

EMPLOYEE BENEFIT ALERT



DECEMBER 20, 2021

Court Rules OSHA Vaccination Mandate Emergency Temporary Standard Can Move Forward

The Sixth Circuit U.S. Court of Appeals has overturned an earlier court ruling that had blocked OSHA's vaccine mandate Emergency Temporary Standard (ETS). The new ruling means that private employers with at least 100 employees will need to implement a mandatory vaccination program unless the U.S. Supreme Court intervenes. In response to the ruling, OSHA has delayed enforcement of the testing requirement in the rule until February 9th, 2022 to give employers time to implement the policies to comply with the ETS.

BACKGROUND

On **November 4, 2021**, the Occupational Safety and Health Administration (OSHA) released an ETS requiring businesses with at least 100 employees to mandate that their employees be fully vaccinated against COVID-19 or wear a mask and test for the virus on at least a weekly basis. Under the ETS, employers are also allowed to implement a strict vaccine mandate without providing the mask and testing option to employees.

Shortly after the release of the ETS, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") issued a stay effectively prohibiting OSHA from moving forward with the mandate. In response to the Fifth Circuit's action, OSHA suspended enforcement of the ETS pending the outcome of further litigation.

SITUATION MOVING FORWARD

In response to the latest court ruling lifting the stay, OSHA issued the following statement announcing that

they would delay enforcement of the rule to give employers time to implement the necessary policies:

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.

Additional details on deadlines and enforcement are expected from OSHA soon.

Opponents of the ETS are expected to appeal to the U.S. Supreme Court (SCOTUS). It remains to be seen if SCOTUS will intervene.

OSHA ETS INFORMATION AND RESOURCES

OSHA has set up a website at <https://www.osha.gov/coronavirus/ets2> containing detailed information regarding the ETS. This site is where OSHA will release additional information and guidance, and contains other resources including:

- ETS factsheets;
- An FAQ with almost 100 questions and answers regarding the ETS;

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- Sample employer vaccine mandate policies; and
- Recordings of OSHA ETS webinars.

Note that the standard does not apply to public employers such as cities, counties, and public schools, or to workplaces covered under the *Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*. Nor does it apply in settings where employees provide healthcare services or healthcare support services subject to the requirements of the Healthcare ETS issued previously. The standard also does not apply to employees who work remotely or employees who work exclusively outdoors.

SEVEN STEP EMPLOYER APPROACH TO PREPARE FOR THE VACCINE MANDATE

Step 1. Determine Employer Coverage.

All private employers with 100 or more employees will be subject to the federal ETS or a state standard that meets or exceeds the requirements of the ETS. The 100-employee threshold is based upon a companywide headcount rather than the number of employees at a particular worksite.

For related companies that may have different management or separate tax ID numbers, the ETS states they should be counted as a single entity for purposes of determining the 100-employee threshold if *“for OSH Act purposes if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted.”*

Employers should count all employees individually, whether they are full time, part time or working on a temporary basis. Independent contractors and leased employees (where the client employer is not the employer of record) are not counted.

Step 2. Survey Current Employees on Vaccination Status.

Understanding how many unvaccinated workers an employer has will help inform the best compliance approach

for the organization. For example, an employer with only 10 unvaccinated workers might allow those employees to choose either vaccination or weekly testing, whereas a company with 100 unvaccinated workers may find the logistics of collecting weekly testing documentation too difficult, and therefore decide not to offer the testing option.

Step 3. Research Testing

Whether an employer will offer the option of weekly testing to unvaccinated workers or only use testing as a religious or disability accommodation, understanding the logistics of testing should be reviewed before determining the employer’s compliance approach. Questions to consider include:

- Are there testing locations near the workplace? What are their hours and procedures for testing? How long does it take to get testing results there? Contact these locations to determine which vaccines they offer and what their capacity is for handling employee testing.
- Is onsite testing a more convenient option?
- What day(s) of the week will the employer require testing? Will local testing locations be open and available to test all impacted workers?
- Which test will the employer accept?

Home testing kits are widely available at pharmacies and online, some with mail-in options for results (PCR), while others give results in about 15 minutes (rapid antigen test). The ETS allows for the use of over-the-counter (OTC) self-tests that are observed by employers or authorized telehealth providers. Self-administered and self-read rapid tests are not acceptable under the ETS.

The ETS does not require employers to pay for any costs associated with testing. However, employers should consider the following:

- Are there current state laws that would require employers to pay for employment-related costs?

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Foreexample, states that require the reimbursement to employees for necessary business expenses would apply here.

- What are the projected costs for both the employee and employer for testing? Contact local suppliers to compare pricing, including organizations providing onsite testing services. The IRS has stated that in-home tests would be reimbursable under flexible benefits plans such as health flexible spending accounts (HFSA) and health savings accounts (HSA), which may help employees manage costs.
- Will the cost of testing, if paid for by the employee, bring the employee's weekly pay below minimum wage? Both the Fair Labor Standards Act (FLSA) and some state laws would not allow this.
- Will an employer's budget allow for employer-paid testing for as long as the ETS is in place (which would be six months to start, and may be extended for another six months or made a permanent standard)? Or is mandatory vaccination, which is free, the better option?

STEP 4. Consider Paid Time Off Requirements

The ETS requires employers to provide employees with up to four (4) hours of paid time off to receive the vaccine during normal work hours. This includes time spent scheduling the vaccine appointment, completing paperwork, receiving the vaccine, and traveling to and from the vaccination site. **Employers are not required to offer paid time off to employees who choose to receive the vaccine outside of their regular work hours.**

Employers must also provide a reasonable amount of paid sick leave to recover from side effects experienced following vaccination; however, employers may require employees to use paid sick leave benefits already provided by the employer.

For employers who include a testing option for unvaccinated workers, the time spent obtaining a COVID-19 test may be considered hours worked depending on the circumstances, such as directing employees to use a specific provider at specific times. Employers may also be able to require the use of paid time off for workers who are unable to get tested outside of work hours. This would not be a popular option from a worker's perspective but could potentially induce them to choose vaccination over weekly testing.

STEP 5. Address Remote Worker Requirements

If an employer has remote workers who will never come into the office, employers may also be able to use remote work as an option for unvaccinated workers.

An employer may choose to consider a full-time remote-work option, determine how many employees this would apply to, what the employee eligibility requirements would be, what the associated costs with long-term telecommuting might be and any other data meaningful to the company.

STEP 6. Determine a Compliance Approach and Create a Written Policy

Under the ETS, an employer must establish, implement, and enforce a written mandatory vaccination policy which requires all new and existing employees to be fully vaccinated other than employees with medical contraindications, for whom medical necessity requires a delay in vaccination, or who are legally entitled to a reasonable accommodation (disability or sincerely held religious belief).

Alternatively, an employer must establish, implement and enforce a written vaccination policy permitting each employee to choose between vaccination or providing proof of regular testing and wearing a face covering.

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A clearly written policy should detail the requirements the employer has decided upon and the consequences for noncompliance.

STEP 7. Develop Employee Communications

Employers should begin developing employee communications now. Consider sending a memo to employees that explains the requirements of the ETS and how the ETS impacts current company policies and procedures.

Communicate ahead of time where employees can go to get vaccines near the workplace, or how to find a location near their homes, and keep this information easily accessible. Detail whether employees must seek testing outside of work hours.

SUMMARY

Obviously, all eyes are on SCOTUS to see if they will intervene, and it is expected that the Court will issue a response very shortly. However, while OSHA's delays in enforcement help, there is very little time for employers to

implement the policies and procedures necessary to comply with the ETS. Employers should quickly move forward with their plans to address the ETS requirements, even as we wait for the SCOTUS response. It is expected that OSHA will consider an employer's good faith attempt to comply and will focus enforcement activity on employers that have done little or nothing to implement the safety polices required by the ETS.

Benefit Comply, LLC offers a support service which provides employers with an assigned HR consultant and direct access to a team of employment law attorneys to assist with compliance with the OSHA ETS. Go to www.benefitcomply.com/hr for more information or to enroll.

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