

To Be or Not to Be? OSHA's Mandatory Vax ETS: What Employers Need to Know Now

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Introduction and Workplace Safety Overview

Introduction and Objectives

Our goal today is to provide an overview of **OSHA's Second Emergency Temporary Standard** relating to COVID-19, published on Friday, November 5, 2021, often referred to colloquially as the vaccine mandate. We will cover:

- 1** | **The landscape leading to the ETS and OSHA's explanation for its necessity**
- 2** | **The provisions of the ETS: Requirements for employers and employees**
- 3** | **Questions raised and answered regarding the ETS's interaction with other federal and state laws**
- 4** | **The state of legal challenges to the ETS and what that may mean for employers' compliance**

Workplace Safety

OSH Act enacted in 1971 to ensure safe and healthy workplaces for America's workers

- Enforcement is through OSHA or one of 22(6) authorized state plans
- State plans are required to be at least as effective as the federal plan
- Rules are enforced through inspections, citations, and penalties

The OSH Act authorized OSHA to promulgate standards

- Adoption of Existing Federal and National Consensus Standard (until 1973)
- Notice and Comment Rulemaking
 - 29 CFR 1910 (General Industry Standards)
 - 29 CFR 1926 (Construction Industry Standards)
- Emergency Temporary Standards
 - Requires determination of whether employees are exposed to grave danger
 - Immediate action is necessary to protect workers
 - Effective immediately on publication, without notice and comment opportunity
 - Effective for 6 months
- **Friday's standard was an ETS**

OSHA's COVID-19 Response

OSHA considered enacting a rule on infectious diseases in 2009, but declined to do so.

Issued guidance for employers

Relied on that guidance though subsequent public health threats

- January 2020
COVID declared a public health emergency by the DHHS and WHO in January 2020
- March 2020
OSHA told Congress no ETS is needed to address COVID-19
- May 2020
AFL-CIO sues OSHA in D.C. federal Circuit Court to require issuance of ETS
 - OSHA tells Court that existing standards and guidance are adequate to address emergency
- October 2020
AFSCME and two unions sue OSHA in U.S. Circuit Court in California to require issuance of infectious disease standard
- June 2021
Following President Biden's E.O. 13999, OSHA issues first COVID-19 ETS
 - Limited to healthcare workplaces (29 CFR 1910.502)
 - OSHA estimated ETS would save **800** lives over **6 months**
- November 5, 2021
OSHA issues second COVID-19 ETS
 - Not limited to healthcare workplaces; employers with **100+ employees**
 - OSHA estimates ETS will save **6,500** lives over **6 months**

What Are the Requirements?

The Obligations for Employers and Employees

Key Obligations

- ✓ Determine if you are a covered employer
- ✓ Implement a policy
- ✓ Ensure employees are compliant by **January 4, 2022**
- ✓ Evaluate and provide appropriate exemptions
- ✓ Provide time off to employees
- ✓ Collect and maintain proof of vaccination/test results
- ✓ Maintain confidentiality of status
- ✓ Provide other documentation
- ✓ Remove COVID-19-positive employees from workplace
- ✓ Allow employees to inspect records

Other Notable Provisions



Employees may have to pay for testing



The ETS is clear that it establishes the floor, not the ceiling



Certain employees are not covered



There are different deadlines for different obligations



Employers must report COVID-19 fatalities and hospitalizations to OSHA



OSHA has published helpful supplemental documents



The ETS and Its Interaction with Federal and State Laws

The ETS and Employee Benefits

General Rule:

- If an employer provides or pays for medical care for its employees, the arrangement is a group health plan subject to ERISA

Exception:

- There is no “plan” unless there is an “ongoing administrative scheme”

If there is a group health plan subject to ERISA, what are the concerns?

- **Primary concern:** ACA
 - Use an “onsite clinic” or structure as an “employee assistance program”
 - Employee assistance programs have a number of legal requirements. Most significantly, there must be no cost to the employee (no premium, deductible, copayment, or coinsurance)
- **Secondary concerns:** ERISA, COBRA, and HIPAA

Other Payment Concerns

- **Time** spent being tested and waiting for results may need to be paid for non-exempt employees under the FLSA, similar state laws, or a collective bargaining agreement
- If employees are paying for the cost of the **test itself**, does the cost of testing bring a non-exempt employee below the applicable minimum wage?
- Some states require reimbursement or payment for necessary business-related expenses
- It may be required or advisable for employers to pay the cost of any required medical exams/testing when it is performed as an accommodation for a disability or sincerely held religious belief

Other Vaccination Requirements

CMS Omnibus COVID-19 Health Care Staff Vaccination Rule

- Applies to Medicare- and Medicaid-certified providers and suppliers, including hospitals, long-term care facilities, home health agencies, and federally qualified health centers, among others
- Requires vaccination of all staff regardless of clinical responsibility or patient contact
- Staff who are 100% remote are not covered
- Does not permit for testing in lieu of vaccination, except for employees with a legally required exemption
- Does not contain requirements related to masking

Safer Federal Workforce Task Force Guidance for Federal Contractors

- Applies to certain federal contractors and subcontractors
- Requires vaccination of employees working on a contract or in the same facility as employees working on a contract
- Requires vaccination of covered remote employees
- Does not permit for testing in lieu of vaccination, except for employees with a legally required exemption
- Requires masking for both vaccinated and non-vaccinated employees in areas with certain rates of community transmission

Preemption and State Plans

- As a federal standard, the ETS is designed to preempt and invalidate state and local bans or limits on an employer's ability to require COVID-19 precautions such as vaccination and masking
- Approved state plans (OSHA-approved workplace safety and health programs operated by individual states) must amend their standards to be either identical to or “at least as effective as” the new ETS within **30 days**
 - State plans may also face challenges, which could proceed on a different timeline. These challenges may be different from challenges to the federal law

What Is Its Current Status?

The State of the Legal Challenges to the ETS and What That Means for Employers

Legal Challenges

- Petitions for review have been filed to date in the Sixth, Seventh, Eighth, Eleventh, and DC Circuits in at least 12 different lawsuits. More petitions for review are expected
- Interim stay issued by the U.S. Court of Appeals for the Fifth Circuit
- We are expecting the courts to follow multi-circuit procedures in order to consolidate these cases for review. The “lottery” is expected to occur on or around November 16, 2021
- Once the cases are consolidated, the stay may be revoked, modified, or extended by the court that “wins” the lottery
- Arguments against the ETS include, among other things, that only states can mandate vaccination and that the ETS exceeds OSHA’s authority (no grave danger), and that it violates the Constitution and other federal laws.
- Cases will also likely be filed claiming that the ETS does not go far enough in protecting workers
- OSHA has lost 5 of the 6 challenges to its emergency rules. The last time an ETS was challenged was an asbestos standard in 1983; a court blocked the rule, stating that OSHA had failed to show that the ETS was necessary to alleviate a grave risk of worker deaths during its six-month applicability



Questions?

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Meet the Presenters



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