

## President Biden's Directives on the OSHA Temporary Emergency Standard

On September 9th, 2021, President Biden directed the Department of Labor to require all employers with more than 100 employees to mandate vaccinations for their workforce or, in the alternative, institute weekly testing for unvaccinated employees. This directive would be accomplished via a new Emergency Temporary Standard ("ETS") issued by the Occupational Safety and Health Administration ("OSHA") within the Department of Labor. An ETS will be effective shortly after publication, likely between 15 and 30 days, and remains effective until superseded by a permanent standard. 29 U.S.C. Section 655(c). OSHA has not released the language of the Vaccine ETS as of the date of this newsletter.

The Occupational Safety and Health Act of 1970 authorizes OSHA to issue standards and oversee safe working conditions and has authority over employers as defined under the Act. OSHA may enact an ETS in instances where it determines that workers are in grave danger due to exposure to toxic substances, agents determined to be toxic or physically harmful, or to new hazards. In these cases, OSHA has the authority to apply an emergency standard to protect workers. 29 U.S.C. Section 655(c)(1).

**However, it is important to note that the U.S. Government, States, and political subdivisions of a state are specifically excluded from the definition of an employer.** 29 U.S.C. Section 652(5). To determine if your entity is a political subdivision of a state, there is a two-part test for the purposes of OSHA. Under the test, any entity that is "(1) created directly by the State, so as to constitute a department or administrative arm of the government, or; (2) administered by individuals who are controlled by public officials and responsible to such officials or to the general public" will be deemed to be a state or political subdivision. 29 C.F.R. §1975.5(b). Please consult with your legal counsel to determine whether your entity is a political subdivision exempt from OSHA regulations, including the forthcoming vaccination ETS.

Finally, Members are advised that Governor Abbott's Executive Order No. 39 Prohibiting Vaccine Mandates in Texas remains in effect as of the date of this newsletter. Under this order, Governor Abbott explicitly states that "No governmental entity can compel any individual to receive a COVID-19 vaccine." Please consult with your legal counsel before taking action to mandate your employee be vaccinated or participate in weekly testing for unvaccinated employees.

