

GAMMAGE & BURNHAM, PLC

ATTORNEYS AT LAW

40 NORTH CENTRAL AVENUE

20TH FLOOR

PHOENIX, ARIZONA 85004

WWW.GBLAW.COM

Julie A. Pace (602.256.4488)

David A. Selden (602.256.4490)

Heidi Nunn-Gilman (602.256.4455)

SIXTH CIRCUIT LIFTS STAY ON OSHA ETS; VACCINE OR TESTING MANDATE REINSTATED FOR COMPANIES WITH 100 OR MORE EMPLOYEES

On December 17, 2021, the Sixth Circuit Court of Appeals lifted the stay on the OSHA Emergency Temporary Standard (“ETS”) requiring that companies with 100 or more employees require either that employees be vaccinated against COVID-19 or be tested weekly for COVID-19.

The states who filed lawsuits to oppose the ETS have filed an emergency appeal with the U.S. Supreme Court, which has discretion whether to hear it.

I. DEADLINES FOR COMPLIANCE WITH OSHA’S ETS.

OSHA has stated that it is exercising its enforcement discretion and will not issue citations for noncompliance with any aspects of the COVID-19 ETS before **January 10, 2022** and will not enforce the testing requirements before **February 9, 2022**, in order to provide employers with time to come into compliance, provided that the company is exercising reasonable, good faith efforts to come into compliance with the ETS.

Keep in mind that in states with a state OSHA plan, such as Arizona, the state will issue its own regulations and deadlines for enforcement. The state plan has 30 days to implement its own requirements.

II. MANDATORY REQUIREMENTS OF THE EMERGENCY TEMPORARY STANDARD.

Employers with 100 or more employees who reach the 100 employee total during the 6-month period that the ETS is in effect, must comply with the ETS requirements. For purposes of determining whether a company has 100 employees, all full-time, part-time or temporary employees are counted—regardless of where they perform their work. The count is company-wide and not location by location. Independent contractors are not counted. Employees of staffing agencies are counted by the staffing agency, but not the host employer using the staffing agency employees.

The primary requirements of the ETS include:

1. Establish a written policy requiring all employees to be fully vaccinated, unless legally entitled to an exemption due to a disability or religious belief or are unable to receive the vaccine for a medical reason or, alternatively, establish a written policy that requires employees to either be fully vaccinated or submit negative COVID-19 tests at least once every 7 days. A self-administered and self-read test is not acceptable. Self-administered tests must be observed by the employer (check with legal counsel for privacy protocols) or

- a health care proctor (and health care could be via video). The regulations list a variety of tests that will satisfy the requirement.
- a. OSHA has stated that as long as companies are making good faith steps towards compliance, it will not issue citations for failing to have a written policy in place until January 10, 2022.
 - b. OSHA has stated that as long as companies are making good faith steps toward compliance, it will not issue citations relating to the ETS testing requirement before February 9, 2022.
 - c. The ETS does not require an employer to pay the cost of testing, but other state or Federal laws may require the employer to pay the cost of testing and/or the time spent testing. The ETS allows the employer to cover the cost of testing in order to encourage more employees to be vaccinated. Employees may want to avoid the cost of testing and, therefore, may obtain the vaccination.
 - d. If employees come to the work site only intermittently and do not regularly come at least one day in every seven days, then they are permitted to provide a negative test only before coming to the office or jobsite, rather than every single week.
 - e. Employees who are granted a reasonable accommodation from the vaccine testing requirement due to religious or medical reasons is still required to provide a negative COVID-19 test weekly, according to the OSHA FAQs.
 - f. OSHA FAQs also make clear that employees who have had one dose of a two dose vaccine or who have not passed two weeks since their final dose of vaccine are not considered fully vaccinated and are therefore subject to the weekly testing requirement. An employee is considered fully vaccinated two weeks after the second dose of a two dose vaccination or two weeks after they receive the one dose Johnson & Johnson/Janssen vaccine.
2. Require employees who are not fully vaccinated to wear appropriate face coverings. Face coverings must meet certain minimum standards, such as being two layers of material that fully cover the mouth and nose and made from a material that does not allow light through (single layer gaiters do not qualify). This policy and requirement must be implemented by January 10, 2022.
 3. Pay employees for the time it takes to get vaccinated, including travel, waiting time, etc., and reasonable time spent recovering from vaccine side effects. Paid time for receiving the vaccine can be limited to 4 hours. Paid time for side effects must be “reasonable,” which is presumptively 2 days.
 4. Maintain records to prove compliance, including records proving an employee’s vaccination status (for vaccinated employees) or negative COVID-19 tests (for employees who are not fully vaccinated). These records are considered confidential medical records and must be maintained in a confidential and restricted manner and not shared with third parties without the employee’s written consent. And, companies should not be disclosing

or sending COVID 19 test results or vaccination cards to general contractors, owners, customers, third parties etc. Companies must gather vaccination status information and have such information available on a confidential roster or spreadsheet no later than January 10, 2022.

5. Establish written policies containing certain elements and provide certain information to employees through training, emails, memos, or other communications appropriate to the workplace. Elements of the policy must include, but are not limited to, vaccination and testing requirements, face coverings, reporting positive COVID-19 cases, and excluding workers with COVID-19 from the workplace. The policy and practices must be in place by January 10, 2022.
6. Exclude employees who test positive for COVID-19 from the workplace until they either receive a negative COVID-19 test, satisfy the CDC guidance on isolation, or receive a release from a health care provider. This policy and requirement must be in place by January 10, 2022.

Other than the vaccination or testing mandate, all other elements of the ETS, such as the requirement to record employees' vaccination status, implement policies regarding face coverings and other protective measures, etc. must be implemented by January 10, 2022 under the Federal OSHA requirements. Again, states with state plans will implement their own requirements and deadlines.

The vaccination and/or weekly testing requirements do not apply to employees who:

- a. Do not report to a workplace where other individuals (coworkers, customers, vendors, etc.) are present;
- b. Workers who telework; or
- c. Workers who perform their work **exclusively** outdoors. This requires that they not travel with other employees in a work vehicle at any time and that time spent indoors be *de minimis*, such as using the restroom on occasion or delivering paperwork to an administrative office. Face coverings should be used during *de minimis* activities. If employees attend toolbox talks or training or meetings indoors, then they are not considered to be performing their work exclusively indoors.

Additionally, work performed at buildings that are under construction is not considered performed outdoors if a substantial part of the structure, such as walls or ceilings, are in place and would impede the natural flow of fresh air.

Employers can voluntarily apply their policies to the above groups of people, but it is not required by the ETS.

Employers can implement higher standards than required by the ETS. The ETS sets the minimum standards. The ETS also specifically preempts any state laws that would prohibit employers from requiring vaccination, testing, or the use of face coverings.

OSHA's ETS also noted that it acts as notice of intent to publish final regulations. Therefore, it has requested comments on the rules, which are due on January 19, 2022.

OSHA is in charge of enforcing the new Federal Government mandate and can issue fines of up to \$14,000 per violation.

III. STATE OSHA PLANS.

States that have their own OSHA plans are not technically covered by the ETS. Instead, the state plan is required to adopt procedures that are "at least as effective" as the Federal standards. Twenty-two states have approved state plans covering private sector workers.

Arizona has a state OSHA plan enforced by the Arizona Division of Occupational Safety and Health (ADOSH). Generally, a state plan, such as Arizona, has 15 days after an ETS is issued to notify Federal OSHA of its plans and 30 days to implement its own standards. According to ADOSH, these time frames do not begin to run until after any stays against the ETS are lifted.

IV. NEXT STEPS

Employers, even in states with State OSHA plans, should begin taking steps towards compliance. Steps include, but are not limited to:

1. Collect data on the COVID-19 vaccination status of all employees. Treat all such information as confidential medical information. Store documents securely. Create a roster or spreadsheet with the information to help the company easily track status and comply with the ETS requirement that companies maintain a roster of employee vaccination status.
2. Identify whether the Company will require vaccinations or will allow the option of weekly testing. If the company will allow weekly testing, consider whether to partner with a testing facility to provide the weekly tests.
3. Consider whether to partner with a health care provider to provide vaccinations to employees or schedule a mobile service.
4. Create a procedure for employees to request an accommodation or exemption from the vaccine requirements for either religious or medical reasons. Keep in mind that OSHA has taken the position that employees who receive a religious or medical exemption from the vaccination must provide a negative COVID-19 test on a weekly basis, or before they are planning to go to worksite, or as otherwise provided in the rules.
5. Prepare a policy that complies with the requirements of the ETS, including face coverings for persons who are not fully vaccinated.
6. Plan for the policy roll out. Identify who will discuss the policy with employees and who will respond to questions and be responsible for implementation of the plan.

7. Educate employees on vaccination efficacy, where to receive vaccinations, etc. The ETS requires that employers provide certain information to employees, including vaccine information from the CDC.
8. Consider alternatives and options of there is a number of staff that resign rather than be vaccinated or undergo weekly COVID-19 testing.
9. Ensure that the Company has in place and is enforcing a Pandemic Preparedness Plan.
10. Continue to educate employees on best practices, such as face coverings, washing hands, etc. an enforcing safety protocols.

For more information on recommended steps and guidance on documents, etc. please see our November news release [OSHA: What is Required Regardless of the Stay in Emergency Temporary Standards for Vaccination or Testing Requirements: https://www.gblaw.com/osha-what-is-required-regardless-of-the-stay-in-the-emergency-temporary-standards-for-vaccination-or-testing-requirements/](https://www.gblaw.com/osha-what-is-required-regardless-of-the-stay-in-the-emergency-temporary-standards-for-vaccination-or-testing-requirements/)

Gammage & Burnham employment lawyers have experience in counseling employers and providing COVID policies, updated OSHA-compliant pandemic plans, safety toolbox talks to use with employees and working with companies to document and engage in the interactive dialogues required by the ADA and for religious considerations. For additional guidance, please contact Julie Pace, David Selden, or Heidi Nunn-Gilman.



Julie Pace's practice handles employment law, handbooks, drug and alcohol policies, I-9 and E-Verify compliance, OSHA, independent contractor and alleged misclassification issues with DES and other government agencies, and defends claims of sexual harassment, employment discrimination, retaliation, whistleblower, and wrongful discharge, and against charges by the EEOC or ACRD. She handles matters involving OSHA, ICE, OFCCP, DOL, NLRB, ADA, FMLA, ERISA, PPA, CARES Act, SIGPR Audits, COVID-19, ACA, Davis-Bacon, wage and hour laws, FAR, SCA, and government contracts. She regularly provides training to companies and assists with investigations. Julie can be reached at 602.256.4488 or jp pace@gblaw.com



Dave Selden's practice focuses on defending employers in employment and commercial litigation relating to the full range of employment issues, including but not limited to wrongful termination, non-competes, independent contractor and alleged misclassification issues with DES and other government agencies, defending claims of sexual harassment, employment discrimination, retaliation, whistleblower, and EEOC OR ACRD charges. He drafted most of the Arizona employment laws enacted during the past 25 years. He handles matters involving OSHA, ICE, OFCCP, DOL, NLRB, ADA, FMLA, Davis-Bacon, FAR, SCA, PPA, CARES Act, SIGPR Audits, COVID-19, government contracts, and wage and hour laws. Dave can be reached at 602.256.4490 or dselden@gblaw.com.



Heidi Nunn-Gilman's practice focuses on employment litigation and human resource matters. She advises clients on matters relating to labor and employment law, including I-9 and immigration compliance strategies, E-Verify, ICE and worksite enforcement, EEOC, Title VII, FLSA, FMLA, ADA, drug and alcohol, NLRB, PPA, CARES Act, SIGPR Audits, COVID-19, wrongful discharge, non-competition and confidentiality agreements, wage and hour laws/DOL for both public and private employers, paid sick leave, employee handbooks, and executive agreements. Heidi can be reached at 602.256.4455 or hunnngilman@gblaw.com.

