

OSHA'S COVID-19 Vaccine Mandate is Back on!

Amundsen Davis Labor & Employment Alert
December 20, 2021

On December 17, 2021, in a 2-1 decision, the 6th Circuit Court of Appeals dissolved the stay of OSHA's Emergency Temporary Standard (ETS) previously ordered by the 5th Circuit Court of Appeals. Therefore, OSHA's ETS mandating workplace vaccination and testing on all private employers with 100 or more employees is back on. While the 6th Circuit did not address timing issues, the day after the decision was released, **OSHA announced that it will not issue citations for noncompliance with any requirements of the ETS before January 10, 2022 and will not issue citations for noncompliance with the standard's testing requirements before February 9, 2022 --- so long as an employer is exercising reasonable, good faith efforts to come into compliance.**

As you may recall, soon after the ETS was published back on November 5, 2021, the 5th Circuit issued a scathing opinion staying the enforcement of the ETS – which had essentially implemented a January 4, 2022 deadline for the “get the shot or test” requirement. In the week that followed, legal challenges were brought in every other Circuit Court of Appeals across the country. On November 16, 2021, the matter was assigned through a lottery system to the 6th Circuit. With the 6th Circuit's decision now in place, the matter has now moved to the U.S. Supreme Court for possible review. The Supreme Court does not have to take on the merits of the matter and could simply allow the 6th Circuit's decision to stand as is.

So, what should private employers with 100+ employees do now?

By January 10, 2022, you will need to implement the following:

1. Finalize and publish your COVID-19 vaccine policy to all employees (this includes clear messaging that anyone who tests positive for COVID -19 or is diagnosed shall immediately provide notice to their employer and shall refrain from entering the workplace until they meet criteria set by the CDC).
2. Distribute and publish to all employees the following notices:
 1. Workers' Rights under the COVID-19 Vaccination and Testing ETS
 2. Information for Employees on Penalties for False Statements and Records

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3. Finalize your Vaccination Roster --- obtaining proof of and confirming who is fully vaccinated and who is not -- in a confidential manner.
4. Provide Paid Leave for anyone obtaining the vaccine (note: boosters do NOT count) (up to 4 hours per shot).
5. Permit a "reasonable amount of time" (i.e. up to 2 days) of paid leave for the recovery from any ill-effects of any vaccination dose.
6. Mandate that face coverings must be worn by anyone who is not fully vaccinated at all times (unless isolated in an office with four walls and a ceiling).

Then, by February 9, 2022, you will need to: A) require all employees to be fully vaccinated (note: boosters are NOT relevant under the current ETS); and/or B) require all unvaccinated employees to submit to weekly testing. Under the ETS, employees who are exclusively working remotely or predominately working outside are not subject to these requirements.

Note, employers must review state and local vaccine requirements and laws when preparing their vaccine policy. Many state and local laws have been enacted since the original ETS was issued and these laws/regulations might be more stringent, contain different deadlines than the OSHA mandate or may place restrictions on employers who issue a mandatory vaccination policy.

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