

Employment & Labor Law Alert

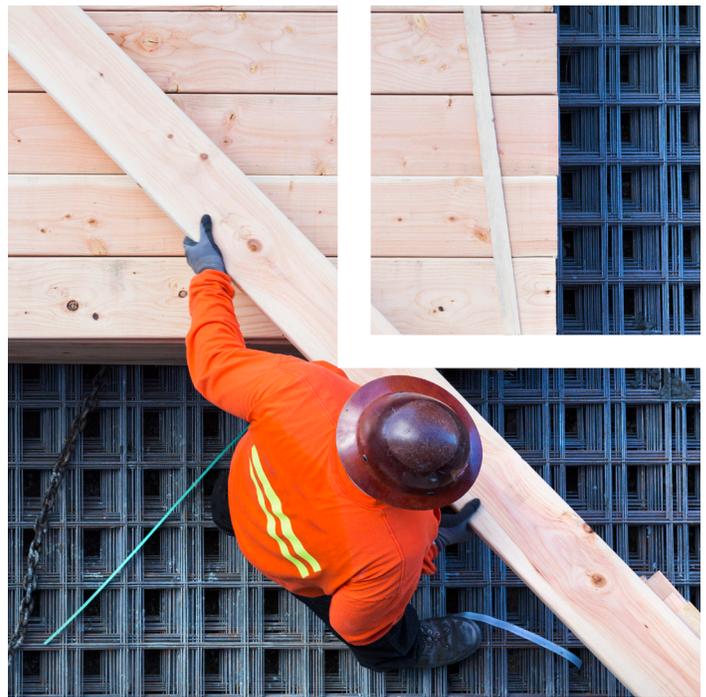
November 2021

OSHA Emergency Temporary Standard On Pause (At Least for Now): What Employers Need to Know About the COVID-19 Vaccine and Testing Mandate and What to Do During 'Limbo'

Updated Dec. 28, 2021: The U.S. Supreme Court issued an order Dec. 22 setting oral argument on the applications to stay OSHA's ETS for Jan. 7, 2022.

Updated Dec. 20, 2021: A split Sixth U.S. Circuit Court of Appeals panel has reinstated the mandate requiring companies with at least 100 employees to require COVID-19 vaccinations or weekly tests. In the 2-1 decision, published Dec. 17, the court found that the Occupational Safety and Health Administration's (OSHA) determination that the pandemic is an emergency situation justified the emergency temporary standard (ETS). The court also set a new effective date of Jan. 4, 2022. The ETS was the subject of numerous legal challenges in courts across the country. After a Fifth Circuit panel put the mandate on hold in November, the U.S. Judicial Panel on Multidistrict Litigation used a lottery to determine that the Sixth Circuit would preside over all lawsuits related to the mandate. The decision by the Sixth Circuit applies nationwide, barring any action by the U.S. Supreme Court.

In a statement following the ruling, the U.S. Department of Labor indicated that it will give employers some latitude in getting their programs up to speed. "To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient



time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance."

It is a matter of when, not whether, the Supreme Court will weigh in on the ETS. Several parties have filed emergency applications with the Court for an immediate stay of the ETS. Justice Brett Kavanaugh, who is assigned to hear petitions from the Sixth Circuit, may grant the applications and stay the ETS pending review of the entire Court, may refer the applications to the full Court, or may take no action pending review of the applications by the Court.

While we don't have a crystal ball at our disposal to predict the Court's actions, given the resources required for employers to implement the ETS, it seems likely that the Court will take at least some action before Jan. 10, 2022.

Attorney Advertising



LOS ANGELES
NEW YORK
CHICAGO
NASHVILLE

WASHINGTON, DC
SAN FRANCISCO
BEIJING
HONG KONG

loeb.com

Executive Summary

The Occupational Safety and Health Administration (OSHA) introduced sweeping rules on Nov. 4, including vaccination and testing mandates for employers with at least 100 employees, as part of the Biden administration's [comprehensive action plan "Path Out of the Pandemic"](#), announced in September. OSHA's new requirements impose significant responsibilities on employers. The emergency temporary standard (ETS) requirements, which are set forth below, are currently stayed following a Fifth Circuit decision that put the brakes on nationwide implementation.

Nevertheless, given the deadlines in the ETS, as well as the operational hurdles it may pose to employers that may not have policies and processes at the ready to meet those standards (if and when they come into effect), it would be prudent for all employers to decide, from an organizational perspective, whether they wish to adopt a mandatory vaccination program, or alternatively, a vax-or-test "hybrid" approach, "as if" the ETS were to go into effect and conduct a gap analysis with existing policies; continue to collect vaccination information and maintain a roster of the employee population in compliance with applicable state law; and be mindful of the mask requirements set forth in the ETS and perform a gap analysis of their current policies. Employers should certainly continue to monitor this space for additional developments out of the Fifth Circuit and other jurisdictions.

Covered Employers

Private employers with 100 or more employees firm- or corporate-wide—roughly two-thirds of all private-sector employers—any time the ETS is in effect.

These employers are under OSHA's authority and jurisdiction, and OSHA believes these employers have the administrative capacity to promptly implement the ETS requirements. This includes employees working in the largest facilities, where the most deadly outbreaks of COVID-19 can occur.

- An employer with 100 or more employees as of Nov. 5, 2021, the effective date of the ETS, is covered, regardless of whether the number of employees later falls below 100.

- An employer with fewer than 100 employees as of Nov. 5 will later come under the ETS if/when it hits the 100-employee coverage threshold.
- The 100 number includes all personnel (full-time, part-time, temporary and seasonal) directly employed by the employer across all of a given employer's U.S. workplaces and locations, regardless of employees' vaccination status or where they perform their work. Employees who are not required to comply with the mandate are still counted for the purposes of determining whether the employer meets the 100-employee threshold.
- Independent contractors and personnel employed through staffing agencies are excluded from the employee count.
- In its guidance, OSHA did not specifically address how to treat related companies. Instead, the guidance simply says, "The count should be done at the employer level (firm- or corporate-wide)," and refers to counting employees at all the work locations "for a single corporate entity." In the absence of further agency guidance, the "single-employer analysis" would likely govern, considering the following factors: (1) the interrelation of operations, (2) common ownership and financial control, (3) common management, and (4) centralized labor relations and personnel.

State and local-government employers in states with OSHA-approved state plans are also subject to the ETS.

Covered Employers' Excluded Employees

- Employees who do not report to a workplace where other individuals, such as coworkers or customers, are present.
- Employees while they are working from home.
- Employees who work exclusively outdoors on all days: (1) the employee must not routinely occupy vehicles with other employees as part of work duties (i.e., the employees do not drive together to work sites in a company vehicle); (2) the employee must work outdoors for the duration of every workday except for de minimis use of indoor spaces where other individuals may be present (e.g., multi-stall bathroom or administrative office); and (3) the employee's work must truly occur "outdoors," which does not include buildings under construction where substantial portions of the structure are in place.

Excluded Employers

- Workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety Guidance for Federal Contractors and Subcontractors. OSHA notes that these employees are already covered by the same protections as in the ETS.
- Settings where any employee provides health care services or health care support services that are subject to the requirements of the Health care ETS (Sec. 1910.502).
- Workplaces of employers that have fewer than 100 employees in total. OSHA says it needs “additional time” to assess the capacity of smaller employers and is currently seeking comment to make that determination.
- Public employers in states without OSHA-approved state plans.

Key Dates for Covered Employers

Currently, OSHA anticipates that the ETS will be in effect for six months, subject to continued monitoring of COVID-19 grave danger.

- **Dec. 5, 2021** (30 days after the ETS effective date): Employers must comply with all requirements other than testing employees who have not completed their primary vaccination dose. This includes employer policy rollout, recordkeeping and mask-wearing requirements.
- **Jan. 4, 2022** (60 days after the ETS effective date): Employers must comply with the testing requirement for employees who have not received all doses required for primary vaccination.

What Covered Employers Must Do

The ETS establishes the minimum requirements for employers, and does not prevent (1) employers from agreeing with their employees to implement additional measures or displace collectively bargained agreements that exceed the minimum standards or (2) host employers from imposing additional requirements on contractors at their worksites (e.g., that all personnel, regardless of vaccination status, wear face coverings while working indoors).

Mandatory COVID-19 Vaccination Policy. Employers must develop, implement and enforce a mandatory

COVID-19 vaccination policy, although there is an exception for employers that instead adopt a policy requiring employees to elect either to get vaccinated or to undergo regular COVID-19 testing and wear a face covering at work. OSHA has posted both a [mandatory vaccination sample policy](#) and a [vaccination or testing and face covering sample policy for employers' consideration](#). The upshot of adopting one of OSHA's sample policies is that it will include all the ETS requirements.

- **The policy must include** (1) requirements for COVID-19 vaccination; (2) applicable exclusions from the written policy (e.g., medical contraindications, medical necessity requiring delay in vaccination, or reasonable accommodations for workers with disabilities or sincerely held religious beliefs), including procedures for COVID-19 testing and face coverings; (3) information on determining an employee's vaccination status and how this information will be collected; (4) paid time off and sick leave for vaccination purposes; (5) notification of positive COVID-19 tests and removal of COVID-19-positive employees from the workplace; (6) information to be provided to employees; and (7) disciplinary action for employees who do not abide by the policy. (OSHA notes that the OSH Act does not prevent employers from taking disciplinary action due to employees' refusal to comply with the employer's vaccination policy.)
- **OSHA recommends that the policy also include necessary components of an effective plan:** (1) all relevant information regarding the policy's effective date; (2) to whom the policy applies; (3) deadlines (e.g., for submitting vaccination information, for getting vaccinated); and (4) procedures for compliance and enforcement.
- **Employers with vaccine mandate policies already** must modify and/or update their current policies to incorporate any missing required elements, and must provide information on these new updates or modifications in writing to all employees.
- OSHA permits employers to develop and implement **partial mandatory vaccination policies** that apply to only the covered-employee portion of their workforce.

Vaccination Status Proof and Recordkeeping.

Employers must determine the vaccination status of each employee, obtain acceptable proof of vaccination from vaccinated employees, maintain records of each employee's vaccination status and maintain a roster of each employee's vaccination status.

- Acceptable proof of vaccination documentation includes (1) record of immunization from a health care provider or pharmacy; (2) copy of U.S. COVID-19 Vaccination Record card; (3) copy of medical records documenting the vaccination; (4) copy of immunization records from a public health, state or tribal immunization information system; and (5) copy of any other official documentation that contains the type of vaccine administered, date(s) of administration and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).
- Acceptable vaccinations include those (1) approved or authorized for emergency use by the Food and Drug Administration (FDA), (2) listed for emergency use by the World Health Organization (WHO); , or (3) administered as part of a clinical trial at a U.S. site subject to certain conditions.
- The ETS does not require employers to monitor for or detect fraud in documents presented. Employees, however, are subject to criminal liability for providing fraudulent documents, as summarized in an OSHA fact sheet available to employers for employee distribution.
- OSHA considers vaccination records and vaccination rosters to be personally identifiable medical information to be maintained in a confidential manner.
- Employers are not required to obtain vaccination-related information beyond what is considered necessary, including about booster shots and additional doses.

Vaccination Support. Employers must support vaccination by providing employees with reasonable time, including up to four hours of paid time off during scheduled work hours, to receive each primary vaccination dose, and reasonable time off and paid sick leave to recover from any side effects experienced following each primary vaccination dose. Employers are not required to reimburse employees for any transportation costs.

- The paid time off cannot be offset by any other leave that an employee has accrued, such as sick leave or vacation leave, but an employer may require an

employee to use accrued paid time off when recovering from side effects following a primary vaccination dose experienced during scheduled work time. (Note: state or local law may require an employer to provide paid time off for recovery.)

- Employers may set a cap on the amount of discretionary paid sick leave available to employees to recover from any side effects, but the cap must be reasonable. OSHA will generally presume that if an employer makes available up to two days of paid sick leave per primary vaccination dose for side effects, the employer would be in compliance with this requirement.

COVID-19 Testing. Employers must ensure that each employee who is not fully vaccinated (i.e., is within two weeks after completing primary vaccination) is tested for COVID-19 at least weekly (if in the workplace at least once a week) or within seven days before returning to work (if away from the workplace for a week or longer).

- The ETS does not recognize an exception to the testing requirement based on "natural immunity" or the presence of antibodies from a previous infection. However, if an employee who is not fully vaccinated has received a positive COVID-19 test or has been diagnosed with COVID-19 by a licensed health care provider, the employer cannot require that employee to undergo COVID-19 testing for 90 days following the date of the positive test or diagnosis.
- Employers must maintain records of each test result while the ETS remains in effect and must treat them as confidential medical records.
- If an employee does not provide a negative COVID-19 test result, the employer must keep the employee away from the workplace until the employee provides the test result.
- While the ETS does not prohibit employers from voluntarily assuming costs for testing, it does not require employers to pay for any costs associated with testing. The ETS recognizes employers may be required to pay for testing under other laws, regulations or collective bargaining agreements. OSHA notes that some employers may choose to pay for some or all of the costs of testing as an inducement to keep employees in a tight labor market, while other employers may choose to put the full cost of testing on employees in recognition of the employees' decision not to become fully vaccinated.

- The U.S. Department of Health and Human Services (HHS) has an online community-based testing site locator. According to that HHS website, low- or no-cost COVID-19 tests are available to everyone in the U.S., including the uninsured, at health centers and select pharmacies nationwide. The HHS directs individuals to call their particular health center for more information about availability of low- or no-cost testing.
- Employees' cost of testing is potentially reimbursable as a business expense under some states' laws.
- Supervised testing protocols must be adhered to. The weekly tests cannot be both self-administered and self-reported unless the employer or an authorized telehealth proctor observes the process. The OSHA ETS explains that it includes a requirement for some type of independent test confirmation to ensure the integrity of the result, given the "many social and financial pressures for test-takers to misrepresent their results." Such proctored tests—whether done by the employer directly or with an authorized telehealth proctor— could include over-the-counter tests that are authorized by the FDA; the ETS notes that as of October 2021, 81 different test kits are authorized for home collection. In addition to proctored tests, permitted testing options are (1) specimens (including home or on-site collected specimens) that are processed by a laboratory and (2) point-of-care tests (such as by a pharmacy or a clinic).
- Employees' time spent getting tested is potentially compensable under the Fair Labor Standards Act (FLSA) and state wage/hour laws.

Positive COVID-19 Test Results. Employers must require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19. They must also immediately remove from the workplace any employee, regardless of vaccination status, who receives a positive COVID-19 test or is diagnosed with COVID-19 by a licensed health care provider, and they must keep the employee out of the workplace until return-to-work criteria are met.

- The ETS does not require employers to provide paid time off to any employee for removal as a result of a positive COVID-19 test or diagnosis of COVID-19 (note that state or local law may require paid time off).
- Removed employees can be required to continue to work remotely or in isolation if suitable work is available and if the employee is not too ill to work.

- The ETS does not have a provision requiring notification alerts or contact tracing after an employee tests positive for COVID-19.

Face-Covering Rules. Employers must ensure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances.

- Face coverings may be removed under following circumstances only (1) when the employee is alone in a room with floor-to-ceiling walls and a closed door; (2) for a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements; (3) when an employee is wearing a respirator or a face mask; (4) when the employer can show that the use of face coverings is infeasible or creates a greater hazard that would excuse compliance with this paragraph (e.g., when it is important to see the employee's mouth for reasons related to their job duties, when the work requires the use of the employee's uncovered mouth, or when the use of a face covering presents a risk of serious injury or death to the employee).
- Employers cannot prevent any employee, regardless of vaccination status, from voluntarily wearing a face covering unless it creates a serious workplace hazard such as interfering with safe operation of equipment.

Information for Employees. Employers must provide each employee with certain information in a language and at a literacy level the employee understands. Employers have flexibility to communicate this information to employees using any effective methods that are typically used in their workplaces, and they may choose any method of informing employees.

The required information includes:

- Information about the requirements of the ETS and workplace policies and procedures established to implement the ETS
- Vaccine efficacy and safety, and the benefits of being vaccinated, by providing the Centers for Disease Control and Prevention (CDC) document "Key Things to Know About COVID-19 Vaccines"
- Information about protections against retaliation and discrimination
- Information about laws that provide for criminal penalties for knowingly supplying false statements or documentation

COVID-19 Fatalities. Employers must report work-related COVID-19 fatalities to OSHA within eight hours of learning about them, and must report work-related COVID-19 inpatient hospitalizations within 24 hours of learning about the hospitalization. Employers are required to report only work-related COVID-19 fatalities and inpatient hospitalizations, recognizing that it may be difficult for an employer to determine the source of exposure.

Records for Employees. Employers must make certain records available for examination and copying to an employee (and to anyone having written authorized consent of that employee) or an employee representative, including (1) the employee's COVID-19 vaccination documentation; (2) the employee's COVID-19 test results, if any; and (3) the aggregate number of fully vaccinated employees at a workplace, along with the total number of employees at that workplace. Employer requests can be made in any manner that provides adequate notice of the request, including in writing (e.g., email, fax, letter), by phone or in person.

Medical and Religious Accommodations

The ETS recognizes that weekly COVID-19 testing is a reasonable accommodation from vaccination requirements for those (1) for whom vaccine is medically contraindicated, (2) for whom medical necessity requires a delay in vaccination or (3) who are legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices or observances that conflict with the vaccination requirement. If testing for COVID-19 conflicts with a worker's sincerely held religious belief, practice or observance, the worker may be entitled to a reasonable accommodation.

Penalties for Violations

Potential penalties could be up to \$14,000 per violation. OSHA officials have indicated that multiple violations of the ETS could each be assessed separately.

State/Local Law Preemption and Legal Challenges

The ETS is intended to preempt state and local laws that ban or limit employers from requiring vaccination, wearing face coverings or testing for COVID-19.

- Multiple states are already pursuing legal challenges to the ETS, seeking court orders to enjoin the ETS from taking effect.

- The Fifth Circuit on Nov. 6 issued a temporary stay of OSHA's ETS, pending further action by the court in a suit brought by the state of Texas and a number of companies. It remains to be seen how this and other legal challenges will play out.
- The ETS does not preempt state or local requirements (e.g., Keys to NYC) mandating face coverings in indoor public spaces or that members of the public provide proof of vaccination or recent COVID-19 test results to enter public spaces.

ETS Not a Final Rule; Subject to Revisions/Updates

The ETS also serves as a final standard proposal, subject to public comment. OSHA may revise or update the ETS if it finds COVID-19 no longer poses a "grave danger" or new information indicates changes in necessary measures.

ETS on Pause—So Now What?

More than half the states, along with various business and religious groups, immediately filed suits to stop the ETS. On Saturday, Nov. 6—one day after the ETS took effect—the U.S. Court of Appeals for the Fifth Circuit (one of the most conservative courts in the country) put the brakes on the ETS implementation nationwide. Subsequently, on Fri. Nov. 12, the Fifth Circuit issued a 22-page ruling identifying multiple reasons why the ETS should be permanently enjoined as unlawful. In addition to developments in the Fifth Circuit, various parties have filed multiple petitions for review of the ETS in nearly every other U.S. courts of appeal. We expect that early this week, one of those courts will be selected by lottery to decide whether or not to lift, modify or continue the Fifth Circuit's decision. Pending further court review, the Fifth Circuit's order bars OSHA from enforcing or implementing the ETS.

The Biden administration, meanwhile, is challenging the Fifth Circuit's action. On Monday, Nov. 8, the White House publicly announced that covered employers should move forward with the ETS requirements anyway. Commentators note a high probability the challenge to the ETS' legality will ultimately wind up before the Supreme Court. Until then, the ETS could remain in flux.

Because the ETS is on hold, covered employers are not legally obligated to comply with its requirements until and unless the stay is lifted. If the lottery selects the Fifth Circuit to hear the case, the ETS is all but certain

to remain on ice pending a review by the Supreme Court. But what about the Dec. 5, 2021 and Jan. 4, 2022 compliance deadlines, assuming the ETS' injunction is lifted or modified by the court of appeals chosen to hear the case? It's uncertain whether the Biden administration would push the dates back, but as a practical matter, OSHA could have to if the stay remains in place until shortly before or after either of the compliance deadlines. In addition, the court selected to hear the case could have the power to toll (i.e., extend) the implementation due dates by the number of days the ETS is stayed.

Moreover, businesses in states that have passed laws prohibiting employers from implementing or restricting mandatory vaccination policies are advised to tread carefully until and unless the ETS stay is lifted. These states currently include Arkansas, Montana, Tennessee and Texas. Given that 26 states are currently challenging the legality of the ETS, we may very well see additional state legislatures pass laws that conflict with the ETS requirements. Adhering to any state laws limiting employer vaccine or testing mandates is important during the ETS stay, notwithstanding the Biden administration's suggestion that employers move forward with compliance. The ETS' preemption of "all State or local requirements . . . that ban or limit the authority of employers to require vaccination, face covering, or testing" only comes into play if the ETS is in effect.

Notwithstanding the foregoing, employers that would potentially be covered by the ETS should not let grass grow as they wait for a ruling. Employers should use this time wisely, and decide and develop a plan of action, whether or not the ETS goes into effect, about how they wish to handle vaccination and/or testing protocols in order to have a full return of employees to the physical workplace.

Importantly, the Fifth Circuit ruling—and any other court decisions regarding the ETS—do not affect Centers for Medicare and Medicaid Services' [interim final rule for health care workers](#) or [Executive Order 14042 on mandatory vaccinations for federal contractors](#). Covered employers (i.e., health care employers, federal contractors and federal subcontractors) should ensure compliance with those separate requirements.

Related Professionals

Ian Carleton Schaefer ischaefer@loeb.com
Mark Goldberg mgoldberg@loeb.com
Brian M. Hayes bhayes@loeb.com

This is a publication of Loeb & Loeb and is intended to provide information on recent legal developments. This publication does not create or continue an attorney client relationship nor should it be construed as legal advice or an opinion on specific situations.

© 2021 Loeb & Loeb LLP. All rights reserved.

6807 REV3 01-04-2022