



FROM: North American Division of Seventh-day Adventists

TO: Denominational Employers in the United States

RE: OSHA Vaccination and Testing Emergency Technical Standard (ETS)

Date: December 9, 2021

Introduction and Purpose

On November 6, 2021 the Occupational Safety and Health Administration (OSHA) published in the Federal Register an Emergency Technical Standard (ETS) requiring employers with 100 or more employees as of November 5 to adopt and implement a policy requiring employees to either show proof of vaccination or be tested weekly. This requirement originally was to start December 6, 2021 with the testing requirement to begin January 4, 2022.

Shortly after being announced, a number of legal challenges were filed by secular employers, trade associations and other groups including religious organizations. The arguments challenging the ETS range from those centered on OSHA's authority to those based upon religious objections.

The Fifth Circuit Court of Appeals entered a nationwide stay of the ETS the same day it was published, November 6. That stay remains in effect. OSHA announced that it was complying with this and will not work on the implementation of the ETS until the challenges are resolved.

Given the nationwide nature of the litigation, all of the lawsuits were consolidated at the Sixth Circuit Court of Appeals based in Cincinnati Ohio. OSHA filed a motion to lift the stay, and the Sixth Circuit entered a scheduling order that has briefing to be completed by December 10, 2021. Thus, we can say with certainty that the stay will not be lifted prior to that date. We believe that the Sixth Circuit will issue its order shortly after briefing is completed, likely the week of December 13.

Regardless of how the Sixth Circuit rules, this case will not be resolved finally until the Supreme Court has weighed in. While there is not an exact timeframe, such review will be done on an expedited basis.

The purpose of this memo is to give guidance to US based denominational employers in the event the challenges to the ETS fail and it goes into effect. This is not an NAD mandate or requirement, and the NAD is not seeking to turn it into one. Rather this is a requirement the US government is seeking to impose.

However, should these challenges not be successful and the ETS goes into effect, the church needs to be ready. Rather than have each church employer pay separate legal counsel, NAD felt it would be more efficient to offer legal compliance assistance to interested conferences and other employers. It has partnered with an outside OSHA specialist firm to provide this guidance should it become necessary. This assistance is being provided without cost to the field and is being paid for by the NAD.

Applicability of ETS to Church Employers and Religious Exemptions

Religious Exemptions

The Occupational Safety and Health Act of 1970 under which OSHA was created and this ETS was promulgated applies to religious employers, including the Seventh-day Adventist Church. Since the law was passed there does not appear to ever have been a challenge to OSHA's applicability to church employers prior to the current litigation. In fact, Adventist Risk Management has defended claims alleging violations of OSHA's standards in workplace injury cases and there has never been doubt that those regulations apply.

The applicability of this ETS to religious employers and a church is of course different than other OSHA regulations, such things as drinking water requirements. Religious organizations and advocacy groups are bringing challenges under all available basis, including the First Amendment (which includes the Ministerial Exception) and the Religious Freedom Restoration Act (RFRA). The Sixth Circuit and Supreme Court will be ruling on these challenges. NAD is tracking these changes and will adjust its guidance should these challenges be successful.

Even if the challenges are not successful, there is a limited enforcement exemption in the OSHA regulations for employees when performing "religious services." During this time OSHA has said it will not treat the employee and employer as being covered by the act.

While the definition of "religious services" is vague, the examples given make it clear this is a narrow exemption limited to a worship service or similar event such as preaching, teaching Sabbath School, leading out in prayer meeting, performing baptisms etc. An unvaccinated pastor may be able to forgo wearing a mask during the Sabbath worship service, but almost certainly would be required to do so at other times such as a board meeting, greeting individuals, visitations or working in the church office.

Employee Threshold

The ETS only applies to employers with a 100 or more employees as of November 5, 2021 or later. Once an employer is at or above that 100 employee threshold it is subject to the ETS for its duration, currently six months, even if it later falls below 100 employees.

All employees count towards this threshold, including part time, local hires, student employees. In other words, anyone who receives a W-2 counts.

It does not matter if these employees are remote or do not work in the same location. The threshold was put in place as a proxy for employer size and ability to comply with the rule, not

because of employee density at any one location. Thus, pastors and others who do not work at a central location are still covered.

Employer and Employee Requirements

The ETS is not a vaccine mandate. Rather employers are required to adopt a written policy that requires employees to either be vaccinated or, if the employer chooses to allow it, to be tested weekly and wear an appropriate face covering.

This means employers must determine the vaccination status of all its employees. While there are privacy protections for collecting and storing this information, employee objections based on privacy, HIPAA or state and local laws simply do not apply. It is an OSHA requirement and employees must either provide the information or be put into the testing group, if employers are offering that option.

There are specific rules and guidance on how to collect vaccination information, acceptable forms of proof and maintaining privacy. If the ETS goes into effect NAD, through the legal assistance being offered will give more details on these requirements.

For employers who offer testing as an option, the rules are more complicated. First, except in some states that require employers to pay for testing, the employer does not have to pay for the weekly testing, though it may. For church employers not in a state that requires it to pay, the decision on whether to pay or not is one each employer will have to make.

The type of testing that is acceptable is also subject to detailed rules, where again, assistance will be provided. However, self-testing is not an option. Employees will need to go to a testing center, take a monitored test (usually done through video conferencing) or an employer monitored test.

Church employers will have to track this on a weekly basis and make sure that employees timely report the results of the test before showing up for work. Employees who test positive must be isolated pursuant to a detailed set of rules and can return to work based on the same rules. Details on how employers can obtain information for handling employees who test positive are addressed below.

As alluded to earlier, employees who are not vaccinated are required to wear a face covering while at an indoor workplace. There is a limited exception for employees who are in an enclosed office by themselves or while eating or drinking. Employees who are working at home with no other employees around also do not have to wear face covering. Except for the limited “religious services” exemption discussed above (which we believe should include a social distancing requirement), during all other times (including for instance while in the car with other people) a face covering must be worn.

North American Division Support

As stated above, if the legal challenges (both secular and religious based) to this OSHA requirement fail, the church like all other employers will be forced to deal with this requirement. Rather than each conference hiring its own law firm, some of which may not be OSHA specialists, the NAD felt it would be more efficient and cost effective to provide legal guidance collectively. This also avoids conferences collectively paying for the same advice several times over.

This offer of assistance is of course voluntary for denominational employer. If entities want to hire or use their own regular outside counsel, they are free to do so at their own expense of course. The attorneys providing this support will also be happy to work with other outside counsel if the conferences wish to also use them.

To deliver this legal compliance assistance NAD is working with Office of General Counsel, Adventist Risk Management, and union general counsels. Each union has been assigned an attorney as listed on the last page of this memo. Denominational employers in that union should reach out to that attorney to arrange for this assistance. The individual attorneys will then coordinate with you how to best work together. These assigned attorneys have worked together and with the OSHA specialist firm to develop policies and other documents each employer can adapt for its needs.

Frequently Asked Questions

Question: Since pastors are treated as self-employed for Social Security tax purposes, can we claim they are not employees for OSHA purposes and thus not subject to this ETS?

Answer: No. While it is true that for Social Security tax purposes pastors are treated as “self-employed” and thus have to pay both halves of FICA, that is limited to that specific tax. Pastors are considered employees for all other purposes, including OSHA.

Question: What is the employer’s obligation to enforce this rule, especially when pastors and others work remotely and no supervisor is around.

Answer: Employers need to make it clear this is an expectation and communicate to all employees they must follow the rule. Conferences are not required to follow employees around or otherwise increase its surveillance of employees. But it cannot be a “nod and wink” policy. If the conference becomes aware of violations it must act on those in a way designed to remedy that problem.

Question: What is the employer’s liability for failing to comply with the ETS?

Answer: OSHA can assess fines for non-compliance up to \$13,653 for Serious Violations and up to \$136,532 for Willful Violations per instance. In certain states the penalties could be even higher.

Willful Violations are when an employer intentionally disregards a legal requirement. Serious Violations would be failures such as not enforcing the face covering mandate or failure to exclude an employee from workplace who has not tested. A pattern of not doing either of these could be considered a Willful Violation.

In addition, not complying with the rule could also increase the employer's liability if others are infected.

Question: Do I have to report the vaccination status to OSHA or testing results?

Answer: No. There are requirements for record keeping and certain reporting requirements if an employee becomes hospitalized or dies from COVID, but there is not routine reporting requirement. OSHA can inspect an employer and ask for documents including the policies and records kept. The attorney supporting you can give more details.

Question: Do I have to give employees time off to get vaccinated or recover from being vaccinated?

Answer: Yes. There are detailed rules regarding time off both to be vaccinated (up to four hours per dose) and time off to recover if a person experiences side effects. Again, the exact rules your attorney can give guidance on.

Question: Are booster shots required?

Answer: No. Currently "fully vaccinated" does not include having received a booster shot. Either two doses of the vaccines requiring that or a single dose of the vaccines requiring one dose. It is possible that will change in the future, but for now boosters are not required.

Question: How long will all of these be required?

Answer: The current ETS is set to expire in six months. However, OSHA has already started the process to extend that. If it comes into effect, expect that it will be in place for as long as Covid-19 is still a threat.

Question: How do denominational employers access the legal compliance assistance?

Answer: Interested church employers should reach out to the attorney covering their territory or entity as listed on the last page of this memo. These attorneys will work with the leadership and HR personal to come up with a strategy and documents that meet your needs. This will not be a situation where employers are

simply given templates to left to figure out how to make it work for their territory. Rather, they will coordinate with your office to provide custom policies and documents based on the decisions each employing organizations makes.

This assistance is being provided without cost to the employing organizations.

Question: **What are the record keeping and privacy requirements for employee information such as vaccination status, proof of vaccination, and testing results?**

Answer: Long standing OSHA regulations lay out what must be kept in an employee's medical records. These are standards HR professionals should already be familiar with and following. While the ETS has slightly modified some of these requirements, such as shortening the retention time, employers should follow their normal process for OSHA medical records.

In short, these records are to be kept confidential, segregated from other employment records, and made available pursuant to the OSHA regulations. For purposes of segregation and confidentiality the records can be treated the same as FMLA or ADA medical records. For purposes of retention, the term is different and unsettled at this time. Care should be taken in using other record or database software that has not been designed with OSHA medical records in mind.

The attorney assisting you will be able to give information regarding the ETS specific requirements for the information that is to be collected and maintained.

OSHA ETS ATTORNEY ASSISTANCE TEAM

Denominational employers who wish to take advantage of the assistance being offered by the North American Division should contact the attorney assigned to its territory or entity listed below.

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