



# OSHA's COVID-19 Vaccination, Testing, and Face Coverings Emergency Rule

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**November 5, 2021**

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## Conn Maciel Carey LLP's COVID-19 Task Force

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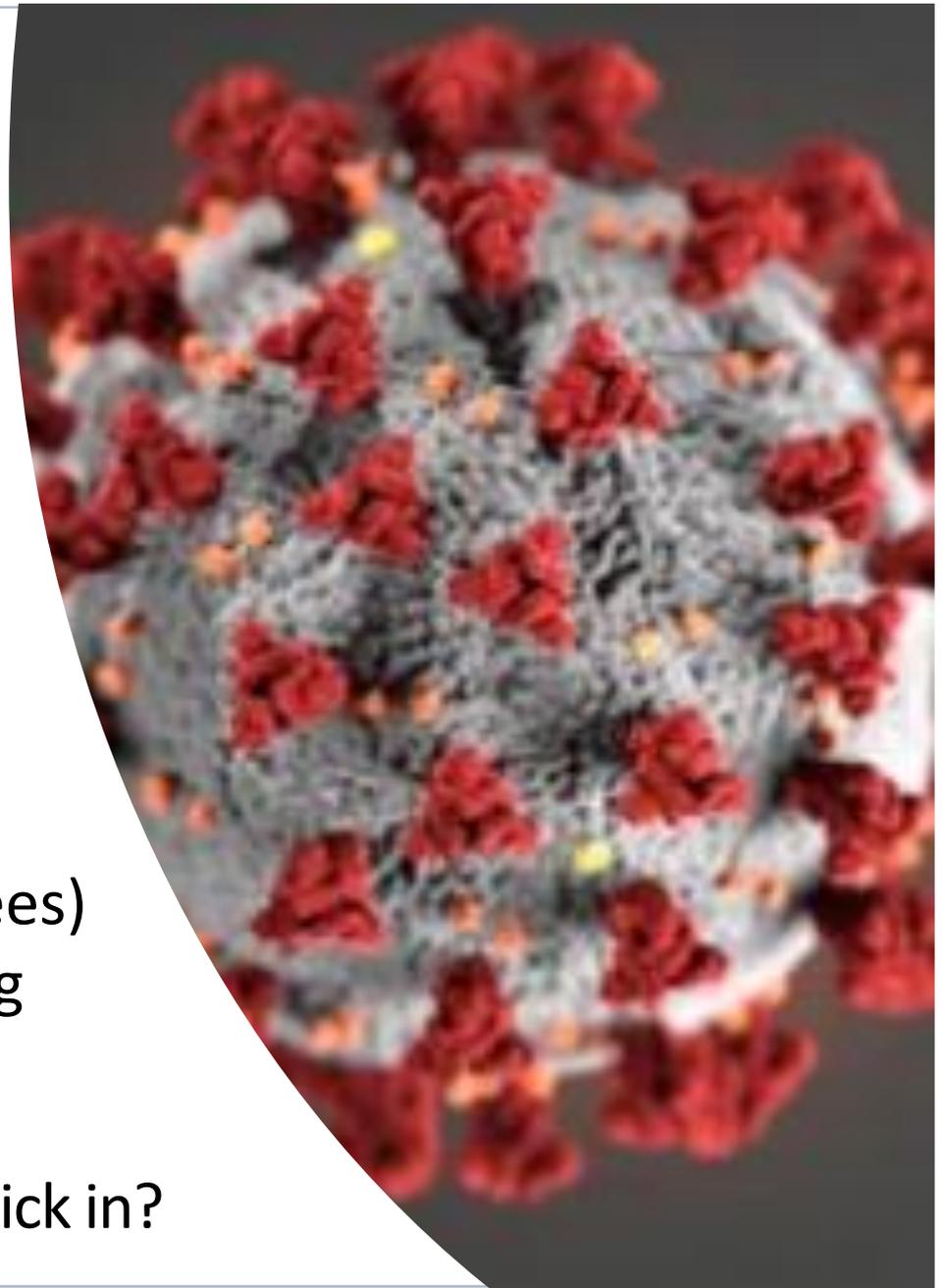
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**ERIC J. CONN** is Chair of the OSHA • Workplace Safety Practice Group at **Conn Maciel Carey**, where he focuses his practice on all aspects of occupational safety & health law:

- Represents employers in inspections, investigations & enforcement actions involving OSHA, CSB, MSHA, & EPA
- Responds to and manages investigations of catastrophic industrial, construction, and manufacturing workplace accidents, including explosions and chemical releases
- Handles all aspects of OSHA litigation, from criminal prosecutions to appeals of citations
- Writes and speaks regularly on safety and health law issues
- OSHA Co-Chair of the firm's COVID-19 Task Force

# Agenda

- What does OSHA's new COVID-19 Vaccination, Testing, and Face Coverings ETS require?
- Which employers are covered by OSHA's ETS?
- Who (employer or employees) is required to pay for testing for unvaccinated workers?
- When do the requirements kick in?





# **Path out of the Pandemic: President Biden's COVID-19 Action Plan**

# President's Path Out of the Pandemic

Sept. 9<sup>th</sup> – President Biden introduced his 6-prong plan to combat COVID-19 through the Fall of 2021

## 1. Vaccinate the unvaccinated

2. Improve care for those infected w/ COVID-19

3. Protect vaccinated from unvaccinated

4. Boost testing and mask requirements

5. Keep schools safely open

6. Protect economic recovery

# Vaccinating the Unvaccinated

1. “Hard” vaccine mandate at healthcare facilities that receive Medicare/Medicaid reimbursement
2. Hard vaccine mandate for educators in fed Head Start programs
3. Encourage entertainment venues to require proof of vaccination or test
4. “Hard” vaccine mandate for federal contractors
5. **“Soft” vaccine or testing mandate for employers w/ 100+ employees via another OSHA COVID-19 Emergency Temporary Standard**



# Timeline for ETS Rulemaking

<b>Sept. 9</b>	Biden directs OSHA to issue an ETS on vaccination and testing
<b>Oct. 13</b>	OSHA delivers proposed final ETS to White House Office of Management and Budget
<b>Oct. 25</b>	Doug Parker confirmed as Pres. Biden's Head of OSHA
<b>Oct. 13-29</b>	OMB held 130 EO 12866 meetings to hear stakeholder input
<b>Nov. 1</b>	OMB "Concluded" its review of the proposed ETS
<b>Nov. 5</b>	Final ETS published in the Federal Register
<b>Nov. 5-Dec. 4</b>	Post-issuance notice-and-comment period
<b>May 4, 2022</b>	ETS expires or replaced by a permanent rule (6 mos.)

# 6 Core Requirements of the ETS

1. Provide up to 4 hours **PTO** for employees to get vaccinated per dose
  - Applies only to vaccinations after effective date of the ETS
  - Applies only to vaccinations received during work hours
  - Does NOT apply to booster shots
  - Includes travel time, but NOT travel costs (e.g., gas, train/bus fare)
  - Time paid at employee's regular rate of pay
  - May not be offset by any other leave employee has accrued
  - Includes time spent during work hours:
    - Making vaccine appointments and completing related paperwork
    - Traveling to and from vaccine sites
    - Waiting to and getting vaccinated, and post-vaccination monitoring

# 6 Core Requirements of the ETS

## 2. Provide “reasonable” time off and paid sick leave to recover from ill effects of vaccination

- Does not apply retroactively to vaccinations received pre-ETS
- Does NOT apply to booster shots
- Employers may set a cap, but the cap must be reasonable:  
*“CDC notes that...side effects, if experienced, should go away in a few days. Generally, OSHA presumes that if an employer makes available up to 2 days of paid sick leave per...dose [that] would be in-compliance....”*
- NOT expected to cover unlikely prolonged illness (e.g., severe allergic rx)
- May require employee to use already-accrued paid sick or generic leave, but not vacation or other specific non-sick leave
- May not require employee to borrow against future paid sick leave

## 6 Core Requirements of the ETS

3. Implement a **soft-vaccine mandate**, under which employees may only report to the workplace after demonstrating:
  - Proof they are fully vaccinated; OR
  - For unvaccinated employees, weekly proof of a negative COVID test
4. Require **unvaccinated employees to properly wear a face covering**
  - Worn at all times indoors or in a vehicle w/ another person for work
  - Does not apply when:
    - Alone in a room w/ floor to ceiling walls and a closed door
    - For brief periods while the employee is eating or drinking
    - For ID purposes in compliance w/ safety and security requirements
    - Where a face covering is infeasible or creates a greater hazard

# 6 Core Requirements of the ETS

## 5. Require employees to provide prompt notice of a COVID positive case and immediately remove them from the workplace

- Keep them out of the workplace until:

- Negative PCR test after positive antigen test;
- Meets CDC’s return-to-work criteria; or
- Healthcare provider recommends return-to-work

- NO requirement to provide PTO for isolation (unless by other laws or a CBA)

*I think or know I had COVID-19, and I had symptoms*

*You can be around others after:*

- 10 days since symptoms first appeared **and**
- 24 hours with no fever without the use of fever-reducing medications **and**
- Other symptoms of COVID-19 are improving\*

*\*Loss of taste and smell may persist for weeks or months after recovery and need not delay the end of isolation*

*Note that these recommendations **do not** apply to people with severe COVID-19 or with weakened immune systems (immunocompromised).*

*I tested positive for COVID-19 but had no symptoms*

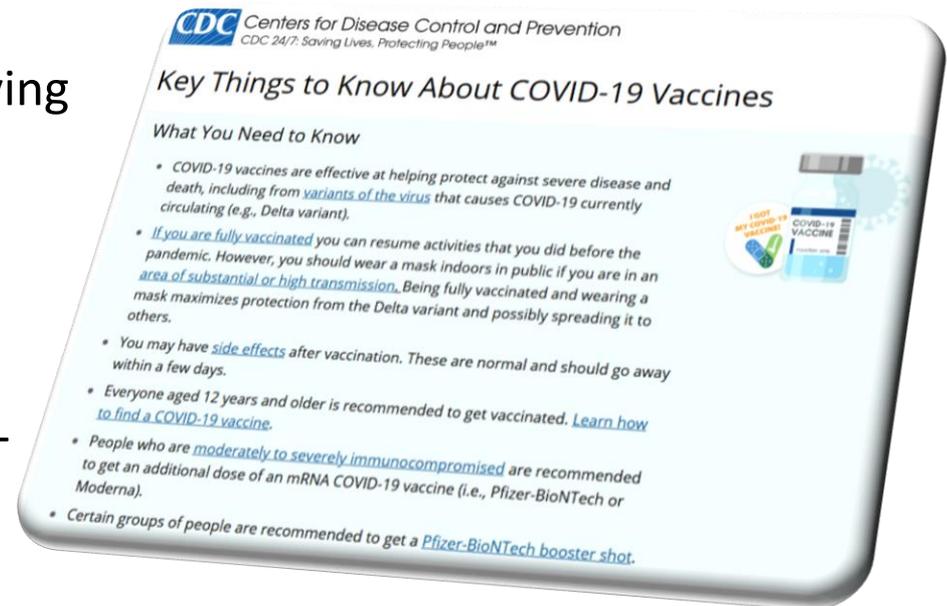
*If you continue to have no symptoms, you can be with others after 10 days have passed since you had a positive viral test for COVID-19.*

*If you develop symptoms after testing positive, follow the guidance above for "I think or know I had COVID-19, and I had symptoms."*

# 6 Core Requirements of the ETS

## 6. Provide information to employees about the ETS:

- Info to be provided to employees includes:
  - Requirements of this ETS and employer’s policies to implement it
  - Vaccine efficacy, safety, and benefits (provide CDC’s [Key Things to Know About COVID-19 Vaccines](#))
  - Penalties for knowingly supplying false statements/documents
  - Anti-retaliation requirements
- Not a “training” requirement
- Flexible how to communicate—any method employees can receive and understand the info (e.g., email, printed fact sheets, or discussion at a meeting)



# ETS Compliance Timeline

Employer Requirement	Compliance Deadline
Written Vaccination Policy	December 5, 2021
Begin Providing PTO for Time Getting Vaccinated	December 5, 2021
Begin Providing PTO for Ill Effects of Vaccination	December 5, 2021
Removal from Workplace of COVID-19 Positive Cases	December 5, 2021
Face Coverings for Unvaccinated Employees	December 5, 2021
Confirm Vaccination Status of Workforce	December 5 , 2021
Begin Testing Mandate (verify weekly negative test to report to work)	By January 4, 2022

# Who Is Covered?

Employers w/ 100 or more employees in most industries

- Employee count is on a company-wide basis
  - Includes part-time, seasonal, and all other employees hired directly by employer regardless of work location (e.g., home-based, outdoors, etc.)
  - Does NOT include temp workers from a staffing agency assigned or independent contractors
- Each employer on multi-employer worksites to count only their own employees to determine ETS coverage
- The employee count is based on the # of employees as of effective date of ETS (11/5/21) or any date thereafter when the employee count increases to 100 (including seasonal hires)
- Once threshold is met, employer is covered for the life of the ETS

# Who Is NOT Covered by the ETS?

- Although included in the employee-count to determine coverage, the substantive requirements of the ETS do NOT apply to:
  - Workplaces covered by OSHA’s COVID-19 ETS for healthcare (while it remains in effect – only until mid-December ‘21)
  - Workplaces covered by vaccine-mandates for fed contractors
  - Employees who do not report to a workplace where other individuals are present (co-workers or public)
  - Employees who work from home
  - Employees who work outdoors



# Who Pays for Testing?

- **NOT** employers
  - The ETS explicitly states that it “does not require the employer to pay for any costs associated with testing”
- **Exception:** Employer payment for testing *may be* required by other laws, regs, or collective bargaining
  - e.g., if testing is provided as an *accommodation* (for medical or sincerely-held religious belief), the employer is likely responsible for costs under ADA/Title VII
- ETS does not prohibit employers from paying costs associated w/ testing if they choose

# Why Do Employees Have to Pay?

- Pres. Biden: *“We’ve made vaccinations free, safe and convenient. The vaccine is FDA approved. Over 200M Americans have gotten at least one shot. **We’ve been patient, but our patience is wearing thin. Your refusal [to get vaccinated] has cost all of us.**”*
- ETS Preamble: *“COVID-19 testing is only required under the ETS where an employee has made an individual choice to forgo [free] vaccination and pursue a less protective option.... OSHA intends for this ETS to strongly encourage vaccination, so requiring employers to bear the costs of COVID-19 testing would be counter-productive.... Because employees who choose to remain unvaccinated will generally be required to pay for their own COVID testing, this standard creates a financial incentive for those employees to become fully vaccinated and avoid that cost.”*

# Definition of “Fully Vaccinated”

- Person’s status two weeks after completing the final dose of a COVID-19 vaccine w/ at least the min. recommended interval b/n doses in accordance w/ the approval, authorization, or listing that is:
  - A. Approved or authorized for emergency use **by the FDA**;
  - B. Listed for emergency use **by the World Health Organization**; or
  - C. Administered as part of a confirmed **clinical trial at a U.S. site, if the recipient was an “active” (not placebo) COVID-19 vaccine candidate**
- Permits mixing of approved vaccines
- Does NOT include a booster for any category of employee



# Definition of “Face Covering”

Face covering means a covering that:

- Completely covers the nose and mouth
- Is made with **2 or more layers** of tightly woven breathable fabric (does not let light pass through when held up to a light source)
- Is secured to the head with ties, ear loops, or elastic bands
- Gaiters are permitted if they have 2 fabric layers or are folded into 2 layers
- Fits snugly over the nose, mouth, and chin w/ no large gaps on the sides
- Is a solid piece of material ***without slits, exhalation valves, visible holes, punctures, or other openings***

# Face Coverings

- Employers may not prevent employees from voluntarily wearing a face covering (unless the covering would create a serious hazard)
- Employers must permit employees to voluntarily wear a respirator
- Employers may not bar customers / visitors from wearing face coverings
- Face shields may be worn in addition to face coverings
- ***Employers are NOT required to pay any costs associated w/ face coverings***
  - Unless required by other laws, regulations, or collective bargaining
  - ETS does not prohibit employers from paying for face coverings



# Does the ETS Recognize “Natural Immunity”?

- ETS on “Natural immunity” = The immune response of an individual previously infected with COVID-19
- No blanket exemption to vaccination or testing based on “natural immunity” or the presence of antibodies from prior infection
- EXCEPT: An employee w/ a confirmed COVID-19 case w/in the past 90 days is not required to undergo weekly testing to report to work
- *“While the agency acknowledges that the science is evolving, OSHA finds that there is insufficient evidence to allow the agency to consider infection-acquired immunity to allay the grave danger of exposure to, and reinfection from, SARS-CoV-2.”*

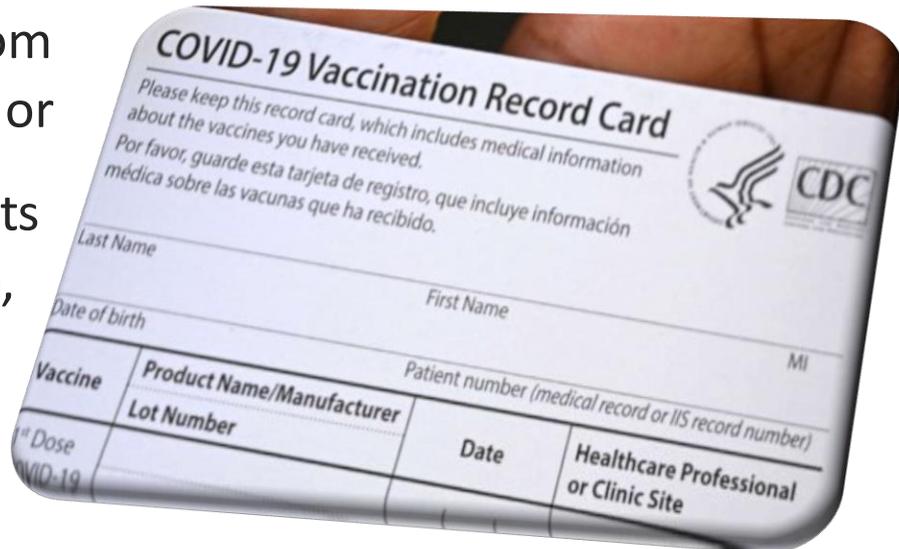
# Types of Testing

- ETS defines “COVID-19 test” as any form of test for COVID-19 that is:
  - i. FDA cleared, approved, or authorized, including in an EUA, to detect current infection with the SARS-CoV-2 virus (e.g., a viral test)
  - ii. Administered in accordance with the authorized instructions; and
  - iii. Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.
- Examples of tests that comply include tests:
  - W/ specimens collected at home or on-site but processed by a lab
  - Proctored over-the-counter
  - Performed at a point of care
  - Where collection and processing is either done or observed by employer
- Antibody test not used to diagnose active infection ≠ acceptable

# Documenting Vaccination Status

Employees must provide “acceptable proof” of vaccination status:

1. Copy of the COVID-19 Vaccination Card;
2. Record of immunization from healthcare provider or pharmacy;
3. Copy of medical records documenting vaccination;
4. Copy of immunization records from health dept. information system; or
5. Any other official document that lists type of vaccine, dates of vaccination, and ID of healthcare professional or site administering the vaccine



Employers must maintain proof documentation and a roster of each employee’s vaccination status

# What About Self-Attestation?

If employee cannot produce “acceptable proof” of vaccination, employee can self-attest to status in a signed and dated statement that includes:

1. Attestation of vaccination status
2. Attestation they have lost or otherwise are unable to produce proof
3. The employee’s best recollection of the type of vaccine, dates of vaccination, and the ID of healthcare provider or site administering the vaccines
4. *“I declare that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.”*

Grandfathering prior verification –

- If an employer collected employees’ vaccination status in any form prior to the ETS effective date, and retained records of that, the employer is exempt from the specific verification requirements of the new ETS for those employees

# Documenting Test Results

- Employers must prepare policy outlining specifically:
  - How testing will be conducted (e.g., testing provided by the employer at the workplace, employees independently scheduling tests at point-of-care locations, employee self-administering but employer observing, etc.)
  - How employees will communicate test results to the employer (e.g. online portal, directly to human resources department)
  - How employers will verify and document test results

# Documenting Test Results

- Employers must maintain records of employee COVID testing, and employers must determine an effective method to verify the results
- Records of testing must include:
  1. Employee ID (i.e., full name + at least another identifier, such as DOB)
  2. Date of test sample collection
  3. Type of test
  4. Entity issuing the result (e.g., lab, healthcare entity)
  5. Test result
- Employees **CANNOT** self-administer and self-report test results
- Employers may verify results by reliance on healthcare provider to conduct test, or requiring employee to conduct the test and read results under the observation of an authorized employee or telehealth proctor

# Record Preservation Requirements

- Proof of vaccination, vaccination status rosters, and test records are considered employee medical records under 29 CFR 1910.1020 (OSHA's Access to Employee Medical Records regulation)
- **However**, the ETS exempts these records from the 30+ record preservation requirement of medical record requirements.
- Rather, records to comply with the soft vaccine mandate:
  - Must be protected as confidential records (not in employee personnel files)
  - Need only to be retained during the term of the ETS
  - Vaccination “Roster” must be produced to OSHA w/in 4 hours of request
  - Documentation of proof of vaccination and testing must be produced upon request to OSHA by the end of the next business

# Reporting COVID-19 Cases

- Must report *all* work-related COVID-19 fatalities w/in 8 hours of learning of reportable case
  - *Not* limited to deaths that occur w/in 30 days of exposure
- Must report *all* work-related COVID-19 in-patient hospitalizations w/in 24 hrs of learning of hospitalization
  - *Not* limited to hospital admissions that occur w/in 24 hrs of exposure
- When reporting COVID-19 related in-patient hospitalizations or deaths, follow all other provisions of 1904.39



# Religious Exemptions/Accommodations

## 10/23 Updated EEOC Guidance:

- Ordinarily presume requests for religious accommodation are based on sincerely held religious belief, but may now ask for explanation how employees' religious belief conflicts w/ vaccine-requirement
- Does NOT cover request based on political or social reasons
- Factors that may undermine employees' credibility include:
  - Prior conduct inconsistent w/ professed belief;
  - Timing is suspect (e.g., follows prior request for secular reasons); and
  - Other reasons to believe the request is not religious-based
- Accommodate unless undue hardship (“more than *de minimis* cost”)
  - Monetary costs AND burden on employer's business, including risk of spread of COVID-19 to co-workers or the public

# What Will Happen in the States?

In the run up to this ETS, we have seen:

- Texas Governor Abbott issued an Executive Order expressly intended to stymie fed efforts to mandate vaccinations
- 24 State Attorneys General forecast intent to challenge federal vaccine-mandates (federal contractors and OSHA ETS)
- 19 State AGs have now officially filed legal challenges; and
- South Carolina governor threatened that SC OSHA would not adopt a vaccination and testing ETS, and would actually issue one antithetical to the federal rule.

# What Will Happen in the States?

The White House and OSHA are flexing their muscles back:

- Safer Federal Workforce FAQ: *“The [EO] is promulgated pursuant to Fed law and supersedes any contrary State or local law or ordinance.”*
- DOL sent letters to SC, AZ and UT informing them fed OSHA has begun to rescind the states’ jurisdiction to operate a State Plan b/c they had not adopted the prior COVID-19 ETS for healthcare
- ETS explains *“OSHA’s intention that the ETS address comprehensively the occupational health issues of vaccination, face coverings, and testing for COVID-19, and thus the ETS is intended to preempt States...from adopting workplace requirements relating to these issues.... In particular, OSHA intends to preempt any State or local requirements that ban or limit an employer’s authority to require vaccination, face covering, or testing.”*

# Conn Maciel Carey COVID-19 Task Force Resources

## COVID-19 TASK FORCE

As employers around the country grapple with the employment law and workplace safety implications of the 2019 Novel Coronavirus, "COVID-19," Conn Maciel Carey has formed a multi-disciplinary legal and regulatory task force comprised of our dedicated Workplace Safety, Labor and Employment Law, and Litigation attorneys to help our clients across all industries manage the multitude of pandemic-related issues employers are facing and prepare for potential litigation that is around the corner. We have produced a comprehensive database of resources to guide employers through this uncharted territory and the unique workplace challenges presented by the presence of a new health hazard in our nation's workplaces.

### Members of CMC's COVID-19 Task Force

Eric J. Conn OSHA Chair	Kara M. Maciel Labor and Employment Chair	Bryan A. Carey Partner	Nicholas W. Scala MSHA Chair
Kate M. McMahon OSHA Partner	Jordan B. Schwartz Labor and Employment Partner	Andrew J. Sommer Cal/OSHA and Employment Partner	Aaron R. Gelb OSHA and Employment Partner
Amanda Strainis-Walker OSHA Partner	Mark M. Trapp Labor and Employment Partner	Lindsay A. DiSalvo Associate	Megan S. Shaked Associate



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### COVID-19 FAQs for Employers

As the COVID-19 Pandemic continues to evolve, we have created an [extensive index of frequently asked questions](#) about HR, employment, and MSHA/OSHA related regulatory developments and guidance from federal agencies and the CDC. Conn Maciel Carey's COVID-19 Task Force will be updating our list of FAQs frequently, but please reach out to us for the most up to date information.



COVID-19 FAQs for Employers

- Employee Layoffs & Reduced Working Schedules
- The CARES Act
- Vacation, Paid Time Off & Sick Leave
- OSHA Recordkeeping and Reporting of COVID-19 Cases
- Temperature Checks for Employees
- Personal Protective Equipment
- Preventing Exposure in the Workplace
- Annual Physical Requirements
- Space Restrictions in Retail
- On-Site Inspection Activities
- Employer-Employee Confidentiality
- Emergency Infectious Disease Rule / NEP
- Offer Letters & Flexible Start Dates
- Employer Liability

### COVID-19 OSHA Recordkeeping and Reporting Resource Guide

CMC's COVID-19 Task Force has prepared a series of resources to assist employers in assessing whether a COVID-19 diagnosis for one of its employees is reportable to OSHA and/or recordable on the company's OSHA 300 Log, and if so, "how to" record it on the log. The toolkit includes a COVID-19 OSHA Reporting Flow Chart, a COVID-19 OSHA Recording Flow Chart, a one-pager on "How to record" COVID-19 cases on the log, and a detailed "Work-Relatedness Questionnaire." For more information about the OSHA recordkeeping and reporting implications of COVID-19, [read this detailed article](#).



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