



OSHA's Mandate-or-Test Emergency Rule Gets Sent to White House for Final Review: How Employers Can Avoid Living in a Land of Vaccine Confusion

Insights
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The Department of Labor just took the next step in advancing President Biden's vaccine mandate-or-test emergency rule, sending the Emergency Temporary Standard to the White House's regulatory office late yesterday. Coming on the heels of Texas Governor Greg Abbott's announcement that he was barring employers from "compelling" employees to become vaccinated against COVID-19, and in the context of a patchwork of states that each seem to have their own approach to workplace safety rules, could yesterday's news be the genesis of employers getting stuck in a land of confusion? In order to avoid any misunderstandings, here is a brief recap of what just happened, what to expect in the coming days and weeks, and how employers in different states will be impacted by the impending development.

What Happened Yesterday?

When President Biden instructed the Occupational Health and Safety Administration (OSHA) on September 9 to develop an Emergency Temporary Standard (ETS) that would require employers with more than 100 workers to either mandate vaccination or test employees for COVID-19 on a weekly basis, he set in motion a procedural process that most employers are not familiar with. The next step in the process – which happened yesterday – is sending the draft ETS to the White House's regulatory office for review and approval.

The Office of Information and Regulatory Affairs (part of the Office of Management and Budget) often takes months from the time it receives a draft rule from a federal agency to releasing it to the public. But this is a far different operation than the typical regulatory process that also sees draft rules released publicly for notice and comment by the general public. Instead, because this is an "emergency" rule, the White House could theoretically finalize and release the ETS in as early as one day.

What Timing Do We Expect?

The Workplace Safety Practice Group at Fisher Phillips is familiar with the workings of OSHA and the White House and believes the following timeline is realistic when it comes to the next steps in the regulatory process:

- **White House review and approval of the ETS:** between October 12 and October 15
- **OSHA publishes the ETS and makes it available to the public:** between October 18 and October 20
- **OSHA publishes the ETS in the Federal Register (making it official law of the land):** approximately October 27
- **State OSHA Plans will have 15 days to announce the adoption of the ETS or announce an alternative:** approximately November 10
- **State OSHA Plans have another 15 days to make the ETS (or their own alternative) effective:** approximately November 25
- **Enforcement begins after expected grace period for compliance lapses:** approximately December 1
- **State OSHA Plan enforcement begins:** approximately January 1, 2022

What are Federal OSHA States v. State Plans?

Federal OSHA does not have jurisdiction over every private employer in the country. Rather, the federal government can largely enforce safety rules against private employers only in 29 states plus the District of Columbia and other American territories (e.g., subject to exceptions like federal worksites/military bases/navigable waters in other states). The remaining 21 states have approved “state plans,” where a state agency enforces safety regulations in that jurisdiction. Adding to the confusion, six federal states and territories *also* have state plans that cover only local and state government workers. These three categories are identified below.

- **Federal OSHA states (private sector employers) (“Federal States”):** Alabama, American Samoa, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, Idaho, Illinois, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Virgin Islands, West Virginia, and Wisconsin.
- **State OSHA plans (private sector and local and state government workers) (“State Plans”):** Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.
- **State OSHA plans (local and state government workers only):** Connecticut, Illinois, Maine, New Jersey, New York, and the Virgin Islands.

What Happens in Federal States when the ETS is Enacted?

The ETS will become effective immediately in Federal States. Although the date of enactment for the ETS is currently uncertain, we expect enactment to be imminent according to the chart above. As

ETS is currently uncertain, we expect enactment to be imminent according to the chart above. As soon as it is published in the Federal Register, it will immediately take effect in Federal States (including Texas), requiring almost all private employers to abide by its terms.

What Happens to Governor Orders in Federal States that Ban Mandates?

Governor Abbott's order may not be the last one employers see banning vaccine mandates. Expect governors in conservative Federal States – including Louisiana, Oklahoma, Georgia, Florida, Alabama, and Mississippi – to rush to issue similar orders to push back against the federal government. This potential conservative firewall will get federal OSHA's attention, but likely won't delay the adoption of the ETS.

The ETS likely will include specific language noting that it supersedes any state or local law concerning vaccines that is not as strict as the ETS. Thus, any order like the one issued by Governor Abbott will become null and void. However, during any period of time between the issuance of a governor order banning mandates and the adoption of the ETS, employers in such states will be in limbo with respect to their vaccine policies. If you are faced with that situation, you should comply with the governor's order during the pendency of the directive, but be prepared to change course once the ETS takes effect. Otherwise, you may risk receiving penalties for violating the order.

What Happens in the State Plans When the ETS is Enacted?

As noted by OSHA, “when Federal OSHA promulgates an ETS, States and U.S. Territories with their own OSHA-approved occupational safety and health plans (State Plans) must either amend their standards to be identical or “at least as effective as” the new standard, or show that an existing State standard covering this area is “at least as effective” as the new Federal standard.”

Thus, in State Plans, following the adoption of the ETS, the state agencies will likely have 15 to 30 days from the effective date (Federal Register publication) to:

- 1) adopt the ETS as enacted by federal OSHA;
- 2) amend the federal ETS to be just as or more effective; or
- 3) enact their own standard or rely on an existing standard that is “just as effective.”

This creates three camps of State Plans, which we predict, based on our experience, will act as follows after the ETS is enacted (state plans not listed are toss ups with respect to how they may respond):

- **Follow-the-leader states.** These states likely will adopt the ETS as issued by federal OSHA: North Carolina, New Mexico, Minnesota, Nevada, Kentucky, and Maryland.
- **Creative states.** These states may alter the ETS to be stricter or include additional requirements: Virginia, Michigan, California, Oregon, and Washington.

- **Gates-of-hell states** (based on earlier [comments](#) from South Carolina governor Henry McMaster about taking President Biden to the “gates of hell” over the ETS). These states likely will not adopt the ETS and argue that current standards (including the OSH Act’s general requirement to provide a safe workplace – the General Duty Clause) are just as effective: South Carolina, Arizona, and Indiana.

3-Step Plan for Change

With too many people, making too many problems, employers should take the following steps now to prepare for this everchanging landscape.

1. **Understand workplace safety governance in your state.** Are you in Federal States, State Plans, or both? Understand the difference between them and follow guidance in each jurisdiction. Seek counsel on this issue when needed.
2. **Obtain vaccination status of employees.** If not completed, seek the vaccination status of your workers so you can be prepared for logistics, costs, and other issues concerning mandating vaccines or tests for unvaccinated workers. Having this information now will allow you to make an educated decision on what is best for your workplace.
3. **Train employees on COVID-19 policies and OSHA inspections.** If you haven’t already done so, create a written COVID-19 response plan and train your employees on your COVID-19 policies. Even though OSHA may have not visited your worksite in the past, train your managers and supervisors on what to say or do when the agency arrives, which is a greater likelihood given the broad reach of the ETS.

Conclusion

The COVID-19 pandemic is the deadliest in American history. We are living through unprecedented times. But addressing sweeping OSHA regulations are part of the world we live in, and these are the hands we’re given. Take steps now to prepare for challenging, confusing standards that may differ by state throughout our land.

We will monitor these developments and provide updates as OSHA releases the Emergency Temporary Standard. Make sure you are subscribed to [Fisher Phillips’ Insight system](#) to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney, the author of this Insight, or any attorney on our [FP Vaccine Subcommittee](#).

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