

CALIFORNIA PRESSES PAUSE ON IMPLEMENTING NEW FEDERAL WORKPLACE VACCINE EMERGENCY RULE

Insights
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California is the latest state to hold off on implementing the [newest federal OSHA Emergency Temporary Standard \(ETS\)](#) in light of the onslaught of legal challenges across the United States. That rule – [currently stalled in litigation but poised to potentially be resurrected at any moment](#) – will require covered employers with 100 or more employees to either mandate their workforce receive the COVID-19 vaccination or test them weekly to ensure they are not infected. Depending on what happens with the federal litigation and the current temporary stay of the federal ETS, California’s pause could be short-lived or longer in duration – creating some uncertainty in workplaces across the state for now. What should California employers do in the meantime?

OSHA ETS Faces Legal Challenges

On November 4, the Occupational Safety and Health Administration (OSHA) released a mandate-or-test workplace vaccine emergency rule, which went into effect on November 5. The ETS requires employers with 100 or more 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.

The ETS immediately faced challenge from across the country. [Two days after the announcement, the Fifth Circuit Court of Appeals issued a temporary “stay” that blocked the ETS until it could more closely examine the legality of the rule. On November 12, the Fifth Circuit extended the stay, and ordered OSHA to take no steps to implement or enforce](#)

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[the ETS](#). Since the original ETS announcement, other challenges have continued to pop up.

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A Multidistrict Litigation Lottery held today determined which federal appellate court will hear the combined challenges that have since been filed, and randomly selected the Sixth Circuit Court of Appeals (with courts overseeing Ohio, Michigan, Tennessee, and Kentucky). That federal appeals court will now determine whether the ETS will go into effect – but this legal challenge could ultimately make its way to the Supreme Court.

How Does This Affect California?

The federal OSHA mandate-or-test workplace emergency rule applies to all Federal OSHA states where the government enforces the OSH Act. California has its own state agency, Cal/OSHA, that enforces its safety regulations. Cal/OSHA has 30 days to adopt the federal ETS or alternative regulations that are at least as effective as the ETS.

Originally, the California Occupational Safety and Health Standards Board planned to meet on November 18 to consider adopting the federal ETS “as is” or with unknown additional changes. The Board never published the proposed language, so it is unclear exactly what language was being contemplated. However, given the state of the litigation currently blocking the federal ETS, California has delayed its vote until there is more information about the next litigation steps and the inevitable appeal to the Supreme Court.

What Should Californian Employers Do?

While we wait for more guidance about the new vaccine-or-test rule, the current Cal/OSHA COVID-19 Prevention ETS remains in effect until at least January 14, 2022. This means that employers should continue to follow the Cal/OSHA ETS. For a refresher on the Cal/OSHA ETS, check out our Insight [here](#).

In the meantime, California employers should evaluate and plan for potential compliance with a California vaccine-or-test rule but should wait to implement its measures until there is more certainty from Cal/OSHA. This means that employers who have not already done so, should establish policies for determining employees’ vaccination status,

obtaining and maintaining proof and evaluating logistics and procedures for tracking weekly test results. For further guidance on the federal ETS, check out [Fisher Phillips' Comprehensive FAQs](#).

We will monitor these developments and provide updates as events warrant. 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 [in our California offices](#).