

COVID-19, Publications

OSHA Shot or Test Rule: Keeping It All Straight

ATTORNEYS & PROFESSIONALS

Kathryn Bjornstad Amin

kamin@groom.com

202-861-2604

Jon Breyfogle

jbreyfogle@groom.com

202-861-6641

Lisa Campbell

lcampbell@groom.com

202-861-6612

Seth Perretta

sperretta@groom.com

202-861-6335

PUBLISHED

01/12/2022

SOURCE

COVID-19 Resource

SERVICES

- [Health & Welfare Programs](#)
- [Fringe Benefits & Payroll](#)
- [Federal Insurance Regulation](#)
- [ERISA](#)

Ever since the Occupational Safety and Health Administration (“OSHA”) published its [Emergency Temporary Standard \(“ETS”\)](#) regarding the COVID-19 vaccine or test requirement, there has been a flurry of litigation, culminating with last week’s oral arguments at the Supreme Court. Below we break down the current status of the ETS and what employers should be doing now to comply. Spoiler alert: Employers adopting the vaccine-only policy must be in compliance now (beginning January 10), and employers adopting the testing alternative must have the testing requirements in place by February 9.

How Did We Get Here and What’s the Current Status?

OSHA published the ETS effective November 5, 2021, which generally required employers with 100 or more employees to either (1) require employees to be fully vaccinated or (2) implement a testing program.^[1] Immediately thereafter, stakeholders filed challenges to the ETS in multiple circuits, most importantly the Fifth Circuit. The Fifth Circuit issued an emergency stay of the ETS on November 6, 2021 and reaffirmed that stay on November 12, 2021.^[2] Then, on November 16, 2021, all of the pending challenges, including the Fifth Circuit’s, were consolidated by the Judicial Panel on Multidistrict Litigation in the Sixth Circuit.^[3] The Sixth Circuit, after disposing of some procedural motions, dissolved the emergency stay issued by the Fifth Circuit in response to a motion by the government.^[4] This order was then subject to petitions to the Supreme Court, requesting a stay of the ETS, which were consolidated and argued on January 7, 2022.^[5] As of the date of this alert, the Supreme Court has not issued a ruling.

Given all that, where we currently stand is:

- *Employers are currently required to comply with the ETS* — Because the Sixth Circuit dissolved the stay, the ETS is now in effect. OSHA issued a press release addressing the dissolution of the stay, stating:

To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.^[6]

- *The pending Supreme Court decision could re-impose a stay at any moment* — The Supreme Court hasn't indicated when we should expect its decision. However, Court watchers noted that the Justices seemed skeptical of the ETS. Oral arguments are not always predictive of the outcome of a case, however, so how the Court will eventually rule is still open to debate.
- *Given the uncertainty, employers implementing the testing option should be making a good-faith effort to comply with the ETS* — While the Supreme Court could re-impose a stay, unless and until that happens, the ETS is in effect, and employers implementing the testing option should be taking steps so that the testing program is operational by February 9.

What Does the ETS Require?

- The OSHA ETS applies to all employers that have at least 100 employees (with certain exceptions, such as employers subject to the federal contractor vaccine mandate).
- The requirement does not apply to employees (1) who do not report to a workplace where other individuals are present, (2) while working from home, or (3) who work exclusively outdoors.
- Employers must generally either require (1) all employees to be fully vaccinated (two weeks from the first dose of Johnson & Johnson vaccine or the second dose of Pfizer or Moderna vaccine) or (2) all unvaccinated employees to undergo weekly testing and wear face coverings.
- The policy must be in writing with certain content, so existing policies may not be sufficient.
- The policy must be made available to all employees and, on request, to OSHA.
- The employer must provide employees time off both to get the vaccine and to recover from its effects.
- The employer must determine vaccination by either direct proof, or, failing that, employee attestation.
- The employer must retain that proof and a roster of employees and their vaccination status and other pertinent data.
- If the employer implements the testing alternative:
 - Unvaccinated employees are required to be tested every seven days, or seven days prior to returning to the office if they do not regularly come into the office.
 - Unvaccinated employees must wear a face mask while at work, except in certain circumstances.
 - The employer is not required to pay for the costs associated with testing (but the ETS notes state laws may require payment).
 - The employer is required to keep a record of each test result.
 - If there are positive test results, the employee must notify the employer and must not come back to work until certain requirements are met; the employee may be required to work remotely, and the employer is not required to provide paid time off (though it cannot fire the employee).
- There is certain required reporting to OSHA.
- OSHA anticipates that the ETS will be in effect until May 5. However, that period may be extended.