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# COVID-19 Vaccine Mandates and the Transportation Industry December 2, 2021

Blair Cash

[blair.cash@momarlaw.com](mailto:blair.cash@momarlaw.com)

404-432-3121 (cell)  
470-480-7258 (direct)

Megan Early-Soppa

[megan.early@momarlaw.com](mailto:megan.early@momarlaw.com)

864-616-3366 (cell)  
864-248-6028 (direct)

# Background Information

- ▶ 50% Vaccination rate for drivers
- ▶ Mortality rates and infection rates below – well below – population averages
- ▶ Up to 37% of driver workforce at covered employers may quit or move to smaller carrier/ go independent
  - SOURCE: ATA

# OSHA Emergency Temporary Standard (ETS)

- ▶ Goal: Minimize risk of COVID-19 transmission in the workplace
- ▶ More than 100 employees
- ▶ Requirements:
  - Employers must “develop, implement, and enforce a mandatory COVID-19 vaccination policy”
  - Determine vaccination status of each employee
  - Keep Record of Employee Vaccination Status
  - Support vaccination – 4 hours PTO + recovery
  - Vaccination or Weekly Testing + Face Coverings
  - “Remove” non-complying employees
  - Fines

# OSHA Emergency Temporary Standard (ETS)

## ▶ Exceptions

- Employees who do not report to a workplace where other individuals are present
- Employees while working from home
- Employees who work exclusively outdoors
- *De Minimis* use of indoor spaces (multi-stall restrooms and admin offices)

## ▶ Timing

- Deadline: December 6, 2021 → January 4, 2022
- Time Limit: 6 Months

## ▶ BUT...

# Legal Action

- ▶ 5<sup>th</sup> Circuit
- ▶ Temporary Stay
- ▶ Stay Upheld
- ▶ Comments of Note:
  - Overinclusive and Underinclusive
  - “All else equal, a 28 year-old trucker spending the bulk of his workday in the solitude of his cab is simply less vulnerable to COVID-19 than a 62 year-old prison janitor.”

# Legal Action Cont.

- ▶ Consolidated in 6<sup>th</sup> Circuit
- ▶ Motions Deadlines
  - Key Date: December 10
- ▶ Potential *En Banc* (full court) Hearing
- ▶ Eventually, Supreme Court
- ▶ Unlikely Allies – Unions
- ▶ Comment Period Still Open – Closes January 19, 2022


# Application in Transportation

- ▶ Drivers
  - DOL comments – drivers exempt
- ▶ Contractors
- ▶ “Likely” Covered
  - Team drivers from separate households
  - Loading Dock / Warehouse Employees
  - Mechanics
  - Management and Administrative Staff
  - Dispatchers

# Should Employers Keep Preparing for ETS?



# FAQs

- ▶ Are off-site workers counted towards the 100-employee threshold?
    - Yes
  - ▶ Is it 100 employees company-wide or per location?
    - Company-wide
  - ▶ Are independent contractors counted?
    - No
  - ▶ Are part-time employees counted?
    - Yes
- 

# FAQs Continued

- ▶ Who is responsible for contractor employees?
  - Contractor
- ▶ Are partial mandatory vaccination policies allowed?
  - Yes, but careful
- ▶ Are booster shots required to be considered “fully vaccinated” under the ETS?
  - No
- ▶ Can I require employees to use personal or sick time to get vaccinated?
  - No

# Questions?





Blair Cash  
Moseley Marcinak Law Group, LLP  
PO Box 1688  
Kennesaw, GA 30156  
[blair.cash@momarlaw.com](mailto:blair.cash@momarlaw.com)  
404-432-3121 (cell)  
470-480-7258 (direct)



Megan Early-Soppa  
Moseley Marcinak Law Group, LLP  
PO Box 26148  
Greenville, SC 29616  
[megan.early@momarlaw.com](mailto:megan.early@momarlaw.com)  
864-616-3366 (cell)  
864- 248-6028 (direct)