

OSHA's ETS: It's Not a Test Unless OSHA Says It's a Test

by **STACIE DAMAZO** — Barran Liebman LLP

President Biden's September Executive Order and the federal Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS) published in early November were anticipated to affect more than 2,000 Oregon employers. Those same employers are now in legal limbo, thanks to the many lawsuits filed within days of OSHA's announcement.

In broad strokes, the ETS would require that covered employers establish, implement and enforce a mandatory COVID-19 vaccination policy with an alternative for testing and masking requirements. Under the alternative policy, employees who are not fully vaccinated and report at least once every seven days to a workplace where other individuals, such as coworkers or customers, are present, must be tested for COVID-19 and provide those test results to their covered employer every seven days, regardless of the employee's work schedule.

Just one day after the ETS became effective, the Fifth Circuit stayed its enforcement. The Court that will ultimately decide the legality of the ETS will be determined by random lottery.

Notwithstanding the mounting legal challenges, when OSHA issues its final rule, employer-mandated testing is all but guaranteed to be part of it. The ETS itself evidences that OSHA spent a significant amount of time considering COVID-19 test protocols and validity. In the interest of making the best use of administrative time and dollars, Oregon employers would be wise to pay attention to and prepare for these testing protocols, as we will likely see them again.

As you revisit your testing protocols, below is a summary of key considerations.

Does the Test Satisfy the ETS?

1. Is it FDA-Approved?

The ETS would require a FDA-approved test. Both PCR and rapid antigen tests are acceptable. Although enforcement of the ETS is stalled, an employer has nothing to gain (and much to lose in terms of administrative costs and decreased accuracy),



by requiring anything less than a FDA-approved test.

2. How is it Administered?

OSHA will want to see employers satisfy specific testing conditions and procedures. First, the COVID-19 test must be administered according to the test's instructions, as authorized by the FDA.

Second, the test cannot be both self-administered and self-read. That means

that tests administered and processed at home, unobserved by either the employer or an authorized telehealth proctor, are not sufficiently reliable. Examples of tests that would be sufficiently reliable include tests processed by a laboratory (including specimens collected at home or on-site, processed either individually or as pooled specimens); proctored over-the-counter tests; point of care tests; and tests where specimen collection is either done or observed by an employer.

There is tension between the plain language of the ETS and recent guidance from some employer resources. Employers hoping to get a head start on a possible federal rule would be better off looking at the plain language of the rule.

3. Who Pays?

When OSHA published the ETS, it did not require covered employers to pay for their employees' testing. However, it also did not supersede other laws, regulations or collective bargaining agreements. For now, that means Oregon employers need to follow the requirements of ORS Chapter 659A.

Similarly, OSHA does not require covered employers to provide paid time off for time spent undergoing ETS-mandated testing. But when the dust settles, it will be important for Oregon employers to align with what Oregon courts, the Oregon Bureau of Labor and Industries or both have to say on this issue.

Are You Maintaining Proper Records?

OSHA's view is, and will probably continue to be, that employers must become champion record-keepers. That is a smart move anyway. Employers should determine

the vaccination status of each employee and maintain proper records of each employee's vaccination status and test results. Test result records should include (1) identifying information, such as full name and at least one other identifier (e.g., date of birth); (2) the specimen collection date; (3) the type of test; and (4) the entity issuing the result. Note that employee test records must not be disclosed, except as required by law.

When Do the Testing Requirements Under the ETS Begin?

Initially set to begin January 4, 2022, it is currently anyone's guess as to when enforcement of the ETS will begin. Just in case, covered employers should continue to target January 4 as the deadline.

What if an Employee Refuses COVID-19 Testing?

Testing is an alternative to vaccination and an employee who refuses testing is at risk. OSHA would require the covered employer to remove that employee from the workplace (likely without pay), until a test result is provided.

What if an Employee Tests Positive for COVID-19?

If an employee tests positive for COVID-19, or has otherwise been diagnosed with COVID-19 by a licensed healthcare provider, OSHA's plan is that the employer cannot require that employee to undergo additional COVID-19 testing for 90 days following the date of the positive test or diagnosis. However, a previously infected employee must meet certain requirements before they can be allowed to return to the workplace.

Due to the speed with which the ETS was filed and then paused, it does not appear Oregon OSHA has had time to react. But keep an eye on that agency. Challengers of the ETS advance the argument this is a state matter, not a federal matter, which means that Oregon OSHA's guidance may be dispositive, if a court finds federal OSHA lacks authority to issue the ETS.

In the meantime, brush up on your testing protocols.

Stacie Damazo is an attorney at Barran Liebman LLP, where she represents employers in employment advice and litigation. For questions, contact her at 503-276-2121 or sdamazo@barran.com.

barran.com