

# OSHA COVID-19 Emergency Temporary Standard

NOVEMBER 5, 2021



# Manesh K. Rath

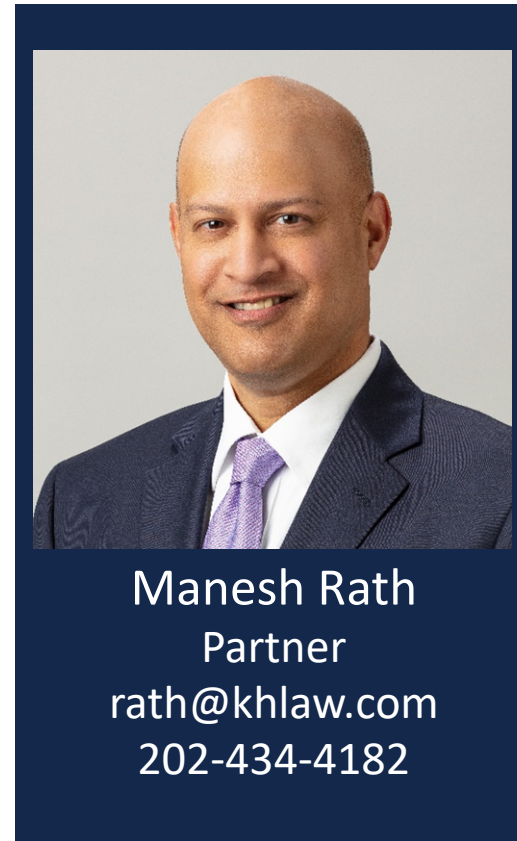


Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. He has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," and C-SPAN.

Mr. Rath currently serves on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. He served on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years.

He was voted by readers to Smart CEO Magazine's Readers' Choice List of Legal Elite; by fellow members to The Best Lawyers in America 2016, 2017 and 2018; selected by Super Lawyers 2016 – 2017, 2017 – 2018; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.



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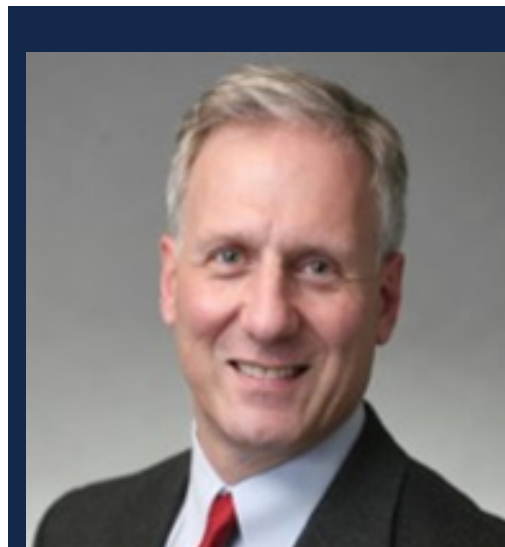
# Lawrence P. Halprin



Lawrence Halprin is nationally recognized for his work in the areas of occupational safety and health and chemical regulation. He represents companies and trade associations at the federal and state levels before the Occupational Safety and Health Administration (OSHA), the US Environmental Protection Agency (EPA), the National Institute for Occupational Safety and Health (NIOSH), and the Alcohol and Tobacco Tax and Trade Bureau. His chemical regulation practice includes: the Globally Harmonized System of Chemical Classification (GHS) and its implementation in the US, Canada and the EU; Prop 65; EPA RMP and OSHA PSM program requirements; TSCA risk assessments; and CERCLA and EPCRA requirements.

Mr. Halprin's engineering and financial backgrounds have been invaluable to his clients in handling enforcement actions, in providing compliance counseling, and in assisting clients in evaluating and responding to agency rulemaking proposals and policy initiatives. He has participated in almost every major OSHA rulemaking initiative over the past 25 years and numerous Cal-OSHA rulemakings.

Mr. Halprin has been a strong advocate of measures to enhance the effectiveness of regulatory agencies and ensure they do not overreach their authority. This is reflected in his testimony before Congress, his participation in agency rulemakings and policy initiatives, as well as litigation he has brought on behalf of clients. Lawrence is a frequent writer and speaker on a broad range of environmental, product stewardship, and health and safety management issues.



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# Taylor D. Johnson



Taylor Johnson is an environmental lawyer specializing in the area of environmental regulation of products, including chemical control, pesticides, energy efficiency regulation, and importantly, domestic and international transportation of hazardous materials. Mr. Johnson also advises clients on community-right-to-know laws, Proposition 65, occupational safety and health matters, and supports a wide variety of commercial tort and other litigation issues.

Mr. Johnson has special expertise in the area of hazardous materials transport, including enforcement defense and compliance counseling. Mr. Johnson helps companies secure competent authority approvals, special permits, and letters of interpretation from regulatory authorities around the world. He has also prepared successful petitions to PHMSA on behalf of shippers seeking regulatory relief.

Prior to joining Keller and Heckman, Mr. Johnson promoted the development of energy and environmental legislation and policy at the state level.



# Javaneh S. Tarter



Javaneh Tarter is an associate in the environmental and workplace safety and health (OSHA) practice groups at Keller and Heckman. Mrs. Tarter practices in all areas of environmental law as well as occupational health and safety law, and chemical control law. She routinely advises clients on a broad range of environmental health and safety compliance issues.

Prior to joining Keller and Heckman, Mrs. Tarter served for three years as Counsel for the American Coatings Association. She provided regulatory compliance and advocacy on a variety of issues on behalf of the coatings industry including TSCA, Prop 65, hazard communication and labeling, state chemical regulation, hazardous waste, air and water quality, occupational health and safety, and chemical safety regulations. She also served as Advocacy Counsel for the Graffiti Resource Council, an organization supported by the aerosol coatings industry that provides anti-graffiti strategies for cities across the country.



# Overview of Today's Briefing:

- ◆ Who is covered in this Rule
- ◆ Requirements of the Rule
- ◆ When must employers comply
- ◆ What can we expect next? Litigation
- ◆ Question and Answer

# Which Employers Are Covered?

- ◆ All employers with 100 employees or more:
  - ◇ Count all employees at all worksites, including those working from home
  - ◇ Part time and full time employees are included
  - ◇ Independent contractors, properly deemed, are not included
  - ◇ Franchisee's employees are not included in corporate's employee count
  - ◇ Temporary and seasonal workers are included if employed at any point while the ETS is in effect
- ◆ Two employers with common management and policies will be counted together
- ◆ Employees of staffing agencies do not count towards the client company

# Which Employers Are Not Covered?

- ◆ Standard does not apply to employers with 99 employees or less
- ◆ Standard does not apply to workplaces covered under the Safer Federal Workforce Task Force Guidance for Federal Contractors and Subcontractors
- ◆ Standard does not apply to any employer who provides healthcare or healthcare support services and is subject to 1910.502 (Healthcare ETS)
- ◆ Standard does not apply to federal agencies, with the exception of the U.S. Postal Service
- ◆ Standard does not apply to State and local governments in states without State Plans



# Which Employees Are Not Covered?

- ◆ Employees are not subject to the standard if they:
  - ◆ Do not report to a workplace where other persons are present
  - ◆ Are working from home
  - ◆ Work exclusively outdoors
  - ◆ Work for federal agencies (excluding the Postal Service)
  - ◆ Work for state and local governments in states without State Plans

# Requirements - Overview



1. Create a written policy requiring vaccination or testing (by 12/5/21)
2. Determine the vaccination status of each employee
3. Provide time and pay for employees to get vaccination & recover
4. Require unvaccinated employees to get weekly testing (by 1/5/22)
5. Employee must notify employer of a positive COVID-19 test
6. Employer must remove workers with positive COVID-19 test
7. Unvaccinated workers must wear face covering (by 12/5/21)
8. Inform employees - policy, vaccine data, 11c rights
9. Self-report COVID-19 fatalities and hospitalizations
10. Maintain and make records available

# Create Written Policy Requiring Vaccination or Weekly Testing

- ◆ Employer must:
  - ◆ Create written policy requiring vaccination  
OR
  - ◆ Create policy allowing employees to choose either to be fully vaccinated OR provide proof of regular testing and wear a face covering
  - ◆ Plan must be readily accessible to all employees – no requirement to submit to OSHA unless requested

# Can an Employee Assert an Exemption?

- ◆ Workers may be entitled to a reasonable accommodation for a vaccination requirement for a disability or sincerely held religious belief
  - ◇ The ETS cites to EEOC Guidance on how to evaluate reasonable requests
- ◆ OSHA does not spell out whether a protected status affects employer duties under this standard re:
  - ◇ Removal from worksite
  - ◇ Paying for weekly testing
- ◆ Employees with vaccine exemption are still subject to weekly testing requirement

# Determine Vaccination Status

- ◆ Employee must provide acceptable proof (scanned copy or photograph is acceptable):
  - ◇ Record of immunization from HCP or pharmacy
  - ◇ Copy of COVID-19 Vaccination Record Card
  - ◇ Copy of medical record
  - ◇ Copy of record from public health, state, or tribal information system
  - ◇ Other official documentation
  - ◇ If employee is unable to provide proof, then a signed statement:
    - Attesting to vaccination status
    - Attesting that documentation is lost or not available
- ◆ Employee who does not provide proof is deemed not fully vaccinated
- ◆ Employer must maintain a roster for vaccination status

# Provide Time and Pay

- ◆ Employer must pay a reasonable amount of time for primary vaccination
  - ◇ Employer must pay up to four hours, including travel time, at regular rate of pay
- ◆ Employer must provide reasonable time and paid sick leave to recover from side effects
- ◆ Employers already required to pay for time off for mandatory medical treatment - DOL states “under the FLSA, employer is required to pay for time spent waiting for and receiving medical attention at employer’s direction or on their premises during normal working hours.”

# Unvaccinated Employees – Weekly Testing

- ◆ Covers any unvaccinated employee who reports to a workplace at least once every seven days where others are present
  - ◇ Must be tested at least once every 7 days
  - ◇ Must provide documentation of test result within 7 days of last test result
- ◆ Employees who do not report to a workplace during a 7-day period:
  - ◇ Must be tested within 7 days prior to returning
  - ◇ Must provide documentation upon return
- ◆ Employer not required to pay for costs of testing (but may be required to pay under anti-discrimination laws)

# What Types of Tests are Acceptable?

- ◆ Tests that are approved by FDA
  - ◇ Must be a test for presence of virus not antibodies
- ◆ Can be a test where specimen is processed at a lab (including home-testing kits and pooled specimens)
- ◆ Proctored over-the-counter tests are acceptable
- ◆ Tests at point-of-care sites are acceptable
- ◆ Tests where both specimen collection and processing is done or observed by employer is acceptable
- ◆ Tests can't be self-administered and self-read. Employer or healthcare provider (a telehealth provider is sufficient) must observe reading



# How Should Employers Handle Adverse Reactions to the Vaccine?

- ◆ Under most state laws, an adverse reaction would be covered by workers' compensation
- ◆ OSHA initially required employers to record adverse reactions to mandatory vaccines but reversed that policy, stating that "OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination and also does not wish to disincentivize employers' vaccination efforts."
- ◆ Employer can require employee use accrued paid sick leave to recover from adverse reactions

# Employee Notification

- ◆ Applies regardless of vaccination status
- ◆ Employer must require employees to notify employer when they receive a positive test or diagnosis
- ◆ Employer must remove employee until employee receives a negative test result or clearance from doctor or per CDC guidance
- ◆ ETS does not require employers to provide paid time off for removed employees
- ◆ Employer can require removed employee to work remotely

# Unvaccinated Workers Must Wear Face Cover



- ◆ Employees not fully vaccinated must wear a face covering:
  - ◇ When indoors or in vehicle with other persons
  - ◇ Not when alone in a room with closed door
  - ◇ Not when eating or drinking
  - ◇ Not while wearing a respirator or facemask
  - ◇ Not where face covering creates a greater hazard or work requires an uncovered mouth
- ◆ Employer must monitor for compliance and proper use
- ◆ Employer may not prohibit customers or visitors from wearing face coverings
- ◆ Face covering is in tandem with weekly test results

# Duty to Inform Employees

- ◆ No specified frequency with which employers must provide information about the OSHA COVID-19 ETS to employees
- ◆ Flexibility regarding manner of providing information
- ◆ Inform employees about employer's policy
- ◆ Vaccine efficacy, benefits, safety
- ◆ Section 11(c) OSH Act rights

# Employer's Duty to Self-Report

- ◆ Fatalities – within 8 hours of employer learning
- ◆ Hospitalization – within 24 hours of employer learning of in-patient hospitalization
- ◆ Fatality or hospitalization needs to be work-related to trigger reporting requirements (see OSHA's recordkeeping regulation at 29 CFR 1904.5 for determining work-relatedness)
- ◆ Report by telephone to OSHA or use electronic submission on [osha.gov](https://www.osha.gov)

# Availability of Records

- ◆ Individual employee can request to examine and copy his or her own vaccination or test result documentation
  - ◇ Employer must comply by the end of the next business day
- ◆ Employee or employee representative may request, by end of next business day, aggregate number of fully vaccinated employees and total number of employees in that workplace
- ◆ Secretary may examine and copy within four business days the written policy and by the end of the next business day all other documents in this standard

# When Must Employers Come into Compliance?



- ◆ Effective date in the *Federal Register* is date of publication- 11/5/21
- ◆ All provisions except for weekly testing – 12/5/21
- ◆ Weekly testing – 1/4/22
- ◆ OSHA anticipates that the ETS will be in effect for six months from the date of publication in the Federal Register
- ◆ 30-day public comment period

# Are States and Others Planning to File Suit?

- ◆ State plans – healthcare ETS, OSHA notice to revoke
- ◆ Arizona lawsuit – Dist. of Arizona
- ◆ Daily Wire – 6<sup>th</sup> Circuit
- ◆ 20+ governors public statement of intent to sue
- ◆ Elements of a stay
  - Likelihood of success on the merits
  - Irreparable harm if there is no stay
  - Balancing equities and hardships
  - Public interest
- Stay versus suit on the merits



# Comments

- ◆ This ETS is also a notice calling for comments
- ◆ 30 days
- ◆ Final rule should be a logical outcome of a proposed rule



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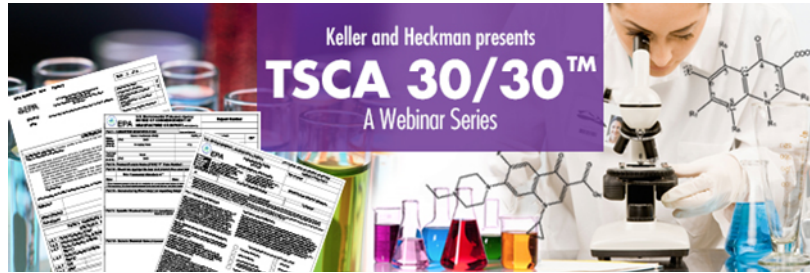


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Thank You.  
We'll take a few questions.