

COVID-19 Alert: ETS Status Update

The United States Supreme Court to Hear Argument on Private Employer Vaccine Mandate on January 7

By: Amanda E. Thibodeau and Matthew L. Mitchell
January 04, 2022



As previously **reported**, on November 4, 2021, the federal Occupational Safety and Health Administration (“OSHA”) issued an Emergency Temporary Standard (“ETS”) that requires all private employers, with 100 or more employees, to implement a mandatory employee vaccination program, or require unvaccinated employees to receive weekly COVID-19 testing.

Under current instruction from OSHA, employers must have a compliant ETS policy in place by **January 10, 2022** and have compliant COVID-19 testing protocols in place by **February 9, 2022**.

Since its issuance, the ETS has been the subject of multiple legal challenges, in multiple jurisdictions, across the country.

The United States Supreme Court has announced that, on **January 7, 2022**, it will hear oral argument on challenges to the ETS – essentially deciding whether private employers will be required to comply with the ETS’s employee vaccination and testing mandates. Even though the ETS is set to take effect, in material part, only three days after the scheduled hearing (on January 10, 2022), the Supreme Court declined to delay implementation of the ETS pending its adjudication. ***This procedural decision raises the specter that employers will be forced to comply with the ETS before the Supreme Court rules on the enforceability of the ETS.***

The following provides a more detailed status of the ETS and offers compliance strategies for employers in light of pending Supreme Court action.

ETS Status Overview

On November 4, 2021, OSHA issued the ETS – a 253-page administrative order obligating private employers with 100 or more employees (“Covered Employers”) to implement a mandatory employee vaccination program or require unvaccinated employees to receive weekly COVID-19 testing.

Legal actions to block the ETS were immediately filed in federal courts around the country.

On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit (covering Louisiana, Mississippi, and Texas) issued a nation-wide preliminary injunction enjoining the ETS. On November 16, 2021, the Judicial Panel of Multidistrict Federal Litigation announced that all legal challenges to the ETS would be consolidated and evaluated by a panel of judges from the Sixth Circuit Court of Appeals. On December 17, 2021, a three-judge panel of the Sixth Circuit dissolved the stay and cleared OSHA to enforce the ETS across the country.

In response to the Sixth Circuit’s decision, OSHA published revised **enforcement guidelines** establishing new deadlines for ETS compliance. Under these new guidelines, OSHA 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 standard's testing requirements before February 9, 2022, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.

The United States Supreme Court has announced that, on January 7, 2022, it will hear oral argument on challenges to the ETS. The Supreme Court also made clear that it will not be taking any action with regards to those challenges before January 7, 2022, at the earliest.

What Should Covered Employers Be Doing Now?

Given the extremely short interval between the Supreme Court's hearing schedule, and ETS compliance deadlines, Covered Employers have little choice but to start making "reasonable, good faith efforts" to come into compliance with the ETS.

Specifically, we recommend the following:

1. *Develop A Written Policy Prior to January 10, 2022*

Under the ETS, Covered Employers must develop a written vaccination policy that contains, *at a minimum*, the following:

- Information on the requirements for COVID-19 vaccination;
- Information related to exclusions from the policy (e.g., reasonable accommodations for workers with disabilities or sincerely held religious beliefs);
- Information on determining an employee's vaccination status and how this information will be collected;
- Information on the availability of paid time and sick leave for vaccination purposes;
- Information on the procedures related to notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace;
- How information is to be provided to employees (e.g., email, postings on online platforms, etc.); and
- Information on disciplinary procedures for employees who do not comply with the policy.

Covered Employers should include all relevant information regarding the policy's effective date, who the policy applies to, deadlines (e.g., for submitting vaccination information, for getting vaccinated), and procedures for compliance and enforcement, all of which are considered by the ETS to be "necessary components of an effective plan."

The **Morse Employment Law team** has developed a template written policy based on ETS standards. However, the ETS anticipates that covered employers adopt written policies that are bespoke to their workforce and work environment – which will take time to develop. As such, employers are encouraged to start the process of drafting appropriate vaccine policies now.

2. *Collect Workforce Vaccine Data Prior to January 10, 2022*

The ETS requires that Covered Employers collect and store employee vaccination status information. This includes obtaining and storing proof of vaccination from vaccinated employees and recording the identity of unvaccinated employees.

To prove vaccination status, the employee may produce a physical or digital copy of a vaccination record. Acceptable documentation includes the following:

- Record of immunization from a health care provider or pharmacy;

- Copy of the U.S. COVID-19 Vaccination Record Card;
- Copy of medical records documenting the vaccination;
- Copy of immunization records from a public health, state, or tribal immunization information system; or
- Copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

An employee who cannot produce an acceptable document as proof of vaccination may be able to produce a signed and dated statement attesting to their vaccination status and that they have lost or otherwise been unable to produce proof required by the ETS.

3. Notify Employees and Train Managers by January 10, 2022

The ETS requires that Covered Employers inform employees about the requirements of the ETS, and the employer's workplace policies and procedures established to implement the ETS. As part of this requirement, the ETS specifically requires that Covered Employers provide employees with: (1) the CDC's publication entitled: "[Key Things to Know About COVID-19 Vaccines](#);" and (2) information about protections against retaliation and discrimination. In addition, it is prudent that Covered Employers develop and implement compliance training for managers prior to January 10, 2022.

4. Have Testing Protocols in Place by February 9, 2022

The ETS provides Covered Employers with the following compliance options: (1) require that all employees be vaccinated unless the employee qualifies for a medical or religious exemption (exempt employees must participate in at least once-weekly testing and wear face coverings); or (2) provide employees with the option/choice of either showing proof of vaccination status or participating in at least once-weekly (every 7 days) testing. Under this framework:

- Acceptable COVID-19 tests are limited tests that are cleared, approved, or authorized by the federal Food and Drug Administration (the "FDA") and that are administered in accordance with authorized instructions.
- Employers do not need to cover the costs of employee testing.
- Employers will be required to keep confidential records of employees' tests results and maintain them during the effective period of the ETS. Employees must be provided access to their records.

All unvaccinated employees, whether due to an allowable exemption or other personal reasons, must submit to weekly testing – unless they will be working remotely that week.

Covered Employers should take steps now to ensure that testing protocols that are consistent with these standards are achievable by February 9, 2022.

Morse is focused on assisting our clients through these unprecedented times. Please contact [Matthew Mitchell](#) or [Amanda Thibodeau](#) should you have questions concerning this subject, or any other COVID-19 response matters.

[Go to our full COVID-19 Resource Collection.](#)