

# Navigating the Uncertainties of the ETS: What Employers Should Do Now

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## Practices

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As anticipated, OSHA's November 5, 2021 Emergency Temporary Standard (ETS) has sparked litigation across the nation and created a flurry of legal activity. The United States Court of Appeals for the Fifth Circuit promptly granted an immediate temporary stay on November 6 "pending briefing and expedited judicial review." On November 12, having conducted that expedited review, the Fifth Circuit reaffirmed the initial stay, finding the ETS "staggeringly overbroad" and "fatally flawed." The Court determined that the ETS was over-inclusive in the way that it failed "to account for the obvious differences between the risks facing" different types of employees in different industries, yet was under-inclusive because it made "no attempt to shield employees with 98 or fewer coworkers from the very same threat." In short, the court concluded that the ETS grossly exceeded OSHA's statutory authority.

The next day, OSHA made the following announcement on its website in response to the Fifth Circuit's stay: "While OSHA remains confident in its authority to protect workers in emergencies, *OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.*"

In response to the widespread ETS litigation, the United States Judicial Panel on Multidistrict Litigation issued a consolidation order on November 16, randomly selecting the United States Court of Appeals for the Sixth Circuit Court to consolidate these petitions for review. The timeline going forward is a bit uncertain. According to the Sixth Circuit's order on November 21, certain responses must be submitted by November 30, but there is no word on when the Court expects to conduct or finalize their review. Additionally, no matter what the Sixth Circuit decides, the losing side will likely appeal the matter to the United States Supreme Court. Adding further ambiguity to any compliance deadline, OSHA-approved State Plans (including North and South Carolina) will also need time to promulgate their own regulations to comply with the ETS. But for now, OSHA has suspended enforcement and implementation activities regarding the ETS until further notice.

While Republicans in Congress have introduced resolutions to nullify the OSHA ETS, legislative efforts to undo the ETS are expected to fail. Thus, all eyes are on the judicial proceedings to determine the final status of the ETS.

## What Employers Should Do Now

Because it is possible the ETS will survive review, employers should prepare for its enforcement. *While we are not counseling that employers actually publish policies that they otherwise would hesitate to implement absent the ETS, covered employers should have a plan to comply with ETS requirements, possibly on short notice.* Here are some steps employers can take to prepare in the meantime:

**Determine if you are a covered employer.** The ETS covers all employers with 100 or more employees, a threshold met by including all employees at all facilities, even if they are part-time, temporary, remote, or outdoor employees. *Employers otherwise subject to the separate federal contractor or healthcare employer vaccine mandates are not subject to the ETS.* The threshold number is designed to capture large numbers of employers, and if you are hovering at or near or might get to 100 employees in the near future, contact us to help determine if you will indeed be a covered employer.

**Establish a team to develop a plan.** Determine what person or department will oversee the implementation of a plan to develop policies and forms, administer accommodation requests, collect information, communicate to necessary stakeholders, keep necessary records, and respond to requests for information. OSHA has clearly put monumental burdens on employers (and their HR departments) to fulfill this mandate. If your HR department is already overburdened, consider whether you would have to outsource some of these functions in order to achieve compliance.

**Determine how you might collect and store ETS-required information.** Covered employers may be required to establish an employee roster that lists vaccination status for all employees, store proof of vaccination for vaccinated employees, and collect test results for applicable unvaccinated employees. A threshold step may be to determine the current vaccinated status of employees.

**In order to explore the testing option, research available COVID testing resources.** Despite OSHA's pronouncement that testing resources are widely available, mid-size employers may have difficulty contracting with testing facilities and/or obtaining testing kits to conduct testing on-site. Determine if testing locations near your worksite have the capacity to handle your employee testing and how you can best administer the weekly testing option and who is going to pay for this testing (while the ETS does not require the employer to pay for testing, there may be other legal requirements or practical considerations that incentivize or mandate employers to pay for weekly testing.)

**Determine if your ETS-compliant policy will require mandatory vaccination for all employees or include the testing option.** Covered employers may allow unvaccinated workers the option of weekly testing (and masking) in lieu of vaccination. A company with a large number of unvaccinated employees and/or whose employees report to many different worksites may find the weekly testing option to be unworkable and next to impossible to administer. Based on our experience, you should also prepare for a significant number of religious or medical "accommodation" or exemption requests that are going to require careful, legal, and individualized review.

Create a written policy. An ETS-compliant policy and communications with employees should include:

- Various anti-fraud and anti-retaliation provisions and other information required by OSHA (such as this CDC document)
- Procedures employees must go through to show proof of vaccination
- Requirements to be considered “fully vaccinated”
- Processes for compliance and noncompliance with the policy
- Consideration of and processes for applicable exemptions (e.g., religious or medical accommodations)
- Paid time and sick leave for vaccination purposes
- Under what circumstances unvaccinated employees can be unmasked
- Notification of positive COVID test results and processes to remove employees who test positive from the workplace

## Key Takeaways

The status of the OSHA ETS is pending, and compliance deadlines are currently unknown. If the ETS survives the legal challenges, each covered employer is going to need to have a customized policy and forms to cover particular needs, circumstances, and preferences. In any event, employers should prepare for the possible enforcement of the ETS by considering the steps above—but not necessarily releasing and enforcing policies at this time—that comply with the requirements of the ETS. Lastly, we want to advise employers that the federal contractor and healthcare employer vaccine mandates might very well survive legal challenges and require compliance even if the ETS is struck down.