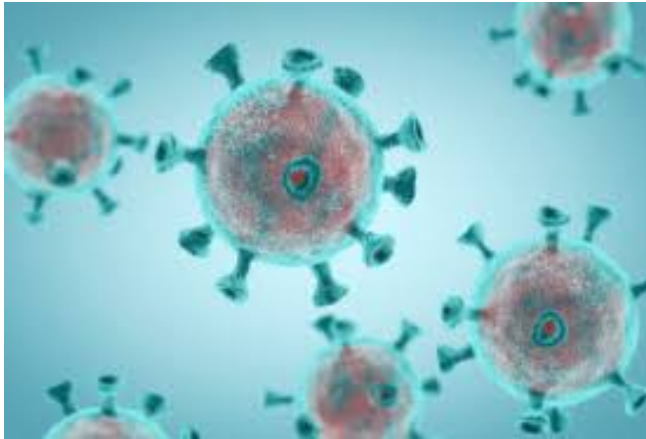
- 100 employees or more (measured at the corporate level)
- Expect “joint employer” issues – USDOL will view coverage broadly
- No consideration for location of work, indoor/outside work, or remote work
- Part-time employees count as 1 employee

# Entity Coverage

- Measuring date, November 5, 2021
- If a company has 100 or more employees on its payroll, coverage applies
- If a company, while not initially having 100 employees on its payroll by November 5, 2021, later reaches the 100-employee mark, coverage applies
- No change in coverage for reductions in force



# Coverage Requirements



1. Decide on type of company policy
  - Testing
  - Face Coverings
2. Determine Vaccine Status/Collect Immunization Records
3. Provide COVID Information
4. Quarantining
5. Reporting



# Vaccination Policy

- All covered employers must develop a written policy
- Two choices
  - A. “Establish, implement, and enforce a written mandatory vaccination policy” 1910.501(d)(1)
  - B. Exemption from developing a vaccinate mandate, if 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 . . . and wear a face coverings” 1910.501(d)(2)

## Testing

- Employees who decline to vaccinate for any reason must test weekly
- Test results must be submitted to the employer and saved
- Employers are not required to pay for weekly test
- *But* Lab 803.02(b) – “[N]o employer shall require an employee or applicant for employment to pay for the cost of a medical examination . . . . This shall not include examinations, permits or licenses required by. . . federal law.”

## Testing

But what about testing  
for remote workers?



- Testing required for every non-vaccinated person who reports to work at least *once* in a 7-day period
- Must be tested at least once every 7 days and must provide test results no later than the 7<sup>th</sup> day from last test
- No testing for remote workers. But they must submit a negative test within 7 days prior to reporting to work

# Testing

## Acceptable Tests – Are:

- cleared, approved, or authorized by FDA to detect current infection with the SARS-CoV-2 virus;
- administered in accordance with the authorized instructions; and
- not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor

# Face Coverings

- Nonvaccinated individuals must wear face coverings when “indoors” or “occupying a vehicle with another employee for work purposes”
- Except . . .when
  - Employee is alone in a room
  - The face covering creates a hazard
  - Employee is wearing a respirator
  - Employee is eating or drinking



## Determine Vaccination Status

- Regardless of the policy selected, covered employers must determine the vaccination status of each employee
- Fully vaccinated, partially vaccinated, or non-vaccinated
- Employer must maintain a “roster” of vaccination status and records of acceptable proof of vaccination
- Records are confidential “medical records”

# Acceptable Proof of Vaccination

- The record of immunization from a health care provider or pharmacy
- A copy of the COVID-19 Vaccination Record Card
- A copy of medical records documenting the vaccination
- A copy of immunization records from a public health, state, or tribal immunization information system
- 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)

*See 1910.201(e)(2)*

## COVID Information

- Covered employers must inform each employee, “in language and at a literacy level” they understand, about:
  - Requirements of the ETS
  - COVID-19 vaccine efficacy, safety, and benefits
  - 11(c) retaliation
  - Criminal penalties for providing false statements, documents, and information



## Reporting Obligations

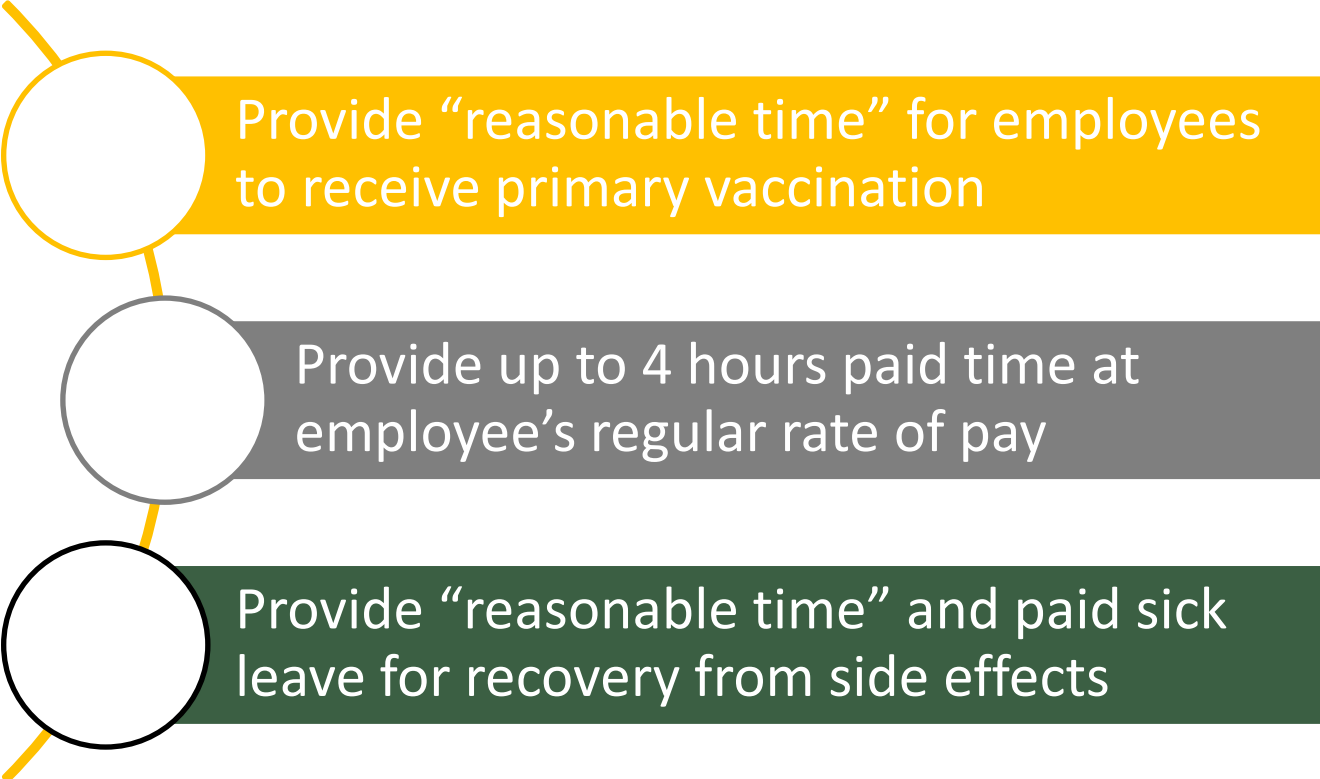
- All COVID-19 related fatalities within 8 hours of learning of them
- All COVID-19 related hospitalizations within 24 hours of learning of them

\*All reports made to OSHA

# Quarantining

- Covered employers must require employees (regardless of vaccination status) to report any positive test result
- Employees who test positive must be *immediately* removed from the workplace until they
  - Test negative
  - Complete CDC isolation guidance, or
  - Receive clearance from a licensed physician

# Compensable Time



Provide “reasonable time” for employees to receive primary vaccination

Provide up to 4 hours paid time at employee’s regular rate of pay

Provide “reasonable time” and paid sick leave for recovery from side effects

## Only One Rule Applies

OSHA's ETS applies (assuming employee threshold is met) only if the Federal Contractor Rule, the Medical Provider Interim Rule, or the Healthcare ETS from June do not apply to the entity

# Religious Accommodations

- Section 701(j) of Title VII requires an employer “to *reasonably accommodate* an employee’s or prospective employee’s religious observance or practice.” § 701(j)



- Undue Hardship Test

## Religion Means?

- Includes traditionally recognized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism
- Also includes beliefs that are new, uncommon, not part of a formal church, or only held by a small number of people
- Social, political, or economic philosophies, or personal preferences, are not “religious” beliefs

## Sincerely Held?

- An employer need only accommodate an employee's "sincerely held religious beliefs"
- Most of the time, there is no reason to question whether a particular practice is religious or if a belief is "sincerely held"
- Bona fide doubt?
- Limited inquiry allowed

## Bona Fide Doubt?

- Whether the employee has behaved in a manner markedly inconsistent with the professed belief
- Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons
- Whether the timing of the request renders it suspect
- Whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons



## Best Practices

- Consider each request for accommodation on a case-by-case basis
- Carefully document requests for accommodation and supporting reasons
- Carefully document reasons for decision
- Have accommodation decision made by same person whose authority is final

## What to Do now

- Determine which regulatory scheme from Executive Order applies, if any
- If none:
  - establish whether you want to mandate vaccinations, encourage/incentivize vaccinations, or have vaccinations be optional
  - review OSHA's Protecting Workers Guidance for General Duty compliance
  - Make reasoned decisions of which policies from the Protecting Workers Guidance to adopt and which to forego

# What to do now

## ➤ If ETS:

- Begin preparing for ETS as if it will take effect immediately
- Develop and disseminate vaccine policy
- Create vaccination roster
- Build-out secure networks and processes for the storage of confidential medical information, including vaccine records and testing records
- Establish testing processes
- Establish process for managing accommodations

# Questions?



THANK YOU!

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