

OSHA's Vax or Test Mandate for Employers with 100+ Employees Is Back in Effect. What's Next for Employers?

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PROFESSIONALS

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Late on Friday, December 17, 2021, the Sixth Circuit Court of Appeals, in a 2-1 decision, vacated the Fifth Circuit's stay on OSHA's Emergency Temporary Standard ("ETS"). The ETS mandates private employers with at least 100 employees to be fully vaccinated or submit to a weekly COVID test and wear face masks. **Given this swift reversal, OSHA updated its compliance dates to provide employers additional planning and coordination:** OSHA will not issue citations for noncompliance with ETS requirements before January 10, 2022, and will not issue citations for noncompliance with the ETS testing requirements before February 9, 2022. OSHA will postpone citations so long as an employer is exercising "reasonable, good faith efforts to come into compliance with the standard."

What does this mean for employers?

By **January 10th**, employers with 100+ employees must comply with everything but the testing requirement. Thus, by January 10th, affected employers should:

- Have an ETS-compliant policy in place. Note that the ETS does contain a template policy that has been deemed compliant by OSHA, found **here**;
- Collect vaccination data of its employees (including proof of vaccination and a status roster of vaccinated and unvaccinated employees);
- Mandate masks for the unvaccinated; and
- Remove COVID-positive employees from the workplace, along with employees known to have been exposed to COVID-positive individuals.

By **February 9th**, affected employers are subject to citations if they have not implemented weekly testing for unvaccinated employees and should prepare for testing implantation accordingly:

- **Know which employees are subject to testing.** Remember that unvaccinated employees who work exclusively remotely are not subject to the testing requirements, nor are those employees who work mainly outdoors except for brief, minimal use of indoor spaces where others may be present,

such as a multi-stall bathroom or an administrative office. (Remote workers who only visit the office intermittently—e.g., monthly for a staff meeting—must only test in the days prior the visit to the workplace.) Employers should expect remote-work requests from employees who do not want to be subject to vaccination or testing, and should know how they will respond to those requests.

- **Research testing options and availability.** Which types of tests will be deemed acceptable? Will the employer pay for and/or provide tests to employees? Who will handle collection and maintain confidentiality of test results?

What's Next in the Courts?

The Sixth Circuit decision concluded that OSHA has statutory authority to create the ETS, as its authority rests in regulating workplace health and safety, especially protecting workers against infectious diseases such as COVID. The court also held that the ETS did not cause irreparable harm because employees are not required to receive the vaccine, instead, employees may wear face masks and undergo regular weekly testing as an alternative.

Not surprisingly, at least 26 trade groups and other interested parties have already asked the U.S. Supreme Court to reinstate the stay.

Now we wait for the Supreme Court to weigh in. The Supreme Court has ordered the government to file briefs by 4:00 p.m. on December 30th to address these requests to block the OSHA ETS. We expect that the Supreme Court will act relatively quickly—but potentially not before January 10th, the first of the two enforcement dates noted above.

A few more points:

In Wisconsin, the ETS rule applies only to private sector employers with 100 or more employees. Public sector employers in Wisconsin comply with the state OSHA requirements, which at this time, does not include compliance with the federal OSHA ETS rule.

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