ETS Legal Challenges, Requirements and Omissions

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Ok, so now everyone's heard that – as promised - OSHA's new Emergency Temporary Standard has been issued and that, in general, employers with 100+ employees must require workers to vaccinate for COVID or be tested weekly starting January 4. (Incidentally, the guidance for contractors is now requiring vaccination by that date, as well.) **Important note** – don't pull the trigger yet, if you haven't already – although the standard took effect on Nov. 5, the U.S. Court of Appeals for the Fifth Circuit stayed the rule the very next day, pending further litigation (which will be expedited, so the question of whether it was validly issued is decided). To be honest, I would not be surprised if this went to the Supreme Court. We'll see.

The biggest question that my clients have asked so far is who pays for testing, given the ETS doesn't require employers to pay testing fees or compensate workers for the time spent being tested? Employers are not off the hook because other laws may require it. Importantly, the Fair Labor Standards Act guidance reads: "[the] employer is required to pay you [worker] for time spent waiting for and receiving medical attention at their direction or on their premises during normal working hours. … For many employees, undergoing COVID-19 testing may be compensable because the testing is necessary for them to perform their jobs safely and effectively during the pandemic." Safe advice: pay non-exempt workers if you're requiring COVID testing. You don't want the DOL to come calling and assess double damages and a fine for your company's failure to pay.

Stay tuned, I'll update you further. In the meantime, contact me if you have any questions and as always, I'd love your feedback. What is your company planning to do?