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OSHA Pauses Vaccination and Testing ETS Following Legal Challenges

On November 5, 2021, the Occupational Safety and Health Administration (OSHA) published its much-anticipated COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS) in the Federal Register. See 29 C.F.R. §1910.501, *et seq* [https://www.osha.gov/laws-regs/regulations/standardnumber/1910#1910_Subpart_U] . OSHA developed the ETS in response to President Biden’s COVID-19 Action Plan, requiring employers with 100 or more employees, among others, to ensure that their workforce is vaccinated or require unvaccinated workers to submit to weekly COVID-19 testing.

Judicial Challenge to the ETS

Immediately after OSHA published its ETS, several states and businesses filed a petition for judicial review of OSHA’s ETS in federal district court. The petition sought a stay (effectively pausing the implementation of the ETS) pending the court’s review of whether OSHA exceeded its authority by implementing the ETS.

The district court entered an order granting the temporary stay, and on November 12, 2021, the federal appeals court for the Fifth Circuit affirmed the stay pending an expedited judicial review. The Fifth Circuit ordered OSHA to refrain from taking any action to implement or enforce the ETS until further court order.

In response, OSHA released a statement on its website stating, “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.” *COVID-19 Vaccination and Testing ETS*, OSHA [<https://www.osha.gov/coronavirus/ets2>] . OSHA’s suspension of activities related to the ETS pending judicial review applies to all covered employers and not merely the petitioners in the litigation.

On November 16, 2021, the U.S. Judicial Panel on Multidistrict Litigation held a lottery to select the federal appeals court to address the 34 petitions seeking review of the ETS. The U.S. Court of Appeals for the Sixth Circuit was selected to hear the consolidated cases. The Sixth Circuit may agree with, modify, or lift the stay on enforcement of the ETS. It will then hear arguments on the merits of the consolidated cases under an expedited briefing schedule. The

Sixth Circuit's decision will be applied across the United States and may make its way to the U.S. Supreme Court for final say.

If the ETS is ultimately deemed valid and enforceable, new deadlines for compliance by covered employers are anticipated. For now, covered employers are in a holding pattern.

The sections that follow in this article provide an overview of the compliance obligations for covered employers in the event the ETS is implemented.

Covered Illinois Private and Public Employers Under the ETS

The ETS applies to private employers with a total of 100 or more employees.

In addition, Illinois public school districts, community colleges, libraries, park districts, and other units of local government with 100 or more employees will be subject to the ETS — or a standard equally or more effective. Illinois is one of five states with a State Approved OSHA Plan that applies only to state and local government workers. When federal OSHA promulgates an ETS, states with State Approved Plans must either amend their standards to be identical or at least as effective as the new ETS or they must show that their existing State Approved Plan is at least as effective as the new ETS. Notably, Illinois currently adopts all federal OSHA regulations and standards identically, so it is likely that Illinois will simply adopt the federal ETS.

Determining the Number of Employees

In determining the number of employees, employers must count all employees across all worksites, including both part-time and full-time employees and employees who work remotely. Independent contractors working at their facilities are excluded from the definition of “employee” under the ETS.

At present, the determination of whether an employer is subject to the ETS is based on the number of employees is done as of the effective date of the ETS (November 5, 2021). If the employer employed 100 or more employees on November 5, 2021, then the ETS applies for the duration of the period in which the ETS is in effect. If an employer employed less than 100 employees on November 5, 2021, but later hires additional employees increasing the total to 100 or more employees, then the employer must comply with the ETS for the remaining period that the ETS is in effect. Once an employer is within the scope of the ETS by employing 100 or more employees, the employer must continue to comply with the ETS regardless of whether the employer later reduces its workforce to a total less than 100 employees.

While employers must count all employees across all worksites to determine whether they meet the 100-employee threshold, the following employees are not required to provide the employer with verification of vaccination or otherwise submit to COVID-19 weekly testing:

1. employees who do not report to a worksite where coworkers or customers are present;
2. employees working from home; or

3. employees who work exclusively outdoors. 29 C.F.R. §1910.501(b).

Employers with a unionized workforce should anticipate a demand to bargain the impact of the ETS on working conditions for employees if the ETS is ultimately implemented.

Key Provisions of the ETS

The following are key provisions of the ETS, in the event it is implemented. Note that Illinois healthcare facilities, school districts, and community colleges have already instituted proof of COVID-19 vaccination or weekly testing protocols in accordance with the Governor's Executive Order No. 2021-22 (Sept. 3, 2021), 45 Ill.Reg. 11,639 (Sept. 17, 2021).

1. **Policy Requirements.** Employers must develop, implement, and enforce a mandatory COVID-19 vaccination policy, or a vaccine or test policy that requires unvaccinated employees to submit to weekly COVID-19 testing.

2. **COVID-19 Testing.** Employees who are not fully vaccinated must be tested weekly for COVID-19.

3. **Face Coverings.** Employees who are not fully vaccinated must wear a face covering when working indoors or when in a vehicle with another person for work purposes, with limited exceptions (*i.e.*, eating/drinking, alone in fully enclosed room with door closed, etc.).

4. **Vaccine Status Verification.** Employers must determine the vaccination status for each employee, obtain proof of vaccination, and maintain a roster for each employee's vaccination status.

5. **Paid Time to Receive and Recover from Vaccine.** Employers must provide employees up to four hours of paid time to receive each vaccine dose and paid sick leave to recover from side effects following each dose.

6. **Notification of a Positive COVID-19 Test.** Employees must promptly notify their employer following a positive COVID-19 test or diagnosis. Employers must immediately remove such employees from the workplace.

7. **Providing Employees with COVID-19 Resources.** Employers must provide employees with information about the ETS and corresponding policies, the Centers for Disease Control (CDC) publication titled "Key Things to Know About COVID-19 Vaccines," information about protection against retaliation and discrimination, and information about criminal penalties for knowingly providing false information about COVID-19 vaccination and testing status. This should be included in the employer's policy.

8. **Reporting Obligations.** Employers must report work-related COVID-19 fatalities and work-related hospitalizations to OSHA.

9. **Recordkeeping.** Employers must maintain COVID-19 related records and make such records available to OSHA, employees, and the employees' union upon request.

More Information About COVID-19 Testing Under the ETS

If implemented, a COVID-19 test must be

1. cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the FDA to detect current infection with the SARS-CoV-2 virus;
2. administered in accordance with the authorized instructions; and
3. not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. 29 C.F.R. §1910.501(c).

Each employee who is not fully vaccinated and reports to an employer worksite at least once every seven days must be tested at least every seven days and provide test result documentation. Employees who fail to comply must be removed from the workplace and cannot return until they provide a negative test result. When an employee is on vacation, leave, or does not report to work for a period of more than seven days, the employee must be tested within seven days of returning to the workplace and must provide documentation of the test result upon return.

When an employee who is not fully vaccinated is diagnosed with COVID-19, the employee does not need to submit to testing for 90 days after the positive COVID-19 test or positive diagnosis by a licensed healthcare provider. However, as discussed below, the employee can only return to the workplace after a negative COVID-19 NAAT or PCR test, when the CDC criteria for quarantine is met, or when recommended by a licensed health care provider.

The ETS does not require employers to pay for any costs and time associated with testing, but this may be a subject of bargaining if demanded by a union.

Employers must collect test results and maintain the records as confidential medical information for the duration of the ETS.

OSHA published an FAQ [<https://www.osha.gov/coronavirus/ets2/faqs>] about the ETS and developed a model policy for implementation purposes.

For more information about employment and labor law, see LABOR LAW: REPRESENTATION AND COLLECTIVE-BARGAINING MATTERS (IICLE®, 2021). Online Library subscribers can view it for free by clicking here [<https://www.iicle.com/iicleOnline/Detail/34396>] . If you don't currently subscribe to the Online Library, visit www.iicle.com/subscriptions [<http://www.iicle.com/subscriptions>] .