Private Schools' Blueprint for Navigating National Vaccine Mandate-or-Test Rule

Insights
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Independent and private schools are wondering how they will be affected by the impending vaccine-or-test mandate the Biden administration announced last week. The Occupational Safety and Health Administration (OSHA) will soon issue a rule requiring employers with 100 or more employees to either ensure their workers are vaccinated or require unvaccinated employees to produce a weekly negative test result before coming to work. Employees will also have to be given paid time off to get vaccinated and to recover from any vaccine side effects as part of the forthcoming emergency rule. For some independent and private schools, this development likely means few, if any, changes. However, those schools not currently requiring vaccines or testing need to know what they will be required to do once OSHA issues the final rule. Here are a series of FAQs and a five-step plan for your school to consider.

What Happened?

Nothing formal has happened – yet. The president did not issue an Executive Order on this subject, contrary to what many had originally reported. Instead, he directed federal workplace safety officials to issue a rule in the form of an Emergency Temporary Standard (ETS), which allows OSHA to enact regulations it can enforce immediately if a "grave danger" to employee safety is present.

Is Our School Subject to OSHA Compliance?

Since the cornerstone of the plan involves OSHA issuing a rule, the first question many schools are asking is whether they are subject to OSHA's reach. Broadly speaking, OSHA's jurisdiction applies to non-profit organizations, including private and independent schools. To be clear, OSHA and the OSH Act apply only to employees and not to students.

With respect to secular schools, OSHA applies to all employees and activities. A surprise to many, however, is that OSHA also applies to the secular activities of religious schools. So, for example, while a religious school's faith leader (chaplain, priest, rabbi, etc.) would not be covered while in the course of leading religious services, other employees may be covered.

Which employees qualify as ministers of the faith so as to be outside the scope of OSHA requires a school-by-school analysis. However, at a minimum, employees such as maintenance workers, food service employees, and bus drivers are almost always covered by OSHA. Therefore, secular and

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service employees, and bus drivers are almost always covered by OSHA. Therefore, secular and religious independent and private schools are generally subject to OSHA and the regulations it promulgates.

Is Our School Subject to This Particular ETS?

If your school has fewer than 100 employees, your school will not be obligated to comply with the ETS. But if your school is secular and has more than 100 employees, then you will have to comply with the ETS. Also, if your school is religious and has more than 100 employees and at least one secular employee, then you will have to comply with the ETS.

What is the Potential Liability for Noncompliance?

Schools that are covered by the new standard and fail to comply could face OSHA citations and penalties of up to $14,000 per violation.

How Long Will My School Have to Comply?

While the Biden administration did not set out a timeline or deadline for OSHA to issue the ETS, the administration is taking an aggressive approach. The agency has already announced that it hopes to issue the ETS in the next several weeks. Once issued, the ETS will have immediate effect in approximately 29 states (i.e. Texas, Pennsylvania, Florida, etc.) where federal OSHA has jurisdiction. But 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.

However, after it is issued, it is anticipated that OSHA will provide schools with a fairly substantial time to become compliant. OSHA will likely 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. In short, it would be surprising if private and independent schools are required to comply with this ETS before winter break.

How Long Will the ETS Last?

The ETS can remain in place for six months. After that time, it must be replaced by a permanent OSHA standard, which must undergo a formal rulemaking process involving a notice-and-comment period. This is, of course, separate from state or local mandates requiring teachers or school employees be vaccinated or undergo testing. Those mandates have timelines of their own.

Will Schools be Required to Collect Proof of Vaccination?

Whether the ETS requires employers to collect proof of vaccination may have a significant impact on schools. OSHA's record retention regulations require that schools preserve and maintain employee medical records for the duration of employment plus 30 years. Therefore, if the ETS requires

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employer to collect proof of vaccination from employees, schools may be required to maintain that record for the duration of the employee's employment plus 30 years.

What Type of Testing will be Required?

It is unclear whether the ETS will mandate a particular type of COVID-19 test (antigen, PCR, etc.). While the PCR test is more accurate, it takes longer to receive the results and is more expensive. Additionally, many schools have taken advantage of the free rapid-test program being offered by the federal government in coordination with various states. But as of now, it is unclear whether those tests are sufficient to satisfy the ETS.

Who Will Have to Pay for the Testing?

While the federal government proposed to improve access to COVID-19 tests – even suggesting that retailers will offer to sell rapid tests at cost for the next three months – the question of who pays for testing remains unanswered. Many schools are fortunate that their states in conjunction with the federal government are offering access to free rapid tests for schools. Additionally, while 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.

With respect to the time spent testing, employers must pay nonexempt employees for any time spent testing during the workday under the federal FLSA. This also likely includes required testing occurring on employees' days off if such testing is necessary to perform their jobs safely and effectively during the pandemic.

Will the ETS Face Legal Challenges?

Regulations pertaining to schools have been hotly contested in many states and we expect that we will see more of that with the ETS. Governors of certain states have already indicated that they intend to challenge the ETS once issued. It will also not be surprising if counties or cities, who have in some instances implemented their own COVID-19 regulations for schools, fight the ETS. It is possible that a court could even block enforcement of the emergency rule until the legal challenges are resolved. OSHA will have to prove that there is a "grave danger" to the workers of employers of 100 or more employees in order for the ETS to withstand a legal challenge, which may be a difficult task.

What Should You Do? A 5-Step Action Plan for Schools

Schools can and should take steps to put themselves in the best position to comply with the expected ETS if they are not already mandating vaccines or requiring testing of unvaccinated employees.

1. ***Adopt Procedures for Determining Employees' Vaccination Status***

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You should prepare to implement a system for asking employees whether they have been vaccinated and maintain confidential records of employee vaccination status. The Equal Employment Opportunity Commission has indicated that it is generally lawful for employers to ask employees about COVID-19 vaccination status. That's because this simple question alone is not likely to elicit information from the employee about possible medical conditions, an inquiry that otherwise would invoke federal or state disability laws. In most cases, the answer to that question alone may be all you really need.

The ETS likely will require that schools not only ask for vaccination status but collect proof of vaccination. If this is the case, you should ask employees to show you documentation from the immunization source showing the date(s) the vaccine was administered. To avoid potential legal issues related to this process, you should affirmatively inform employees that they do not need to provide any additional medical or family history information. In lieu of collecting vaccination records, you can create a confidential list of vaccinated workers in order to minimize legal risks and requirements associated with retaining medical documentation, including checking state laws regarding confidentiality and privacy of medical records. If you decide to collect vaccination records, it is recommended that you treat those records as you would other medical records. Some schools have opted to expand use of the medical records platform they use for student vaccination records to include employees. If you choose this route, be sure to confirm with your vendor that the platform is OSHA compliant.

2. ***Determine if You Will Mandate the Vaccine or Allow Unvaccinated Employees to be Tested Weekly***

Schools will need to determine whether they will adopt a mandatory vaccination policy or allow unvaccinated employees to be tested weekly. For some schools, collecting and tracking weekly test results may burden them such that they may decide to adopt a mandatory vaccination policy for employees. For other schools, a free rapid-testing program offered by the federal government through various states might be the answer.

3. ***Develop a Plan for Handling Accommodation Requests***

For those schools adopting a vaccine mandate, you need to have an accommodation policy to address religious and disability issues. Take special care to communicate and administer the accommodation process thoughtfully, emphasizing individualized, confidential consideration of each request. Schools should also be prepared for employees to request an accommodation from the weekly testing requirement – an accommodation process that must be addressed separately from requests for exemptions from any vaccination mandate.

For a detailed discussion of this topic, please refer to An Employer's 3-Step Guide to Responding to COVID-19 Vaccine Religious Objections.

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Have a Plan for Tracking Test Results

For schools already requiring individuals who are not fully vaccinated to undergo weekly COVID-19 testing in lieu of receiving the vaccine, you should have a plan in place for collecting and tracking test results. For those planning to allow testing in lieu of vaccination, now is the time to start coordinating a process for tracking test results.

5. ***Prepare for OSHA Complaints and Inspections***

As a reminder, the vaccination ETS will not displace current compliance duties related to COVID-19 prevention and mitigation. Social distancing, masking, sanitizing, and other safety steps you may already be required to take under existing OSHA and CDC guidance, or state or local public health orders, remain in effect.

Therefore, while OSHA inspections are not common in independent and private schools, in addition to the requirements of the new ETS, OSHA likely will ask for your school's COVID-19 response plan and training records if it receives a complaint or conducts an inspection concerning the vaccine mandate ETS. If not already in place, develop a COVID-19 policy and communicate its requirements to your employees. Train your operations director on what to do and say if OSHA arrives for an inspection. This effort could save your school from paying significant fines.

Conclusion

Although the timeline is still unclear, schools should begin preparing now for the forthcoming Emergency Temporary Standard by establishing policies for determining employees' vaccination status and procedures for tracking weekly test results. Schools may also prepare for the possibility that employees refuse to comply with the requirements of the ETS and begin planning an appropriate response – which would include terminating their employment.

We will monitor these developments and provide updates as OSHA drafts and implements the Emergency Temporary Standard. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our Vaccine Resource Center for Employers or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Education Law Team.

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