

DON'T KNOW WHAT TO DO WHILE THE OSHA MANDATE-OR-TEST VACCINE ETS IS IN LITIGATION LIMBO? HERE'S A 3-STEP APPROACH FOR EMPLOYERS

Insights
Nov 22, 2021

You've digested [the detailed FAQs on OSHA's mandate-or-test vaccine ETS](#), you've read about [the rule being blocked by a court order](#), and you know that [a conservative appeals court now controls the fate of the rule \(for now\)](#). But you also know that the ETS could get jolted back to life at any moment, either by a surprise appeals court ruling or by a final ruling from the U.S. Supreme Court. There's no telling when those events could occur – next week is just as likely as next month – leaving employers uncertain what steps to take during this uncomfortable limbo period. Adding to your discomfort is the patchwork of new state laws that may or may not conflict with your ability to implement such measures, and which may or may not be rendered invalid if and when the federal ETS is upheld. While employers sometimes gamble, that's not your normal decision-making process. So how should you approach the days ahead – balancing the risk of having to quickly perform a huge amount of work if the ETS survives the legal challenge against the chances that all of your work could be for nothing? Here is a commonsense approach that employers should consider during these confusing times.

Too Long; Didn't Read Version: Some Prep Now is Advisable

The remainder of this Insight provides a review of the considerations you should take into account and a detailed checklist of actions you should be taking, but the 30,000-foot overview is this: **If you are subject to the OSHA ETS,**

Related People



Howard A. Mavity

Partner

404.240.4204

Service Focus

Government Contracting,
Compliance, and Reporting

Litigation and Trials

Workplace Safety

Industry Focus

Healthcare

you should perform some behind-the-scenes actions but not unfurl major initiatives during the limbo period.

In other words, it makes sense to collect information and draft policies and procedures, but you probably shouldn't spend thousands of dollars on self-check COVID-19 testing kits or contracting with a tele-proctor service so employees can self-administer tests. You could collect the vaccination status of your employees (done properly) but not roll out big new policies or make big company-wide pronouncements.

Of course, many employers are choosing to proceed with a mandatory vaccination program or testing regimen regardless of the outcome of the ETS. This Insight provides recommendations for those employers still unsure about how to proceed or only pushing toward a mandate-or-test policy because of the ETS's requirements.

3 Steps to Take During Litigation Limbo

Workplace law attorneys are engaged in intense speculation about the outcome of the ETS, rivaling the annual debate about who will win the Super Bowl. The current collective wisdom among court speculators? Most feel confident that the 6th Circuit Court of Appeals will uphold the stay of the OSHA ETS and the rule will remain blocked for the time being, and then end up at the U.S. Supreme Court before the end of the year. But while some feel confident about its ultimate fate at the Supreme Court and the timing of such a decision, any conjecture you hear on those data points are pure speculation at this time. Which means the ETS may or may not survive, and the effective date of the rule should it survive is an absolute unknown. Understanding that background, here are three critical tips with helpful links to other FP materials to guide you as you make your decisions.

1. Use Coming Weeks to Gather Facts and Information

First, ask these series of questions about your organization to determine if you are even covered by the OSHA ETS and/or whether you have similar impending obligations imposed on you by other government mandates – which are less likely to be struck down. You may be able to tie in some ETS preparation with these other efforts.

- Do you meet the proposed OSHA ETS coverage requirements? [Read our guidance on coverage issues](#)

[here](#).

- Are some or all of your sites covered by the Mine Safety & Health Act? [Read our guidance here](#).
- Are you covered by the earlier OSHA Healthcare ETS, and/or the more harsh requirements being imposed on recipients of Medicare/Medicaid monies by the more demanding [CMS Medicare Omnibus Staff Vaccine Mandate Interim Final Rule](#)? [Read our guidance here](#).
- Are you covered in whole or in part by the Biden Federal Contractor Mandate because you have one of the four traditional federal contractor or subcontractor contracts? [Read our guidance here](#). (Note: even if you have not previously received contracts referencing the Federal Acquisition Regulations (FAR) and are not covered by Executive Order 14042 (COVID Safety), federal agencies are “strongly” encouraged to incorporate a clause requiring compliance with the Task Force [Guidance for Federal Contractors and Subcontractors](#) into contracts that are not covered or directly addressed by [Executive Order 14042](#) and to send it now.)
- Do you have locations where state and local rules already impose COVID-19 obligations? [Read our guidance here](#). Generally, federal mandates will preempt state and local COVID-19 safety regulations, but if you are already taking steps required by the proposed OSHA ETS, you may be able to piggyback compliance preparation.

Analyze whether you are covered by these other mandates, and if so, whether coverage is limited to certain business units or work. In such scenarios, there may be alternative strategies for you to take in consultation with your workplace lawyer.

Second, besides gathering facts about coverage, you should use this time to gather information about your workforce. You can and should use this time period to inquire among your employees their vaccination status so that you are in prime position to make determinations about whether to impose a mandate or testing requirement, and can implement either such obligation most effectively. You can read two of our relevant Insights covering the issues here: [Is Asking an Employee if](#)

[They're Vaccinated a HIPAA Violation? What Employers Need to Know](#) and [How Employers Can Handle Confidentiality and Privacy Concerns Related to Collecting COVID-19 Vaccine Information.](#)

2. *Weigh the Probability of the OSHA ETS Being Upheld Against Your Risk Tolerance*

The Fifth Circuit blocked the OSHA ETS on November 12 and [OSHA soon thereafter issued a notice that it would suspend implementation and enforcement efforts](#) for the time being. The many other legal challenges filed across the country were later consolidated and assigned to the 6th U.S. Circuit Court of Appeals, which is now determining the next steps in the legal process. That court has 20 Republican- and six Democratic-appointed judges, so there is optimism among the challengers to the ETS that any panel of judges assigned to the matter will be responsive to their arguments. We speculate on the upcoming process and the likely outcomes in [our most recent Insight.](#)

Whichever side comes out on the losing end of that 6th Circuit process will undoubtedly petition the U.S. Supreme Court to hear their challenge. There are no guarantees as to how swiftly the decision would be made if the SCOTUS accepted the inevitable appeal, however. Our only guarantee is that we will timely provide updates when there are significant developments in the process, so make sure you are [subscribed to our FP Insight service](#) to receive prompt updates.

You might be the gambling type and feel confident that the SCOTUS will ultimately strike down the ETS and you'll never be forced to mandate the vaccine or a testing regimen. If so, you need to weigh the risk of business disruption that could come your way if you are forced to scramble to implement the ETS should the Supreme Court uphold it – and the potential monetary penalties that could come your way if you are unable to meet the eventual deadlines.

If the ETS is ultimately upheld and implemented, expect OSHA to follow its normal approach to imposing penalties for violations with initial "Serious" violation penalties of \$14,000 for violation of a standard requirement and up to \$136,000 for "Repeat" or "Willful" violations. While it's hard to see OSHA classifying initial violations as Willful or

Egregious, your lack of activity during this limbo period could be cited as support for higher penalties. Of course, the latest incarnation of the Biden administration's [Build Back Better legislation](#) has a provision that could increase all OSHA penalties by up to 10 times, so you should also factor that into your decision-making risk analysis.

3. *Consider Some Commonsense Steps*

Once you've gathered information, weighed the risks, and read the tea leaves, consider the following steps:

- Establish an ETS-compliant written policy on vaccines, testing, and face coverings, and determine how you will enforce it. The ETS imposes more requirements than vaccination, including notices to employees and OSHA.
- Evaluate your company culture and how employees will react to a vaccine mandate. Do you know current site vaccination rates? Have you offered Incentives and were they effective?
- Plan for how to handle temporary and long-term employee loss.
- Provide information to employees on vaccines and the ETS requirements (and other mandates if applicable to sites or business units).
- Determine "how" to explain the pending court litigation and pending appeal(s), because many employees may assume that the ETS is dead if they just glanced at headlines.
- Prepare to provide paid time off to employees to obtain the vaccine and reasonable time and paid sick leave to recover from side effects following each dose.
- Follow the narrow ADA-acceptable approach and obtain records and a roster of employee vaccination status, and how to not unduly excite workers.
- Build a process (committee, outside providers, etc.) to evaluate requests for medical and [religious accommodations](#). The CMS and Federal Contractor analysis may in practice be stricter.
- Under federal wage and hour regulations, plan to pay nonexempt employees for required testing, and

determine whether to charge for test costs for exempt employees.

- Determine state laws dealing with vaccination requirements, proof of vaccination, pay for testing, mask requirements, etc. While federal requirements generally will preempt such state Laws, you must evaluate your choices pending resolution of the ETS challenges. Just this week, in fact, [Tennessee](#) and [Florida](#) passed such laws.
- Consult your FP counsel on the [CMS Healthcare](#) and [Federal Contractor](#) vaccine mandates, which are subject to various court orders blocking them as well.
- Recognize [Collective Bargaining obligations](#) if you are unionized.

Conclusion

We will continue to monitor this situation and provide updates as warranted. Until then, Fisher Phillips has created [a set of comprehensive FAQs for employers on the ETS](#) to help you navigate through this process. 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](#).