



# **“Strait” Talk for Employers on COVID-19 Compliance After OSHA Pulls Short-lived Vaccine ETS**

Insights

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After federal workplace safety officials withdrew the emergency temporary standard that would have forced larger employers to either mandate COVID-19 vaccinations or require each unvaccinated worker to be tested each week, some employers are wondering whether it's a case of Easy Come, Easy Go. After all, OSHA's withdrawal of the ETS may seem like mostly good news, as some of its provisions were time-consuming and costly – especially for companies that planned to test unvaccinated workers weekly in lieu of mandatory vaccinations. Yet many employers may end up regret losing the ETS, thinking I'd Like to Have that One Back. That's because other requirements were actually less burdensome than existing COVID-19-related OSHA regulations and Centers for Disease Control and Prevention (CDC) guidance that now govern workplaces. This Insight will review three reasons why employers may want the ETS back and three reasons employers are glad to bid the ETS farewell, and provide a three-step compliance plan now that we're seemingly back to square one.

## **ETS Rollercoaster Ride**

The ETS endured a short, tumultuous lifespan, causing employers to prepare draft policies that were either never instituted or adopted and then withdrawn. Following the status of the ETS was often confusing and complicated (unless, of course, you subscribe to Fisher Phillips' Insights).

OSHA published the ETS in the Federal Register on November 5, and it was quickly blocked by the 5th Circuit Court of Appeals the very next day. The 5th Circuit's stay remained in place until December 17, when the 6th Circuit lifted the stay in an opinion that surprised employers. The ETS' second chance was short lived, however. The U.S. Supreme Court reinstated the stay on January 13, citing its concerns over the breadth of the ETS and OSHA's ability to regulate a virus found both in public and the workplace.

OSHA then pulled the ETS on January 25, probably hoping to avoid a further negative ruling – this time about the substance of the rule itself – from another court. However, the agency announced that it was retaining the ETS as a proposed permanent standard, perhaps forecasting a future OSHA standard on infectious diseases in the coming months.

## **3 Reasons Employers Want the ETS Back**

Again, even if you celebrated the SCOTUS ruling knocking down the ETS, there might be some reasons why you should think twice about the current state of affairs.

1. **OSHA's Medical Record Retention Standard.** OSHA's access to medical record standard requires employers to retain certain medical documentation (e.g., created by a pharmacist, nurse, doctor, or other healthcare provider) for the length of the worker's employment **plus 30 years**. The ETS provided employers reprieve from this rigorous retention requirement, decreasing that length to the duration of the ETS, or (likely) no more than six months. Unfortunately, without the savings clause of the ETS, employers must now again retain employee vaccination and testing records for the length of the worker's employment plus 30 years.
2. **Mask-Wearing Requirements.** The ETS was lenient on mask-wearing for vaccinated workers. All employees who had either the one Johnson & Johnson COVID-19 vaccine dose, or both doses of the Moderna or Pfizer vaccines, at any point, and even without a booster, were not required to wear a mask under the ETS in most situations. Now, without the ETS, employers must follow the stricter CDC guidance on mask wearing in the workplace. The CDC recommends that all individuals, regardless of vaccination or booster status, wear a mask while indoors in areas of the country with substantial or high transmission of the virus.
3. **Lack of Uniformity in Guidance.** Although companies disliked some of its provisions, the ETS offered uniformity on what employers, especially those with locations in several states, must do to protect workers from hazards related to COVID-19. Now, like during times before the ETS, employers must keep abreast of and follow a litany of local, state, and CDC guidance. This task is an onerous one, requiring employers to spend significant resources on determining what different actions must be taken throughout the country to remain compliant. To make matters worse, OSHA can still cite employers for violating the generic requirement to keep a safe workplace, known as the General Duty Clause, for violating local, state, and CDC guidance, and now has higher penalties available at its discretion.

### 3 Reasons the Employers Are Glad to Watch the ETS Go

Since its inception in November, many employers were eager for the ETS to go away. A large portion of employers hoped that if there was a plane or bus leaving Dallas, the ETS was on it. Now that the ETS is in fact gone, those workplaces feel like they are taking a vacation at Marina Del Rey, because COVID-19 compliance life is easier without the ETS, at least for these three reasons.

1. **No Required Weekly Testing.** The logistical and financial burden that accompanied the weekly testing requirement for unvaccinated workers would have proven challenging for employers. Guidance in almost every locality and state does not require weekly testing now that the ETS is gone, eliminating these concerns.
2. **Reduced Recordkeeping Burdens.** The ETS required employers to keep and retain (confidentially) a variety of documents, including vaccination and testing records, a roster of employees' vaccination status, and the number of employees vaccinated vs. employed at a

worksite. Those requirements are gone – but remember that any medical records collected at the workplace, including vaccination-related documents, must be kept for the regulatory retention period mentioned above.

3. **No More Tracking Time Spent Getting Vaccinated or Tested.** The ETS generally required employers to pay employees for reasonable amounts of time to obtain vaccinations, and recover from vaccination side effects, and state and (other) federal law required reimbursement in most cases for time spent obtaining a required test. Without required vaccinations and/or testing, employers now don't have the same administrative burden of keeping track of the time spent by employees completing these tasks to ensure proper payment.

### 3-Step Plan for Compliance after Withdrawal of ETS

Now that the ETS is gone, what should employers do to keep a safe workplace without clear guidance? The three items below are crucial for maintaining a healthy work environment.

1. **Write This Down: Written COVID-19/Infectious Disease Policies are Key.** Even if you never adopted a written COVID-19 plan, it's never too late to document the policies you have in place to keep employees safe from any infectious disease. Work with counsel and/or a safety professional to write down what you are doing to keep employees healthy in response to COVID-19 or any other infectious disease. This helps with training employees on your programs.
2. **Engage with Employees.** The companies that thrived during the COVID-19 pandemic are those who communicated with, listened to, and engaged their workforce. Ask non-managers for feedback on company policies, listen and address their concerns through tasks like safety committees, audits, and safety improvement projects, and provide a transparent workplace where their concerns are considered.
3. **Clean the Workplace.** Employees are happier, feel safer, and more productive in a clean work area. Workers take pride in a clean facility. OSHA inspectors will believe you have the proper management policies in place and spend less time looking for safety violations. The COVID-19 pandemic has demonstrated how important sanitation is to the workplace. Employees will rightfully demand it going forward.

### Conclusion

The ETS is gone, but the obligation to keep a safe workplace is not. Learn from the opportunities presented by the COVID-19 pandemic to adopt and retain policies for ongoing safety and health issues. Such policies will be crucial not only now, but also in the future if another pandemic surprises us out of the Blue Clear Sky.

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 author of this Insight, or any attorney on our [FP Vaccine Subcommittee](#).

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