



SCOTUS Vaccine Aftermath: What Should Employers Do Now?

Insights

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The Supreme Court blocked OSHA from enforcing the vaccine mandate-or-test ETS and the agency responded yesterday by shelving the emergency rule altogether. In some ways, these two developments mean that the pathway for employers is much more clearly defined – but others may feel lost given the confusing nature of how we got here. We've assembled a collection of Fisher Phillips attorneys from our Workplace Safety and Vaccine teams to answer the most pressing questions you probably have now.

What's the Latest on the ETS?

“Just yesterday OSHA announced that it was withdrawing the ETS, no doubt in reaction to SCOTUS's ruling putting a halt on enforcement. So what's next? The agency indicated that it will push forward with a standard, but this time as a proposed rule under the rulemaking provisions of the Occupational Safety and Health Act and not as a temporary emergency measure. This means that OSHA could pursue a permanent rule requiring vaccination or testing through the normal rulemaking notice-and-comment process. We think it is likely that the agency may also attempt to tailor the rule to a narrower group of employers by targeting specific industries. Long term, OSHA could use the framework of the ETS as the basis for a broader infectious disease standard going well beyond just COVID-19.”

Nick Hulse (Charlotte)

Can We Still Mandate the Vaccine for Our Workforce?

“Yes, in most states it is still permissible to impose your own vaccine mandate in most locations, regardless of SCOTUS's decision. Remember, all the Supreme Court said is that OSHA can't *require* you to implement a vaccine policy – but the Court did not say you couldn't implement a policy on your own, if you believe it is right for your workplace. If you want to go down this path, you should first coordinate with your workplace law counsel to determine if state law permits you to proceed or requires you to allow a broader set of exemptions than provided under federal law. And you'll need to sort out questions related to requirements for paying your employees for the time they spend getting vaccinated and any time they miss with side effects. The bigger question, of course, is how would such a policy impact your workforce – will morale issues and workforce shortages override your concerns about worker safety? Make sure you are in touch with your current business

environment before moving forward.”

Kevin Troutman (Houston), Co-Chair of FP's Vaccine Subcommittee

Can We Require Regular COVID-19 Testing for Unvaccinated Workers?

“Yes, for the same reasons Kevin described above, the SCOTUS ruling in no way prevents you from implementing a policy that requires regular COVID-19 testing of all non-vaccinated personnel if you want to offer a vaccination alternative. You’ll have some tough decisions to make before you roll out such a policy, however. How often will you test the unvaccinated workers? Will you be in compliance with national and local wage and hour laws for time spent on receiving employer-required tests? Who will pay for the tests? What kinds of tests will be acceptable under your policy? And finally, while tests are becoming more widely available in some regions, how will you ensure you have sufficient tests to cover the unvaccinated workers?”

Emily Litzinger (Louisville), Co-Chair of FP's Vaccine Subcommittee

Are We Allowed to Ask the Vaccination Status of Our Employees?

“This is one of the most common questions we’re hearing lately – and one of the most common myths out there is that HIPAA prevents you from asking about vaccination status. This is absolutely wrong. Not only did the EEOC say way back in December 2020 that you can lawfully ask employees their vaccination status without violating federal anti-discrimination laws – provided the question is limited to a yes-or-no response – but another federal agency said that HIPAA is not implicated at all in typical workplace settings. The HHS said in October that HIPAA does not prohibit an employer or business from asking whether an individual has received a particular vaccine, including COVID-19 vaccines. It does regulate, however, how and when a covered entity may use or disclose information about an individual’s vaccination status, so make sure you understand privacy and confidentiality rules before you do anything with the information you collect.”

Hannah Sweiss (Los Angeles)

What Should We Do with All of our Workers’ Vaccine Cards We Collected?

“We’d recommend you hold onto them for the time being in the event a permanent vaccine rule ever comes online. Keep them safe, guard them against theft and cybercrime, and don’t reveal them to personnel who aren’t on a need-to-know basis. However, you almost certainly won’t need to retain them for a full 30 years like the way OSHA requires you to hold onto other similar records in non-pandemic instances.”

Travis Vance (Charlotte), Co-Chair of FP's Workplace Safety Practice Group

We Collected Information About Whether Our Employees Were Vaccinated or Not in Anticipation of the ETS – Do We Have Additional Obligations Now That We Have This Roster? In Other Words, Do We Need to Create More Safety Barriers Around the Unvaccinated Workers?

“It’s unlikely that you will be held to a higher standard by OSHA because you have knowledge of vaccination status from having created a roster to comply with the recently rescinded ETS. In other words, we don’t think it likely that the agency will poke its head into your workspace and use your knowledge of vaccination status gained by creating a roster for regulatory enforcement purposes.”

Patrick Dennison (Pittsburgh)

We Want to Implement Heightened Safety Obligations for Non-Vaccinated Employees – Is that Allowable?

“Yes, you can. While you might not be forced to do so by OSHA, you can require those who don’t prove their vaccinated status to comply with additional safety restrictions as necessary to maintain a safe working environment. These can include masking requirements, social distancing rules, restrictions on business-related travel, and other concepts relevant to your work environment. Whatever you decide, you will want to announce these requirements ahead of time, so it does not appear as if you are individually targeting certain workers – and you’ll want to check state laws. You’ll also want to craft your policies thoughtfully, with regard to your specific workplace, and in coordination with your workplace law counsel so as not to create the perception that your rules are punitive or coercive.”

Kristin White (Denver)

What Are Some Other Ways We Can Increase Vaccination Rates Without Mandating the Vaccine?

“Think about this from a stick-or-carrot perspective. If you want to go with the stick, you could impose an additional surcharge on health insurance premiums for those workers who are unvaccinated. This would be similar to a nicotine surcharge that many employers already have in place as part of their wellness programs. Before considering any surcharge, make sure you understand state and federal law regarding this option. Or you could go with the carrot – offering incentives to any worker who can prove they are fully vaccinated. The most common incentives employers have offered include cash, gifts, or paid time off. The easiest way to do this and stay on the right side of EEOC guidance is to have your employees voluntarily provide documentation confirming they got vaccinated from a third party. In such cases, you can offer them any incentive you’d like with no apparent limitations. But if your organization or some entity acting on your organization’s behalf administers the vaccine, your incentives cannot be so substantial in value as to be considered coercive.”

Megan Janes (Ft. Lauderdale)

Should We Revise Our Policies to Require Boosters for our Workers to be Considered “Fully” Vaccinated?

“Probably not, but there could be some circumstances where this is warranted. From a purely legal perspective, I would be hesitant to require something that hasn’t yet been approved in all situations by the CDC. The current CDC guidance specifically states that ‘fully vaccinated’ means after having your ‘primary series’ of shots – i.e., two shots in most cases. In fact, it specifically notes that ‘booster shots are not recommended for everyone at this time.’ However, your decision should ultimately hinge on your organization’s particular circumstances, including local transmission rates. Requiring boosters may be appropriate in some situations, certainly only where it is permitted by state law and where it is less likely to result in an employee revolt. In addition to some healthcare settings, employers with workplaces such as a meatpacking plant or a production facility might seriously consider requiring or *at least* encouraging boosters. Requiring boosters could also help alleviate any workforce shortage you may be experiencing as the most recent quarantine and isolation guidance from the CDC does *not* require individuals who have been boosted to quarantine after exposure to someone with COVID-19.”

Jacqueline Del Villar (Houston)

Do You Have Any Final Recommendations for Us?

“Yes – prepare for an OSHA with teeth for the rest of 2022 and beyond. The agency might have been blocked from enforcing the Vaccine ETS, but it is loaded for bear when it comes to enforcement of workplace safety obligations right now. The agency was funded to hire hundreds of additional investigators last year. It is wrapping up training of this new batch of representatives now, which means all of these eager new investigators will be unleashed on the nation’s employers in the coming months. They will be looking for COVID-19 protocol compliance as well as general workplace safety violations, so the time is now to get your house in order. If you haven’t strategized with your workplace safety lawyer lately to make sure you are in the best position, you should make that a priority today.”

Todd Logsdon (Louisville), Co-Chair of FP’s Workplace Safety Practice Group

Conclusion

As we have done throughout the pandemic, 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, or any attorney on our [FP Vaccine Subcommittee](#).

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