

OSHA's Vaccine-or-Testing Rule Is Back, Unless Supreme Court Says Otherwise

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Businesses with at least 100 employees will soon need to determine the COVID-19 vaccination status of their employees and develop a written vaccine-or-testing policy under a revived Occupational Safety and Health Administration (OSHA) rule. Be aware, though, that the U.S. Supreme Court could decide to block the directive again.

On Dec. 17, the 6th U.S. Circuit Court of Appeals lifted the stay (<https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0287p-06.pdf>) on the federal government's rule requiring covered employers to ensure workers are vaccinated against the coronavirus or undergo weekly COVID-19 testing.

"OSHA can now once again implement this vital workplace health standard, which will protect the health of workers by mitigating the spread of the unprecedented virus in the workplace," the agency said.

To give employers time to comply, OSHA will not enforce any requirements under its Emergency Temporary Standard (ETS) until Jan. 10. Additionally, the agency "will not issue citations for noncompliance with the standard's testing requirements before Feb. 9, so long as an employer is exercising reasonable, good-faith efforts to come into compliance with the standard," according to an OSHA update.

Thus, standards that would have taken effect on Dec. 6, such as vaccination verification rules and indoor masking requirements for unvaccinated workers, will begin on Jan. 10. Weekly COVID-19 testing policies for unvaccinated workers must be implemented by Feb. 9 if the rule is upheld.

The directive is expected to cover more than 80 million private-sector workers.

6th Circuit Ruling and Appeal

The 6th Circuit lifted the stay in a 2-1 ruling. "Based on the [Occupational Safety and Health Act's] language, structure and Congressional approval, OSHA has long asserted its authority to protect workers against infectious diseases," wrote Judge Jane Stanch for the majority. "OSHA relied on public health data to support its observations that workplaces have a heightened risk of exposure to the dangers of COVID-19 transmission."

The federal appeals court noted that "the number of deaths in America has now topped 800,000, and healthcare systems across the nation have reached the breaking point."

In a dissenting opinion, Judge Joan Larsen said she would have upheld the stay. "Vaccines are freely available, and unvaccinated people may choose to protect themselves at any time. And because the [Secretary of Labor] likely lacks congressional authority to force them to protect themselves, the remaining stay factors cannot tip the balance," she said.

The state attorneys general who oppose the ETS immediately filed an appeal with the Supreme Court. "We remain confident that the court will agree that the mandate is unconstitutional federal overreach," said Utah Attorney General Sean Reyes. "Regardless, this ruling does not immediately affect Utah because our state's OSHA Division has not adopted the rule."

OSHA allows states to develop their own workplace health and safety plans, as long as those plans are "at least as effective" as the federal program. Law firm Jackson Lewis noted that none of the 22 locations with OSHA-approved state plans (<https://www.osha.gov/stateplans/>) that cover private employers have taken steps to enact an ETS, but they have a limited window to do so if the Supreme Court does not block the rule.

Emergency appeals are reviewed by the Supreme Court justice who is assigned to that circuit, Jackson Lewis explained (<https://www.jacksonlewis.com/publication/sixth-circuit-gives-employers-lump-coal-christmas-dissolves-stay-osha-vaccine-ets>). "The assigned justice may distribute the application to the full court to consider or decide the request on their own."

Justice Brett Kavanaugh is assigned to the 6th Circuit.

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COVID-19 Vaccination Resources (www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx)

Litigation Background

On Nov. 6, the 5th U.S. Circuit Court of Appeals temporarily suspended OSHA's ETS while it considered a challenge brought by state attorneys general and private employers that oppose the directive. The employers argued that OSHA's "claimed authority over [employees'] private lives and vaccine status is an egregious government overreach." On Nov. 12, the 5th Circuit reaffirmed its suspension of the rule.

Similar challenges to the ETS were filed with other federal appeals courts, and the cases were moved to the 6th U.S. Circuit Court of Appeals in a consolidated action.

The U.S. Department of Justice (DOJ) had asked the 6th Circuit to reinstate the ETS. "Delaying this standard would endanger many thousands of people and would likely cost many lives per day," according to DOJ documents filed with the court.

Ultimately, the U.S. Supreme Court will likely decide the fate of OSHA's ETS. But employment law attorneys say businesses shouldn't wait for a final answer from the courts to start planning. "There's just not enough time to get ready for the ETS if you don't start now," said Julie Vanneman, an attorney with Dentons in Pittsburgh.

Kristin White, an attorney with Fisher Phillips in Denver, recommended that employers provide notices and start gathering vaccination information now. "Then, they can hold off finalizing the plan and testing for a couple of weeks while they gather vaccine information and the litigation moves forward."

Employers may also choose to implement a vaccination policy regardless of the litigation outcome, since the ETS establishes minimum requirements for covered businesses.

Proposal for Permanent Vaccine-or-Testing Rule

OSHA, which is part of the U.S. Department of Labor, published the ETS in *the Federal Register* on Nov. 5. An emergency temporary standard may remain in place for only six months from the date of publication. The agency is considering a permanent vaccine-or-testing standard.

OSHA is accepting comments on the proposal through Jan. 19, 2022, at www.regulations.gov (<https://www.regulations.gov>) in Docket No. OSHA-2021-0007. Some of the areas of interest that OSHA highlighted include:

- Whether employers with fewer than 100 employees should be covered by a potential final standard; whether such employers are currently requiring workers to get vaccinated (either with or without offering alternatives, such as testing and masking); and what benefits and challenges they have experienced.
- Whether the scope of the rule should change to address the significant risk posed by COVID-19 in the workplace. For example, should portions of the rule, such as masking requirements, apply to fully vaccinated workers?
- Whether the agency should consider additional scientific information about prior COVID-19 infection and immunity. "Given scientific uncertainty and limitations in testing for infection and immunity, OSHA is concerned that it would be infeasible for employers to operationalize a standard that would permit or require an exception from vaccination or testing and face covering based on prior infection with COVID-19," the agency said.
- Whether OSHA should impose a strict vaccination mandate with no alternative compliance options.
- What types of COVID-19 vaccination policies employers have implemented to protect workers; whether vaccination is mandatory or voluntary under the policy; what type of leave is offered; and what percentage of their workforce was vaccinated as a result.
- Whether employers have COVID-19 testing and removal policies and what those policies require.

"OSHA encourages commenters to explain why they prefer or disfavor particular policy choices, and include any relevant studies, experiences, anecdotes or other information that may help support the comment," according to the agency's request.

OSHA noted that the proposal and the comment period is separate from the litigation.

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