

OSHA'S Emergency COVID-19 Vaccination and Testing Standard Reinstated

Amundsen Davis OSHA Alert
December 20, 2021

In September, the Biden Administration announced its plan to have OSHA issue an Emergency Temporary Standard (ETS) requiring employers with one hundred or more employees to ensure their employees are either fully vaccinated or tested for COVID-19 on a weekly basis. That promised ETS was published on November 5, 2021, and linked here are OSHA's summary of the ETS and the FAQ's relating to the ETS. One week later, on November 12, 2021, the 5th Circuit Court of Appeals issued an opinion staying the enforcement of the ETS. In the week that followed, legal challenges were brought in every other Circuit Court of Appeals across the country. The matter was assigned through a lottery to the 6th Circuit Court of Appeals for final ruling at the appellate level.

On December 17, 2021, the 6th Circuit lifted the stay, ultimately allowing the ETS to take effect. Shortly thereafter, OSHA reiterated its intention to implement the ETS, and the parties seeking to invalidate the ETS immediately requested that the Supreme Court issue an emergency stay preventing the ETS from taking effect until the legal challenges have been fully resolved. That emergency request will likely be ruled on in early 2022—potentially after the updated deadlines for the ETS go into effect, as outlined below.

As it pertains to the new dates for the ETS, OSHA is essentially requiring that all requirements of the ETS be in place on or before January 10, 2022 *except* weekly testing for the unvaccinated. That weekly testing requirement is set to go into effect one month later, on February 9, 2022—though OSHA has indicated it will not be issuing citations for failure to comply by that deadline, assuming the employer is exercising “reasonable, good faith efforts” to comply. A summary of the relevant requirements of the ETS are included below:

- Provide paid time to employees to get vaccinated and to allow for paid leave to recover from any side effects;
- Determine the vaccination status of each employee, obtain proof of vaccination status from vaccinated employees and maintain records and a roster of each employee's vaccination status;
- Require employees to provide prompt notice when they test positive for COVID-19 or receive a COVID-19 diagnosis, and immediately remove the employee from the workplace, regardless of vaccination status;

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- Ensure each employee who is not fully vaccinated is tested for COVID-19 at least weekly (if the worker is in the workplace at least once a week) or within 7 days before returning to work (if the employee is away from the workplace for a week or longer); and
- Ensure that each employee who has not been fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes.

Prior to the 6th Circuit's most recent opinion reinstating the ETS, we conducted a webinar discussing the requirements of the ETS, amongst other topics. While the discussions regarding the status of the legal challenges and the dates for compliance are now outdated, the other topics remain relevant. Moving forward, we will continue to keep you advised as to the status of the ETS and the related legal challenges—but for now, employers should re-start their efforts to comply with the ETS.

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