

When Do We Have to Require the Shot? Status of the OSHA Vaccine Mandate

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As we reported [here](#), President Biden issued his “Path out of the Pandemic” memorandum on September 9, 2021. Part of that memorandum directed the Occupational Safety and Health Administration (OSHA) to develop a rule to increase the number of workers who have received a COVID-19 vaccination. The direction was to do this through the Emergency Temporary Standard (ETS) procedure as previously was done with healthcare workers. The broader ETS would apply to all employers with 100+ employees and require all employees to be vaccinated or be tested on a weekly basis and to have a negative test before coming to work. The anticipated ETS also would require paid time off to obtain the vaccination.

Current Status of the ETS

Following President Biden’s memorandum, OSHA developed the ETS vaccine mandate and sent it to the Office of Management and Budget (OMB) for review on October 12, 2021. This usually is the final step before an actual rule is published in the Federal Register. As of the writing of this post, the OMB has not provided any information on the content of the ETS or any comments about it. The ETS likely will be released soon, and it will be published as a so-called interim final rule. Although employers and the public generally will be able to comment during the interim period, it will become effective immediately in federal OSHA-jurisdiction states.

Some states are not direct federal OSHA-jurisdiction states but rather have their own plans covering the private sector. Those 21 states will be required to promulgate their own vaccine mandate rule. Such states will have to do this within 30 days of the publication of the new ETS.

Legal Challenges

Several attorney generals in states with their own OSHA plans have stated that they will file lawsuits to challenge the new ETS. Alabama Gov. Kay Ivey recently [directed](#) state agencies not to cooperate with the federal contractor vaccine mandate (a mandate for federal contractors separate from the

upcoming OSHA ETS), so Alabama likely will fight the OSHA ETS as well. Texas Gov. Greg Abbott previously issued [a similar ban](#) against the federal contractor mandate. Florida just filed a lawsuit against the federal contractor mandate as we write this post. How the legal challenges to the OSHA ETS will play out remains to be seen. For example, a court could issue an injunction against the ETS, but it is very possible that courts will not issue an injunction but will allow the lawsuits to proceed on a normal schedule that may last beyond the current pandemic. OSHA will argue that it is well within its “grave danger” standard for issuing an ETS “to protect employees from such a danger,” and this argument could defeat the entry of an injunction.

What Now?

Irrespective of legal challenges, employers should go ahead and prepare.

- **Are you covered?** Employees will be counted on a company-wide basis for the coverage threshold rather than just at a particular location. Count all employees on your payroll (not just full-time employees) just to be safe.
- **How many of your employees are already vaccinated?** You can ask employees about their vaccination status (although you should not ask them why they are not vaccinated). The ETS will likely require employers to pay employees for the time to get the vaccine and recover from the shot.
- **Will you let people do the weekly test option?** This could depend on how many of your employees are already vaccinated and how easy it is to get an employee tested. The DOL has indicated that if a non-exempt employee is required to be tested for work, the time to test is compensable.
- **Recordkeeping should be considered.** A procedure for collecting proof of vaccinations or negative tests and the confidential maintenance of these records for an OSHA inspection should be put in place.
- **Consider who should pay for the weekly test?** It is not yet clear whether employers must pay for the testing alternative. If employers are allowed to have the employee pay, make sure that cost does not bring an employee below the minimum wage standards.
- **Get ready for employee pushback.** Prepare for disability and religious accommodation requests, as well as collective bargaining obligations at union locations.

Finally, in case of an OSHA audit, employers should continue to be mindful of the OSHA guidance that we previously reported on [here](#).

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National Law Review, Volumess XI, Number 302

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