

In Brief

COURT LIFTS STAY OF OSHA ETS REQUIREMENTS FOR COVID-19 VACCINATION AND TESTING

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.

Linked [here](#), OSHA developed the ETS in response to [President Biden's COVID-19 Action Plan](#), requiring employers with 100 or more employees to ensure that their workforce is vaccinated or require unvaccinated workers to submit to weekly COVID-19 testing.

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. In response, OSHA voluntarily suspended activities related to the implementation and enforcement of the ETS.

On November 16, 2021, the U.S. Court of Appeals for the Sixth Circuit was selected to hear the consolidated cases seeking review of the ETS. On December 17, 2021, the Sixth Circuit, in a 2-1 decision, dissolved the stay previously placed on the ETS.

Ultimately, the U.S. Supreme Court may decide the fate of the ETS as petitions for review have been filed with the Court. For now, however, OSHA stated that it will not issue citations for noncompliance with any requirements of the ETS before January 10, 2022 and will not issue citations for noncompliance with the testing requirements under the ETS before February 9, 2022, "so long as an employer is exercising reasonable, good faith efforts to come into compliance with the ETS".

In the event the Supreme Court stays implementation or issues a ruling affecting the ETS, we will provide an update. In the meantime, below is a summary of the key components and requirements of the ETS as it currently stands.

Covered Employers Under the ETS

Illinois Private and Public Employers

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

With respect to public employers, 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 to or at least as effective as the new ETS, or states must show that they have an existing State Approved Plan at least as effective as the new ETS. Notably, Illinois generally adopts all federal OSHA regulations and standards identically, so it is likely that Illinois will simply adopt the federal ETS. Therefore, Illinois public school districts, community colleges, libraries, park districts, and other units of local government with 100 or more employees may be subject to the ETS, even though schools and colleges are already subject to separate state requirements for vaccination and testing.

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 as of the effective date of the ETS (November 5, 2021). If the employer had 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 had 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 co-workers or customers are present;
2. Employees working from home; or
3. Employees who work exclusively outdoors.

Key Provisions of ETS

The following details the key provisions of the ETS. Illinois health care 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 (E.O.) 2021-22. If Illinois adopts the OSHA ETS as its State Approved Plan, these entities with

100 or more employees must ensure that they are compliant with both the E.O. and the ETS.

1. **Policy Requirements.** Beginning January 10, 2022 (or as soon thereafter in January that a public board can convene), 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 beginning no later than February 9, 2022.
3. **Face Coverings.** Beginning no later than January 10, 2022, 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 beginning January 10, 2022.
5. **Paid Time to Receive and Recover from Vaccine.** Employers must provide employees up to 4 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)'s 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 upon request and make records available to employees and their 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.

Each employee who is not fully vaccinated and reports to an employer worksite at least once every 7 days must be tested at least every 7 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. In situations where an employee is on vacation, leave, or does not report to work for a period of more than 7 days, the employee must be tested within 7 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, the employee can only return to the workplace after a negative COVID-19 NAAT or PCR test, or 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 about the ETS and developed a model policy for implementation purposes.

We will continue to monitor the pending litigation about the validity of the ETS. In the meantime, please contact any Robbins Schwartz attorney for questions related to compliance with the ETS.