

WHAT MINE OPERATORS SHOULD KNOW ABOUT LEGAL CHALLENGES TO OSHA'S VACCINE ETS – AND WHAT TO DO IF IT SURVIVES

Insights
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Mine operators may not be among the employers that will be impacted by [OSHA's mandate-or-test Emergency Temporary Standard \(ETS\)](#), but questions abound in the mining community about the state of the emergency rule and whether operators should be preparing for an ETS from MSHA. After all, [the Fifth Circuit Court of Appeals just issued an order over the weekend blocking the ETS from taking effect on a nationwide basis](#), citing potential "grave statutory and constitutional issues" with the emergency rule, and OSHA's immediate response may mean that mine safety officials may be more likely to issue a rule of their own. Here is what mine operators need to know about OSHA's response to that argument, and what MSHA might do if the ETS survives legal challenge.

What Happened?

By now, most are aware of the ETS issued by federal workplace safety officials, which will require all covered employers with 100 or more employees to either mandate their workforce receive the vaccination against COVID-19 or test them weekly to ensure they are not infected. For more information, you can read our [Comprehensive FAQs for Employers on the OSHA Vaccine Emergency Temporary Standard \(ETS\)](#).

Under section 6(c)(1) of the Occupational Safety and Health Act, OSHA can issue an ETS only if the agency determines that employees are exposed to a "grave danger" from exposure to substances or agent determined to be toxic or physically harmful or from new hazards (e.g., COVID-19) and

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an ETS is necessary to protect employees from such danger. In its initial response to the Fifth Circuit filed on Monday, OSHA outlined how COVID-19 represents a “grave danger” because of “significant evidence of workplace transmission and exposure.” The agency further explained that workplace dangers include contracting communicable diseases due to working in close proximity with coworkers, and vaccination was the most effective means to avoid workplace transmission. According to OSHA, a regular testing schedule and face covering mandates could also prove effective.

OSHA explained that voluntary safety measures have proved ineffective, and the vaccine is not only available but sorely needed given that the Delta variant has significantly increased infection rates. OSHA stated the Delta variant creates an ongoing threat that is overwhelming the healthcare system. The agency estimates that the ETS will save 6,500 lives and prevent over 250,000 infections in the six-month duration of the ETS. This would reduce the strain on healthcare systems, slow the emergence of new variants, and minimize COVID’s impact on the economy by avoiding shutdowns and loss of businesses.

Why Should Mine Operators Care?

We will see if OSHA’s justification is enough to convince the Fifth Circuit or other federal appeals courts that will hear other challenges whether the ETS is legally justified and appropriate, but OSHA has certainly emphasized the “grave danger” the rule is designed to address. If the ETS survives the current round of challenges, it will be because the courts conclude that COVID-19 does present grave danger to workers. If that happens, MSHA’s refusal to develop a similar ETS for COVID in the nation’s mines could change.

What Does This All Mean for Mine Operators?

Most mine operators are aware of MSHA’s position on a vaccine standard. [As explained in our recent Insight](#), MSHA has consistently stated the agency has no intention of requiring vaccination or testing at mine sites. It points to the Mine Act and the powerful enforcement actions available to the mine safety agency to temporarily shut down a mine if MSHA determines that mine is spreading COVID. MSHA’s response so far completely ignores that OSHA’s justification for the ETS is to use vaccination or testing to save lives and

prevent outbreaks that could cripple businesses and the economy.

At some point, someone in the Department of Labor might recognize the inconsistency of MSHA's position with that of OSHA's "grave danger" justification in its Fifth Circuit response. Consequently, there may be a time when MSHA is forced to develop its own ETS or infectious disease standard to address the impact of COVID on the mining industry. Thus, mine operators may want to [familiarize themselves with the OSHA ETS requirements](#) as any MSHA standard would most likely borrow heavily from the OSHA ETS.

As summarized in our [OSHA ETS FAQs](#), the OSHA ETS generally requires private employers with more than 100 employees to either mandate covered employees be fully vaccinated against COVID-19 or require covered employees that are not fully vaccinated to test for COVID-19 at least weekly and wear a face covering.

As part of OSHA's ETS, employers must also:

- Establish, implement, and enforce a written policy on vaccines, testing, and face coverings;
- Provide certain information to employees on vaccines and the requirements of the ETS;
- Provide paid time off to employees to obtain the vaccine and reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination series dose to each employee for each dose;
- Obtain and maintain records and roster of employee vaccination status; and
- Comply with certain notice requirements when there is a positive COVID-19 case and reporting to OSHA when there is an employee work-related COVID-19 fatality or hospitalization.

Most of these requirements would translate to MSHA-regulated facilities. Therefore, mine operators should consider how to implement them if they were to be included in an MSHA ETS. Operators will have to wait and see if MSHA takes any regulatory action to protect miners from the potential hazards of COVID transmission.

We will keep you posted on any actions MSHA takes and will advise on how best to prepare for an MSHA ETS if one materializes in the coming weeks or months. 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 authors of this Insight, any attorney on our [FP Vaccine Subcommittee](#), or any attorney on our [Mine Safety and Health Practice Group](#).