

# SCOTUS LIKELY TO BLOCK OSHA'S EMERGENCY TEMPORARY STANDARD ON COVID-19 POLICY:

AHEAD OF PENDING LEGAL REVIEW, HERE IS  
WHAT TO KNOW AND PLAN FOR

Friday, the U.S. Supreme Court heard oral arguments for and against the Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard (ETS), which is a COVID-19 vaccine/testing rule that will apply to employers with 100 or more employees.

According to many legal experts, the majority on the Court appeared ready to reject the ETS rule. Previously, OSHA announced that it would not issue citations for non-compliance with any requirements of the ETS before January 10, 2022, and will not issue citations for non-compliance with testing requirements before February 9, 2022, so long as an employer is exercising "reasonable, good faith efforts" to come into compliance with the ETS.

That said, it is unclear whether the Supreme Court will be able to issue a ruling by the end of the day today, January 10. Therefore, we want to provide some recommended steps to take in order to be in compliance with the ETS should the Court rule in its favor.

## **Some Initial Observations and Planning Thoughts for Employers**

There are currently three 'rules' that relate to COVID-19 which are being litigated:

- 1) Vaccine or testing requirements for employers with 100 or more employees – Emergency Temporary Standard (ETS) issued by the Occupational Safety and Health Administration (OSHA),
- 2) Federal Contractor Vaccine Mandate – a Presidential Executive Order, Executive Order 14042, and
- 3) Healthcare Worker Vaccine Mandate – An emergency regulation issued by the Centers for Medicare & Medicaid Services.

The focus of this summary is on item 1). The ETS requires large companies with 100 or more employees to develop and implement a COVID-19 policy. There are specific elements that the OSHA rule requires be in the policy, which we include below.

#### Employer Enforcement:

One challenging aspect of this rule is that there is not guidance on exactly how employers should go about enforcing the requirements. Nor does the rule specify how employers should address employee non compliance with whatever policy the employer puts in place.

By contrast, the rule states specifically that “employers must immediately remove any employee from the workplace regardless of vaccination status who has received a positive test or is diagnosed with COVID-19 until they meet the ... criteria for returning to work...”. But there is no similar specificity in the rule for addressing employee non compliance.

There is also absent any language that might support termination of employees who choose not to comply. Therefore, we suggest that employers take a very slow and cautious position in developing company policies.

#### Texas Executive Order:

One question that has come up is whether the ETS is in conflict with the Texas Governor [Executive Order No. GA-40](#) (EO) that was put in place in October 2021. We believe it is not.

The Texas EO states that “no entity in Texas can compel receipt of a COVID-19 vaccine by any individual, including an employee...who objects to such vaccination for any reason...”. However, the ETS doesn’t specify that employers must “compel” employees to be vaccinated.

OSHA has indicated that the ETS will “preempt and invalidate any State or local requirements that ban or limit an employer’s authority to require vaccination, face covering, or testing.” Regardless, the ETS as written does not appear to actually be in conflict with the Texas EO.

Since the ETS allows employers to include in their policy a requirement for unvaccinated employees to produce a weekly negative test result before coming to work and the EO does not prohibit testing, that would seem to indicate that employers in Texas would be able to abide by both the ETS and the EO if the rule remains in place.

#### Policy Implementation:

We believe the extent of the requirement for employers is to develop and implement a policy and inform employees of the policy. Should an employee refuse to comply, employers should document and keep record of the refusal. It is not a requirement that the employer take any further action.

Unless and until there is further action that might either delay the implementation of the ETS or it is blocked completely, following are our recommended steps to take now:

## Suggested Steps to Take Now:

In order to show a good faith effort as we await the final ruling, we recommend large employers take the following steps in the meantime:

### Establish a written policy on vaccination and/or testing that includes the following:

1. Notify employees as soon as possible of the new requirement to collect and track COVID-19 vaccination information;
2. Ask current and future employees to verify if they have been vaccinated or not;
3. Collect and retain copies of proof of vaccination, dates, etc.;
4. Request and document the reason(s) for refusal;
5. Support employees in efforts to be vaccinated (paid time off);
6. Require employees to provide prompt notice of a positive COVID-19 test or diagnosis and remove those employees from the workplace;
7. Require employees who are not fully vaccinated to wear face coverings when indoors or inside a vehicle with a co-worker;
8. Report work-related COVID-19 fatalities and in-patient hospitalizations;
9. If the policy includes testing, set up automated reminders to employees and supervisors for periodic testing, as required.

### Notes

- 1) We believe the extent of the requirement for employers is to develop and implement a policy, inform employees of the policy and make the requisite request for information. Should an employee refuse to comply or refuse to disclose their vaccination status, employers should document and keep record of the refusal.
- 2) We have the ability to collect, retain and report all of this information and push out notifications within our Payroll system as well as Employee Navigator. **If you are a BFG Payroll, Employee Benefits and/or HR client, please contact us when you are ready to begin the process.**

## Overview of the OSHA ETS

The policy must be one of these two options:

Option 1: Employers can require all employees to be fully vaccinated

- Exceptions to this option are employees:
  - For whom a vaccine is medically contraindicated
  - For whom medical necessity requires a delay in vaccination
  - Who are legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.
    - The ETS requires weekly COVID-19 testing of all unvaccinated employees who are entitled to a reasonable accommodation from vaccination requirements. However, if testing for COVID-19 conflicts with a worker's sincerely held religious belief, practice or observance, the worker may be entitled to a reasonable accommodation.

Option 2: Employers can require employees to choose between getting fully vaccinated or undergoing weekly COVID-19 testing and wearing a mask indoors.

OSHA is currently seeking comment (through January 19) on all aspects of this ETS and how it would be adopted as a final standard as well as how smaller employers (companies with fewer than 100 employees) will be guided.

## Compliance Dates and Requirements:

Should SCOTUS uphold the ETS, below are the compliance dates and requirements:

- By January 10, 2022:
  - Employers must have developed, implemented and begun enforcing a mandatory COVID-19 policy. The plan should be made readily accessible to all employees through the employer's normal methods of distributing information to employees. Employers are not required to submit their written policy to OSHA, unless requested. The following provisions and requirements must be put in place:
    - Employers must provide employees the information and requirements of the ETS and the workplace policies that have been put into place to comply including:
      - The CDC's ["Key Things to Know About COVID-19 Vaccines"](#)
      - Information and protections against retaliation and discrimination
      - Information about laws that provide for criminal penalties for knowingly supplying false statements or documents

- Employers are required to obtain acceptable proof of vaccination and maintain records of each employee’s vaccination status.
  - Employers must give employees up to 4 hours of PTO per COVID-19 vaccine and “reasonable time and paid sick leave” to recover from side effects from each dose.
  - As an exception to requiring all employees to be fully vaccinated, employers can allow unvaccinated employees to undergo weekly COVID-19 testing and wear a face covering at the workplace while indoors. In this case, the ETS does not require employers to pay for any costs associated with testing unless an employee provides proof of a medical or religious exemption. However, employer payment for testing may be required by other laws or regulations. The weekly testing requirement is to begin January 4, 2022.
  - Employees must promptly provide notice to employers if they receive a positive COVID-19 test result and employers must immediately remove any employees from the workplace regardless of vaccination status who has received a positive test or is diagnosed with COVID-19 until they meet the following criteria for returning to work:
    - Receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if the employee chooses to seek a NAAT test for confirmatory testing;
    - Meets the return to work criteria in CDC’s “Isolation Guidance” (incorporated by reference, § 1910.509); or
    - Receives a recommendation to return to work from a licensed healthcare provider.
  - Employers must report work-related COVID-19 fatalities (within 8 hours) and hospitalizations (within 24 hours) to OSHA.
  - Employers must make available for examination and copying an employee’s COVID-19 vaccine documentation and any test results to that employee or anyone with written authorized consent of that employee.
  - Employers are required to make available to any employee or employee representative the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.
- By February 9, 2022:
    - In addition to the above, employers must require mandatory weekly COVID-19 testing for staff who have not been fully vaccinated.
      - This applies to staff who are in the workplace at least once a week
        - As noted above, employers do not have to pay for any costs associated with the tests.

The full ETS can be found here: <https://www.osha.gov/coronavirus/ets2>

See OSHA's ETS fact sheet here:

<https://www.osha.gov/sites/default/files/publications/OSHA4161.pdf>

OSHA ETS FAQ's: <https://www.osha.gov/coronavirus/ets2/faqs>

## Violation Penalties

Failure to implement the requirements of the ETS could result in potential citation and/or fines of up to \$13,653 for each serious violation. Willful violations could result in a fine as high as \$136,532.

## For More Information

We will continue to monitor this situation and release updates. If you have any questions, please contact our HR team at **210-775-6082**, toll-free at **1-888-757-2104**, or [HRmanagement@BFGonline.com](mailto:HRmanagement@BFGonline.com).



### [BusinessFinancialGroup.com](https://www.businessfinancialgroup.com)

210-495-8474 / 1-888-757-2104

Business Financial Group provides corporate services, including human resources consulting, compliance and administration support, payroll and employee benefit program development and maintenance. We also provide group retirement and personal financial planning services.

---

Securities and advisory services offered through Commonwealth Financial Network®, Member FINRA/SIPC, a Registered Investment Adviser. Human resources services and consulting, payroll processing services, employee program development and maintenance services, fixed insurance products and services offered by Business Financial Group are separate and unrelated to Commonwealth. Business Financial Group is located at 500 North Loop 1604 East, Suite 250, San Antonio, Texas 78232.

This material has been provided for general informational purposes only and does not constitute either tax or legal advice. Although we go to great lengths to make sure our information is accurate and useful, we recommend you consult a tax preparer, professional tax advisor, or lawyer.