Federal Court Puts OSHA's Emergency COVID Vaccination Mandates on Hold, But Private Employers Must Still Consider Next Steps

Client Alert

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What You Need to Know

- OSHA issued an Emergency Temporary Standard (ETS) requiring employers with 100 or more employees to mandate COVID-19 vaccinations or regular testing for employees that do not choose to vaccinate.
- The Fifth Circuit Court of Appeals rendered the ETS unenforceable by issuing a temporary stay, which it subsequently reaffirmed and which OSHA is voluntarily not contesting.
- The Sixth Circuit Court of Appeals will now consider the consolidated legal challenges of numerous states, private employers and other parties.
- Private employers awaiting the outcome of the Court's involvement are well advised to familiarize themselves with the requirements and compliance deadlines associated with the ETS in the event they are upheld and then enforced.

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In November of 2021, a chain of events in quick succession has left private employers in a state of uncertainty concerning their legal obligations under federal law, going forward, to comply with regulations associated with COVID-19 vaccine mandates and related workplace policies. Although future compliance requirements remain up in the air and are now in the hands of the courts, it nonetheless remains prudent for employers to counter this uncertainty by gaining a clear understanding of what has transpired at the federal level on the COVID-19 vaccine mandate front. The need for employers to be well informed and prepared for various outcomes cannot be

overstated in the challenging and unprecedented circumstances that continue to characterize the ongoing pandemic and its impact on both public health and business operations.

Background

On November 5, 2021, the Occupational Safety and Health Administration (OSHA) published its Emergency Temporary Standard (ETS), forgoing its normal rule-making process in order to provide emergency guidance for private employers to comply with the Biden Administration's COVID-19 vaccine mandate. The ETS required employers with 100 or more employees to develop a written policy requiring employees to either voluntarily obtain COVID-19 vaccines or present ongoing negative test results to their employer. Under the ETS, covered employers were required to develop and implement a written vaccination policy by December 6, 2021 and to begin enforcing their written employee testing policy by January 4, 2022.

The following day, however, the U.S. Court of Appeals for the Fifth Circuit on November 6 issued an order staying the implementation and enforcement of the OSHA ETS. The Fifth Circuit subsequently reaffirmed its order on November 12, holding that OSHA had grossly exceeded its authority by issuing the ETS.

On November 16, following the Fifth Circuit's decision and actions brought in several other jurisdictions challenging the ETS, the U.S. Judicial Panel on Multidistrict Litigation conducted a lottery, and an order was issued that consolidated petitions filed in twelve federal Circuit Courts of Appeal for review by the Sixth Circuit Court of Appeals.

Current Status of the ETS

In response to the consolidation order issued on November 16, OSHA issued this statement: "While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation."

In view of the status of judicial review of the ETS, as of this writing employers are not currently obligated to comply with OSHA's intended deadlines. However, this does not mean that OSHA's mandates as contained in the ETS will not be upheld. At a minimum, employers should closely monitor the ETS-related litigation, as depending on how those cases progress, employers may have a short window within which to develop their written vaccination policies and become ready to enforce them.

The ultimate outcome of legal challenges to the ETS aside, the OSHA rules provide useful guidance for all employers, including those with less than 100 employees who are considering a requirement that their employees be vaccinated, as well as those with more than 100 employees who may wish to implement vaccine mandates and other policies on a voluntary basis.

For these reasons, it is important to understand who the ETS would apply to, and what will be required of employers in order to achieve compliance if it ultimately survives judicial scrutiny.

"Covered Employers" Defined

OSHA has limited the scope of the ETS to private employers with 100 or more employees under the assumption that such businesses would have developed the administrative capability to carry out its requirements without significantly impeding operations. Although OSHA states that it may be prudent to also regulate smaller private

employers, additional time is needed to assess the feasibility and appropriateness of taking such action.

The 100-employee threshold is based on an employer's total number of employees regardless of hours worked or location, with limited specialized exceptions for franchisees and staffing agencies. Employers with 100 employees on the effective date of the ETS would need to comply with the standard for the entirety of its duration even if its number of employees subsequently dropped below 100. Employers reaching the 100-employee threshold after the effective date of the ETS would be expected to comply from that date forward, until expiration of the standard.

In determining whether an employer has 100 or more employees, it is necessary to carefully consider the work being done by workers who are classified as independent contractors paid on a "1099" basis, as the reclassification of such workers could cause the employer to become subject to the ETS. The employer will also need to review the workforce for any related entities to determine whether they need to be aggregated for the purpose of counting employees.

Employers with union employees should be aware of a recent memo by the General Counsel of the National Labor Relations Board (NLRB) which states that an employer may have a duty to bargain over their decision and the effect of implementing the requirements of the ETS.

Vaccination Policy and Procedures

Under the ETS, the written policy must be distributed in an easy to read, multi-lingual, and understandable format that includes specific information about the COVID-19 virus, the efficacy of the vaccine, and specific legal disclosures that put employees on notice of the prohibition on anti-discrimination and criminal liability for false statements.

Covered employers can only accept as proof of vaccination one of the following:

- The record of immunization from a health care provider or pharmacy
- A copy of the COVID-19 Vaccination Record Card
- A copy of medical records documenting the vaccination
- A copy of immunization records from a public health, state, or tribal immunization information system
- A copy of any other official documentation that indicates the type of vaccine administered, dates of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s)

Employees that claim vaccination status but are unable to produce any of the above listed items may sign a form attesting to the type of vaccine administered, the date of vaccine administration, and the name of the healthcare provider that administered it. The attestation should state: "I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties." Employers that have already obtained some other form of employee vaccination status prior to the date of the ETS may continue to rely upon that record for the duration of the standard.

The ETS does not require covered employers to assume the cost of vaccinating their employees. Employers are, however, required to provide at least four hours of paid leave so that an employee can travel and obtain

vaccination. Employers must also provide paid sick leave to cover the time needed for employees to recover from the vaccination.

Testing Policy and Procedures

The ETS requires covered employers to develop and enforce a written COVID-19 testing policy. Unvaccinated employees that report to the workplace at least once every seven days must produce a negative test result every week to reenter the workplace. Unvaccinated employees that do not report every seven days can only reenter the workplace if they have tested negative within seven days and provide the negative test result upon return to the workplace. Covered employers must not require an employee that tests positive for, or that is diagnosed with COVID-19, to be tested under the provisions of the ETS for 90 days - this time period considers the high likelihood of false positive results that do not indicate active infection but are instead a reflection of past infection.

The ETS further requires covered employers to require that their employees report positive COVID-19 test results. Employers must then remove from the workplace any employee that tests positive and must not allow that employee to return until the employee:

- Receives a negative test result
- Meets the return-to-work criteria in the Centers for Disease Control “Isolation Guidance,” or
- Receives clearance to return to work from a licensed healthcare provider.

Finally, it is important to note that the ETS does not require employers to cover the costs of employee testing.

Employer/Employee Exemptions

OSHA limits the scope of the ETS to the specific nature of COVID-19, which it has identified as a "grave danger" to the workplace that statutorily justifies and necessitates the issuance of an ETS.

The ETS does not mandate employers to require employees to vaccinate or regularly test for the virus if:

- The employee exclusively works in a solitary location where no other individuals are present
- The employee exclusively works from home
- The employee works exclusively outdoors with extremely limited contact in indoor locations

Additional exemptions include:

- Employees that have a medical contraindication
- Employees with a disability that prevents them from being vaccinated and/or tested
- Employees with a sincerely held religious belief that prevents them from being vaccinated and/or tested
- Federal contractors and subcontractors

Face Mask Policy and Procedures

Covered employers are required to ensure that all unvaccinated employees wear a face covering that covers the employee's nose and mouth when indoors and when occupying a vehicle with another person for work purposes

with the following exceptions:

- When the employee is alone in a room with floor to ceiling walls and a closed door
- For limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements
- When an employee is wearing a respirator or face mask
- Where the employer can demonstrate infeasibility/potential hazard

As with vaccination and testing, covered employers are not required to cover the cost of providing face masks.

Record Keeping/Reporting Responsibilities

The ETS contains extremely strict record keeping and reporting deadlines. Covered employers are required to keep track of the number of vaccinated employees in their census. They must also file and maintain all vaccination and testing records as confidential medical records for at least as long as the ETS remains in effect. Finally, covered employers must report any COVID-19 work-related hospitalizations (within 24 hours) and deaths (within 8 hours) to OSHA.

Next Steps

COVID-19 continues to generate uncertainty and remains a highly fluid situation for employers to contend with as we approach the third year of the pandemic. Vaccination, testing and other workplace policies and procedures are matters of critical importance for all employers, regardless of size or industry - but for private employers with 100 or more employees the potential impacts of OSHA's ETS remain to be seen. It is therefore vital for employers to stay updated on all relevant developments. To that end, we will be issuing future Client Alerts addressing the status of legal challenges to the OSHA ETS and other related matters. In the meantime, please contact the authors of this Alert with questions or to discuss your specific business circumstances.

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