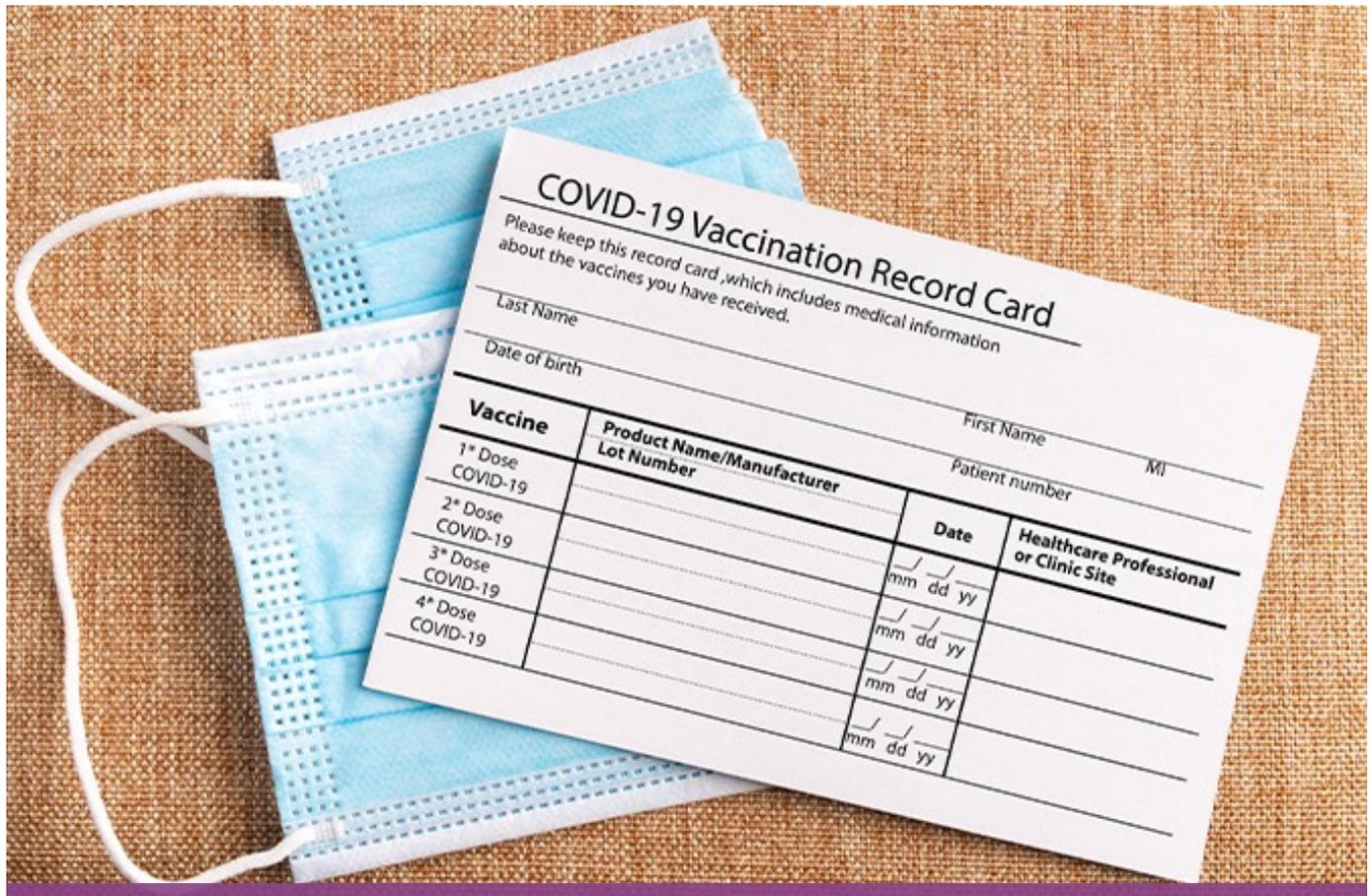


OSHA ETS vax or test mandate revived: What now?



Miriam L. Rosen, Ryan Neumeyer | Monday, December 20, 2021

Employers were left in limbo when the U.S. Court of Appeals for the Fifth Circuit issued a nationwide stay on OSHA’s Emergency Temporary Standard (ETS) in November. Now, in a 2-1 decision issued late on December 17, the U.S. Court of Appeals for the Sixth Circuit has lifted the stay clearing the way for OSHA to resume enforcement of the vaccination or test rule. Immediately following the decision, 27 business groups filed an appeal with the U.S. Supreme Court in an attempt to overturn the Sixth Circuit’s decision. Just days before many are headed off for a holiday break, employers are once again wondering – what now?

What about the ETS compliance deadlines?

The U.S. Department of Labor (DOL) issued a statement on Saturday, December 18, 2021, addressing a modified timeline for compliance with the ETS.

- **OSHA has extended the compliance date for the ETS to January 10, 2022**

As employers will recall, the ETS requires employers to take a number of actions to comply with the ETS beyond the vaccination and test requirements, including: establish a policy on vaccinations, determine employee vaccination status, obtain proof of vaccination, maintain records and roster of vaccination status, and provide support for employee vaccination. In addition, employers must ensure employees who are not fully vaccinated are tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer) and

that unvaccinated employees wear face coverings in the office.

- **In addition, OSHA advised in its statement that it will not issue citations for noncompliance with the ETS testing requirements before February 9, 2022.**

The enforcement grace period hinges on employers “exercising reasonable, good faith efforts to come into compliance with the standard.

What actions should employers take?

With a relatively short compliance extension from OSHA and an appeal pending with the Supreme Court, employers are once again caught in the middle. At this point, it is imperative that covered employers are prepared for enforcement. A full discussion about the ETS and its requirements can be found here: Ready, set, go: [Employers race to comply with OSHA ETS vaccine requirements.](#)

Employers who have not yet done so should promptly take the following actions to ensure compliance:

- **Determine employer coverage under the ETS, federal contractor, or healthcare ETS**
 - The ETS applies to private employers with 100 or more employees in the total firm or corporate-wide. This means that employers with a small numbers of employees at various locations are covered if the total workforce is 100 or more within the company.
 - Part-time and remote employees are included in the count; independent contractors are not.
 - Note, however, that workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors or where the Healthcare ETS are applicable are covered by those separate rules and are NOT the ETS.
- **Determine which employees are covered**
 - The ETS requirements apply to employees who work in the employer’s physical location (e.g., fixed, mobile) where the employer’s work or operations are performed.
 - The requirements do not apply to employees who do not report to a workplace where other individuals such as coworkers or customers are present, who work from home, or who work exclusively outdoors.
- **Collect vaccine status information immediately**
 - Fully vaccinated means a person’s status two weeks after completing primary vaccination with a COVID-19 vaccine with, if applicable, at least the minimum recommended interval between doses.
 - The employer must require that each vaccinated employee provide acceptable proof of vaccination status, including whether they are fully or partially vaccinated. Acceptable proof of vaccination status includes:
 - The record of immunization from a health care provider or pharmacy
 - A copy of the COVID-19 Vaccination Record Card
 - A copy of medical records documenting the vaccination
 - A copy of immunization records from a public health, state, or tribal immunization information system
 - A 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)
 - In instances where an employee is unable to produce acceptable proof of vaccination, a signed and

dated statement by the employee that meets specific requirements is acceptable.

- **Decide whether to implement a vaccine mandate or allow employees to remain unvaccinated and require mask wearing and weekly testing**
 - Unvaccinated employees who report to a workplace at least once every seven days must be tested at least once every seven days.
 - Those unvaccinated employees who are working remotely and occasionally report to a workplace must be tested within seven days of reporting to the workplace.
 - Employees are responsible for providing documentation of the test to the employer. An employee who does not produce a test or tests positive is not permitted in the workplace.
 - Employers can require employees to pay for testing. Employers should consult counsel regarding applicable federal and state laws related to testing.
- **Develop and implement a written policy stating the employer's requirements related to vaccine and/or testing and mask-wearing immediately. The policies should address the following areas:**
 - Requirements for COVID-19 vaccination
 - Applicable exclusions from the written policy (e.g., medical contraindications, medical necessity requiring delay in vaccination, or 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
 - Paid time and sick leave for vaccination purposes
 - Notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace (e.g., how the employer is making that information available to employees)
 - Disciplinary action for employees who do not abide by the policy, and
 - All relevant information regarding the policy's effective date, who the policy applies to, deadlines.

Employers with a union-represented workforce should also consider their obligation to bargain about the scope of the policy.

- **Decide how to present the current information to employees**
 - The ETS requires employers to provide employees with the following information:
 - The ETS requirements and the employer's policies implemented to comply with the ETS
 - The CDC document entitled "[Key Things to Know About COVID-19 Vaccines.](#)"
 - The employee's rights under OSHA whistleblower provisions and the recordkeeping regulations, which prohibits retaliation when an employee reports a work-related illness.
 - The criminal provisions in the OSH Act and other federal laws; OSHA concludes that these provisions prohibit falsifying a vaccination, testing, or other required record.

Given the fluidity of the legal situation and the impending deadline, it is best to inform employees that the employer will be moving forward with compliance measures.

What should employers expect next?

This situation will continue to play out in the courts and in workplaces. Numerous emergency stay petitions were filed with the Supreme Court after the Sixth Circuit lifted the stay. Justice Brett Kavanaugh, who has responsibility for emergency actions out of the Sixth Circuit, will decide the next steps at the

Supreme Court – possibly including another stay. In addition, the merits of the case will continue to be hashed out at the Sixth Circuit.

All of this legal wrangling means that employers should continue to expect uncertainty. The best steps that employers can take now are to prepare for enforcement of the ETS by reacquainting themselves with the ETS requirements, reviewing other available resources, and consulting with counsel.

The McDonald Hopkins Labor & Employment Team will continue to provide regular updates and to assist with compliance.



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