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# OSHA Vaccine Mandate ETS

Compliance Series  
November 18, 2021

# Presenters



## **Liz Mann, J.D.**

Liz Mann is EPIC's internal compliance director. Liz and her team are responsible for disseminating information to clients about changing requirements and regulations and reviewing all plan designs and programs for compliance with Federal and State regulations. Liz is embedded into our account management team to provide timely support and guidance as ERISA-related regulations or concerns emerge in the marketplace. Liz graduated Magna Cum Laude from Saint Mary's College in Notre Dame, IN with Bachelor of Arts degrees in History and French. She graduated with her law degree from University of Toledo, College of Law in Toledo Ohio in 2007. She has accumulated over 12 years of experience working in employee benefits and offers expertise in ERISA, IRS, COBRA, FMLA and ACA compliance.



## **Michael Goldfarb, Esq., President of Guardian HR**

Mr. Goldfarb has been an employment law attorney for over 28 years and has counseled companies of all types and sizes and conducted numerous jury trials. He is a member of the Labor and Employment Law Section of the State Bar of California, the Ventura County Bar Association's Employment Law Division and the American Bar Association. He sits on several boards of directors and is a sought-after lecturer in the area of employment law and human resources and has had articles in various publications including the Wall Street Journal.



## **Bob Radecki, Senior Regulatory and Public Policy Analyst**

Bob Radecki has over 30 years of experience in the HR and employee benefits industry helping employers deal with difficult benefit and compliance matters. Previously Mr. Radecki founded, and served as President of A.E. Roberts Company, a nationally recognized compliance consulting and training firm. Bob is recognized as a leading expert on a variety of benefit compliance issues including COBRA, FMLA, ERISA and Health Reform. Bob has been the featured speaker at many industry events and conferences and has published several articles concerning employee benefits compliance issues.

# Agenda

1. ETS Background
2. Employer Questions
3. Resources
4. EPIC Survey Results and Update



# Background

# Three Separate Rules

- OSHA ETS Applicable to All Private Employers with at Least 100 Employees
  - State and Local Government are not subject to ETS, but may be subject to state OSHA rules
- Healthcare Facilities (29 CFR 1910.502)
- Federal Contractors (Executive Order 14042)

# Legal Challenges

- 5th Circuit Court of Appeals Temporary Stay of OSHA ETS
  - Petitions filed in 11 of the 12 circuit courts
  - The stay does not affect rules applicable to Federal contractors or health care facilities
- 11/16/21 - All cases combined into a single case and assigned to the 6th Circuit
- OSHA has officially suspended enforcement pending outcome of court challenges
- Next steps
  - 6th Circuit will hold a hearing very “quickly”
  - Whichever side loses case will appeal to the Supreme Court

# Basics of OSHA ETS

- If an employer has at least 100 employees, then their employees must be fully vaccinated, or subject to weekly testing and masking requirement at work
  - Jan. 4th deadline will likely be pushed back even if courts uphold the ETS
- ETS would be in effect for 6 months
- Employer must collect proof of vaccination and testing results
  - Employee attestation is sufficient for employees who cannot provide proof of vaccination if the attestation includes specific elements
- ETS does not apply to some remote and home-based workers

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# **Employer questions**



# Employer Questions

- How do we count the 100 employees?
  - Count all employees of a “corporate entity” – not by location
    - ETS not clear about separate but related entities
    - ETS states treat related organization as one entity “...if they handle safety matters as one company...”
  - Count all employees – FT, PT, seasonal, and even remote workers who are exempt from the ETS
  - Applies if employer has 100 employees at any time during the ETS period

# Employer Questions

- What Remote Workers are Exempt from ETS requirements?
  - Three types of remote workers may be exempt from the requirement
    1. Employees who do not report to a workplace where other individuals such as coworkers or customers are present
    2. Employees working from home
    3. Employees who work exclusively outdoors
  - Rules that apply to remote workers
    - Must have negative test 7 days prior to coming into workplace
    - De minimis use of indoor spaces allowed

# Employer Questions

- Can an employer adopt a stricter policy and require vaccinations without providing a weekly testing and masking option to employees?
  - Yes – as long as accommodations are considered for any employee who cannot be vaccinated due to disability (ADA) or a religious objection (Title VII)
- Must employers adopt a vaccination policy?
  - Yes – Employers must adopt a written vaccination policy
    - OSHA has published two sample policies - <https://www.osha.gov/coronavirus/ets2>
      - Mandatory Vaccination Policy
      - Vaccination or Weekly Testing and Face Covering Requirement policy

# Employer Questions

- What are the weekly testing requirements?
  - Test must be FDA approved
    - Cannot use self-administered tests unless results are sent into a lab or “tele-proctored”
    - Employer must maintain records of testing results
- Are employers required to pay for testing?
  - No – but there could be state laws, union contracts, etc. to consider
  - Health plans are not required to pay for testing done for employment purposes

# Employer Questions

- Must I provide paid time off for employees to be vaccinated?
  - Yes – employers must provide up to 4 hours of paid time for employee to receive vaccine
  - Employer cannot require employee to use accrued vacation, sick leave, or PTO to receive vaccine
- What if an employee needs time off to recover from side effect of receiving the vaccine?
  - Employers can require employees to use accrued sick leave or PTO to recover from side effects of a vaccine
  - However, if employee does not have available sick leave or PTO, employer must provide up to two days paid leave to recover



# Additional Employer Questions

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# Resources

# Resources

- OSHA Employer with 100 Employee ETS Website
  - <https://www.osha.gov/coronavirus/ets2>
  - Includes Factsheets and 100 question FAQ
- Guidance for Federal Contractors =
  - [https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc\\_20210922.pdf](https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf)
- Healthcare Facility ETS =
  - <https://www.federalregister.gov/documents/2021/06/21/2021-12428/occupational-exposure-to-covid-19-emergency-temporary-standard>
- [www.OSHAETSHelp.com](http://www.OSHAETSHelp.com)

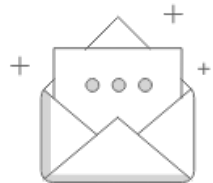


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## **EPIC Survey Results & Update**

# EPIC Vaccine Mandate Survey Results

**In early November EPIC sent out a Market Pulse Survey to Clients and received 419 responses. Below is a summary of the findings.**

- Currently 75% of respondents are not requiring proof of vaccination in the workplace
- 53% of respondents will wait until the court systems make a decision the OSHA rules before implementing a policy. 21% have not made a decision yet.
- Approximately a third of respondents have determined an approach on how to comply with the OSHA rules, while only 13% will require vaccination and 50% allowing either testing or multiple approaches to compliance.
- Of those employers who responded that will allow testing as an alternative, 33% will not cover the cost, and 44% are still undecided on covering the cost.
- Nearly three quarters of employers who responded are concerned about the negative response of the rules from employees, while 59% are concerned with testing procedure and testing tracking administration and 38% concerned with vaccine tracking administration.

# Vaccine Mandate Employer Tracking Systems

- EPIC has been vetting BenAdmin, Wellness Providers and specialty vendors on their ability to support tracking for the upcoming mandate.
- Taking into account systems clients might already have in place and an easy turn-on for employer and ease of use for employee, there are a lot of differences in what these vendors can offer from daily symptom checks to support with medical or religious exemptions.
- Currently we have vetted over 22 products out in the market and the list grows weekly. For more information on how EPIC can help you get a vaccine tracking system in place contact your EPIC account team.



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