

Stay Lifted on OSHA's ETS Mandatory COVID-19 Vaccination/Testing Policy

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Practice Area: Labor and Employment

On December 17, 2021 the 6th Circuit Court of Appeals lifted the stay on the Occupational Health and Safety Administration's (OSHA) Emergency Temporary Standard (ETS) on mandatory COVID-19 vaccinations and testing for employers with 100 or more employees. This decision reinstates the ETS mandates, but OSHA has indicated its intent to allow covered employers until January 10, 2022, by which to come into compliance with the ETS. Moreover, OSHA has stated it will not issue citations for noncompliance with the ETS testing requirements before February 9, 2022, as long as an employer is "exercising reasonable, good faith efforts to come into compliance" with the ETS. Information surrounding OSHA's position can be found here: <https://www.osha.gov/coronavirus/ets2>

We are aware of several parties that have filed emergency applications with the U.S. Supreme Court to review the 6th Circuit's decision and to reinstate the stay of the ETS. The applications will initially be reviewed by the Supreme Court Justice who has responsibility for reviewing emergency requests from the 6th Circuit—Justice Kavanaugh—who can either take action on his own or can refer the matter to the entire Supreme Court. Although we expect that, given the timing, the Supreme Court will act relatively quickly to resolve the question of whether the ETS should be stayed while it is reviewed by the lower courts, at this time it would be wise for employers to revisit their compliance plans (see below) and make preparations to implement the ETS if necessary.

While the Biden Administration had discussed expanding the OSHA's ETS to all employers, it currently only applies to employers with 100 or more employees. For these employers, they are required to have their employees either be fully vaccinated or subject to weekly COVID-19 testing. There are considered exceptions for qualifying medical and religious reasons.

In effecting compliance and safeguarding employer rights, employers must look to implement the following protections:

- Develop and communicate the policy on vaccination, testing and exemption requests for employees including requirements on vaccination status and acceptable proof of vaccination
- Establish workplace rules for employees who are vaccinated (including return to work obligations in the event of exposure or breakthrough cases) and unvaccinated employees, including the wearing of face coverings, social distancing and other precautionary steps while at work (indoors or in vehicles)
- Maintain records and roster of vaccination status for each employee
- Establish enforcement and monitoring protocols for non-vaccinated employees, including supervisory training on obligations of the employer to uphold the OSHA ETS
- Distribute information to employees concerning the requirements of the OSHA ETS, including agency access information
- Require employees to promptly provide notice of positive COVID-19 test, exposure to COVID-19 positive persons or upon a diagnosis of COVID-19
- Establish a process for excluding from workplaces an employee who receives a positive COVID-19 test or COVID-19 diagnosis
- Comply with the ETS requirements on the reporting of work-related hospitalizations (within 24 hours) and fatalities (within 8 hours)

Important for Wisconsin employers, Wisconsin regulatory agencies have indicated that compliance with weekly testing under the federal mandate is not an “employer mandated medical test” for which it has responsibility for payment or reimbursement to the employee. As a reminder, the OSHA ETS applies to private employers with 100 or more employees. Public sector employers are not explicitly subject to the ETS. See our November 5 Legal Update for more information.

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