

Legislative & Regulatory Bulletin



A Special Report of the Mulch & Soil Council

January 14, 2022

SCOTUS Halts OSHA Vaccination Rule for Large Businesses

Yesterday, the Supreme Court of the U.S. (SCOTUS) blocked enforcement of the Biden Administration's unprecedented OSHA vaccination-or-test & mask rules, which would have required companies with more than 100 nationwide employees to receive a COVID-19 vaccination or undergo weekly testing and wear a mask while working.

The high court issued a stay of the regulation just 3 days after it went into effect on January 10th, and sent the case back for review to the 6th U.S. Circuit Court of Appeals. The rule was issued by the Occupational Safety and Health Administration, part of the Department of Labor.

In its ruling, SCOTUS stated that the plaintiffs are "likely to succeed on the merits of their claim that the [Labor] Secretary lacked authority to impose the mandate."

In the 6-3 ruling, the majority also wrote, "Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense. This is no 'everyday exercise of federal power.'"

The stay will remain in place nationwide pending disposition of the challenges to the merits of OSHA's order in the 6th Circuit Court. The three justices in the dissenting minority protested the majority's contention that the mandate represented a limit "found no place in the governing statute."

While the minority Associate Justices Elena Kagan, Stephen Brier and Sonia Sotomayor suggested that OSHA's mandate is "comparable to a fire or sanitation regulation imposed by the agency," they also acknowledged that the vaccination mandate is "strikingly unlike the workplace regulations that OSHA has typically imposed."

Following OSHA's publication of the vaccinate-or-test regulation on November 5, 2021, dozens of state attorney generals, businesses, trade associations and other non-profit groups filed numerous lawsuits in virtually every federal court jurisdiction seeking legal revocation of the OSHA

mandate. The first ruling came from the 5th Circuit Court of Appeals that issued a stay pending results of all the other independent actions. A lottery was used to determine which court would consolidate the multiple jurisdiction cases into one hearing and that duty went to the 6th Circuit Court of Appeals. There on December 17, a 3-judge panel overruled 2-1 the 5th Circuit stay and allowed the OSHA vaccination-or-test mandate for companies with 100 or more employees (nationwide) to move forward.

On December 21, SCOTUS announced it would hear an emergency petition to overturn the 6th Circuit Court ruling for the OSHA vaccination-or-test mandate as well as the Biden Administration's vaccination mandate for public health workers in hospitals.

In its ruling, the majority justices noted that in the January 7th arguments by plaintiffs "the equities do not justify withholding interim relief. We are told by the states and the employers that OSHA's mandate will force them to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs."

"For its part, the federal government says that the mandate will save over 6,500 lives and prevent hundreds of thousands of hospitalizations," the majority wrote. They went on to say, "It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly."

In its ruling, SCOTUS reinstated the stay of the OSHA vaccination-or-test mandate and remanded it back to the 6th Circuit Court of Appeals. At the same time, SCOTUS allowed the Biden Administration's HHS vaccination mandate to move forward on healthcare workers without medical or religious exemptions at hospitals & institutions that accept Medicare and/or Medicaid funding.

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December 23, 2021

SCOTUS to Hear OSHA ETS Arguments Jan 7

The Supreme Court of the U.S. (SCOTUS) announced yesterday it will hold a special session in just over two weeks to weigh challenges to two Biden administration policies covering vaccine requirements for millions of workers — policies that affect large employers and health care workers.

A three-judge panel of the 6th U.S. Circuit Court of Appeals in Cincinnati ruled 2-1 on Dec. 17 that the vaccination or testing regime for workers at companies with 100 or more employees could take effect. The plan requires workers at larger companies to be vaccinated or wear face masks and get tested weekly. The requirement could affect some 84 million U.S. workers.

The high court's announcement Dec. 22 that it will hear arguments in the cases Jan. 7 is an extraordinarily fast timeline. The court had not been scheduled to hear cases again until Jan. 10.

The Court did not stay the enforcement of the ETS pending oral arguments: so, the enforcement dates that OSHA announced are still January 10

and February 9, 2022, for the remainder of the ETS provisions!

OSHA announced the ETS will go into effect Jan. 4, 2022, requiring a vaccination verification system for all employees OR a mask-and-weekly-testing requirement for unvaccinated employees.

To account for any uncertainties created by the 5th Circuit Court stay, OSHA stated it would exercise enforcement discretion with respect to the ETS's stated compliance deadlines. To provide employers with sufficient time to comply, OSHA assured employers it would not issue citations for non-compliance with any requirements of the ETS (Vax verify OR mask-and-test) before Jan. 10 and would not

issue citations for noncompliance with the ETS's testing requirements before Feb. 9, so long as an employer had made reasonable, good faith efforts to comply with the ETS.

OSHA says it will work closely with the regulated community to provide compliance assistance.

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November 23, 2021

OSHA ETS Opposition Builds as DOJ Petitions 6th Circuit Court

New Legislative Opposition

Last Friday, Sen. Mike Braun (R-IN) and Rep. Fred Keller (R-PA) introduced a [Congressional Review Act \(CRA\)](#) challenge to OSHA's vaccination and testing emergency temporary standard (ETS). The Senate bill is SJRes 29 and the House bill is HJRes 65. All 50 Republican Senators and 173 Representatives have cosponsored their respective joint resolutions. The CRA allows Congress to challenge rules issued by the executive branch. If passed, the ETS would be nullified, and OSHA would not be able to issue any substantially similar rule in the future. CRA does require a signature by the President. These CRA challenges are not often successful, but do send a message about the position of the Republican Party on the President's vaccine mandate.

In addition, several trade associations, including Associated Builders and Contractors, National Retail Federation, and the National Association of Wholesaler-Distributors, created safetynotmandates.com – a grassroots website where individuals can reach out to Congress and express opposition to the OSHA ETS and the provisions in Congress' reconciliation bill that dramatically increases penalties under the Occupational Safety and Health Act.

DOJ Appeals 5th Circuit Stay

In terms of the legal challenges to the ETS, the [Judicial Panel on Multidistrict Litigation](#) has [assigned](#) the ETS litigation to the U.S. Court of Appeals for the 6th Circuit. At 2:28 a.m. this morning, OSHA filed an [emergency motion](#) to dissolve the Fifth Circuit's stay of OSHA's vaccine mandate, taking three distinct positions. OSHA principally argues, as expected, that:

- 1) it is likely to succeed on the merits because,
- 2) OSHA reasonably concluded that the standard is necessary to address a grave danger,
- 3) the Fifth Circuit's statutory interpretation was flawed and its "constitutional concerns" were mistaken.

OSHA also argues there was ample support for its determinations, and that the balance of equities tips in its favor.

OSHA also stakes out a middle position, arguing that the Sixth Circuit should modify the stay so that the masking-and-testing requirement can remain in effect during the pendency of this litigation. If nothing else, OSHA argues, the Sixth Circuit should not block its ruling giving employers the *option* to adopt COVID-19 policies. This would shield employers from state and local requirements that limit employers' authority to require vaccination, face covering, or testing.

As a final fallback, OSHA asks for clarification of the Fifth Circuit's order that OSHA "take no steps to implement or enforce" the regulation. OSHA would like the Sixth Circuit to allow it to provide pre-enforcement information to the public about its "sometimes technical rules" so that people "can understand those rules and the agency's reasoning." It also wants to take "purely internal steps," such as drafting appropriate guidance or training call-center employees. OSHA says this is necessary so that if the stay is lifted, "the agency can provide accurate and consistent guidance and enforcement."

On a more procedural note: the Sixth Circuit has now consolidated all of the cases challenging the vaccine mandate into *In re: OSHA Rule on COVID-19 Vaccination and Testing*, 86 Fed. Reg. 61402, No. 21-7000. And yesterday, twenty-seven States, including Ohio, Kentucky, and Tennessee (though not Michigan) filed a petition for initial en banc ([available here](#)). There are now several initial-en banc petitions pending in these consolidated cases. OSHA's consolidated response to those petitions is due next Tuesday, November 30, 2021.

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A Special Report of the Mulch & Soil Council

November 4, 2021

OSHA ISSUES VACCINATION MANDATE

Today the U.S. Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) announced an Emergency Temporary Standard (ETS) to minimize the risk of COVID-19 transmission in the workplace. The ETS establishes binding requirements to protect employees of large employers (100 or more employees) from the risk of contracting COVID-19 in the workplace. A fact sheet describing the rule is attached and more information can be found on the OSHA website.

Some of the key points include:

- **Employers must require their employees to get vaccinated by January 4 or require their unvaccinated employees to produce a negative COVID test weekly.**
- While the testing requirement for unvaccinated workers will begin after January 4th, **employers must be in compliance with all other requirements – such as providing paid-time for employees to get vaccinated and masking for unvaccinated workers – on December 5th.**
- Employers must ensure that any employees who have not received the necessary shots begin producing a verified negative test to their employer on at least a weekly basis, and they must remove from the workplace any employee who receives a positive COVID-19 test or is diagnosed with COVID-19 by a licensed health care provider.
- The ETS lays out the wide variety of tests that comply with the standard. Given that vaccines are safe, free, and the most effective way for workers to be protected from COVID-19 transmission at work, **the ETS does not require employers to**

provide or pay for tests. Employers may be required to pay for testing because of other laws or collective bargaining agreements.

- **Employers must provide paid-time** for their employees to get vaccinated and, if needed, sick leave to recover from side effects experienced that keep them from working.
- **Employers must ensure that unvaccinated employees wear a face mask while in the workplace.**
- The standard requires employers to maintain records.

This afternoon, Thursday, November 4, from 1:00-1:45 p.m. ET, the Department of Labor (DOL) will hold a briefing with senior DOL, OSHA, and administration officials to provide an overview of the ETS, including guidance around implementation and answers to key questions.

Attendees are encouraged to review the fact sheet and information from OSHA ahead of the briefing and submit questions using the RSVP link below.

Time: TODAY, November 4 from 1:00-1:45 pm ET
RSVP: https://pitc.zoomgov.com/webinar/register/WN_T8GPW8GYRAecIx9QEvmmlJQ

You can find the ETS materials on OSHA's website at: <https://www.osha.gov/coronavirus/ets2>

and the ETS on the federal register inspection desk at: <https://public-inspection.federalregister.gov/2021-23643.pdf>

FACT SHEET: Biden Administration Announces Details of Two Major Vaccination Policies

New OSHA and CMS Rules Mean Two-Thirds of All Workers Now Covered by Vaccination Rules

Thanks to President Biden’s focus on getting Americans vaccinated, 70 percent of adult Americans are now fully vaccinated—up from less than one percent when the President took office. This is significant progress, made possible by a vaccinations program that made shots free and convenient for months. But more vaccinations are needed to save lives, protect the economy, and accelerate the path out of the pandemic. To that end, in July, President Biden began rolling out vaccination requirements for federal employees and contractors and calling on employers to do the same. Thousands of organizations across the country have answered the President’s call, and vaccination requirements have already helped reduce the number of unvaccinated Americans by approximately 40 percent since July.

Today, the Biden Administration is announcing the details of two policies to fight COVID-19 that will drive even more progress and result in millions of Americans getting vaccinated, protecting workers, preventing hospitalization, saving lives, and strengthening the economy.

First, the Department of Labor’s Occupational Safety and Health Administration (OSHA) is announcing the details of a requirement for employers with 100 or more employees to ensure each of their workers is fully vaccinated or tests for COVID-19 on at least a weekly basis. The OSHA rule will also require that these employers provide paid-time for employees to get vaccinated, and ensure all unvaccinated workers wear a face mask in the workplace. OSHA has a strong 50-year record of requiring employers to take common sense actions to prevent workers from getting sick or injured on the job. This rule will cover 84 million employees.

Second, the Centers for Medicare & Medicaid Services (CMS) at the Department of Health and Human Services is announcing the details of its requirement that health care workers at facilities participating in Medicare and Medicaid are fully vaccinated. The rule applies to more than 17 million workers at approximately 76,000 health care facilities, including hospitals and long-term care facilities.

The Administration has previously implemented policies requiring millions of federal employees and federal contractors to be fully vaccinated. To make it easy for businesses and workers to comply, the Administration is announcing today that the deadline for workers to receive their shots will be the same for the OSHA rule, the CMS rule, and the previously-announced federal contractor vaccination requirement. Across all three requirements, workers will need to have the necessary shots to be fully vaccinated – either two doses of Pfizer or Moderna, or one dose of Johnson & Johnson – no later than January 4, 2022. OSHA is also clarifying that it will not apply its new rule to workplaces covered by either the CMS rule or the federal contractor vaccination requirement. And, both OSHA and CMS are making clear that their new rules preempt any inconsistent state or local laws, including laws that ban or limit an employer’s authority to require vaccination, masks, or testing.

The Administration is calling on all employers to ensure that as many of their workers are vaccinated as quickly as possible. As detailed in a recent [White House report](#)¹, vaccination requirements work and are good for the economy. Vaccination requirements have increased vaccination rates by more than 20 percentage points – to over 90 percent – across a wide range of businesses and organizations. According to Wall Street analysts, vaccination requirements could result in as many as 5 million American workers going back to work, and a survey of prominent, independent economists found unanimous agreement that vaccination requirements will “promote a faster and stronger economic recovery.”

Today’s announcements include:

New Vaccination Requirement for Employers With 100 or More Employees: OSHA is issuing a COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS) to require employers with 100 or more employees (i.e., “covered employers”) to:

¹<https://www.whitehouse.gov/wp-content/uploads/2021/10/Vaccination-Requirements-Report.pdf>

- **Get Their Employees Vaccinated by January 4th and Require Unvaccinated Employees to Produce a Negative Test on at Least a Weekly Basis:** All covered employers must ensure that their employees have received the necessary shots to be fully vaccinated – either two doses of Pfizer or Moderna, or one dose of Johnson & Johnson – by January 4th. After that, all covered employers must ensure that any employees who have not received the necessary shots begin producing a verified negative test to their employer on at least a weekly basis, and they must remove from the workplace any employee who receives a positive COVID-19 test or is diagnosed with COVID-19 by a licensed health care provider. The ETS lays out the wide variety of tests that comply with the standard. Given that vaccines are safe, free, and the most effective way for workers to be protected from COVID-19 transmission at work, the ETS does not require employers to provide or pay for tests. Employers may be required to pay for testing because of other laws or collective bargaining agreements.
- **Pay Employees for the Time it Takes to Get Vaccinated:** All covered employers are required to provide paid-time for their employees to get vaccinated and, if needed, sick leave to recover from side effects experienced that keep them from working.
- **Ensure All Unvaccinated Employees are Masked:** All covered employers must ensure that unvaccinated employees wear a face mask while in the workplace.
- **Other Requirements and Compliance Date:** Employers are subject to requirements for reporting and recordkeeping that are spelled out in the detailed OSHA materials [available here](#).² While the testing requirement for unvaccinated workers will begin after January 4th, employers must be in compliance with all other requirements – such as providing paid-time for employees to get vaccinated and masking for unvaccinated workers – on December 5th. The Administration is calling on all employers to step up and make these changes as quickly as possible.

New Vaccination Requirements for Health Care Workers: CMS is requiring workers at health care facilities participating in Medicare or Medicaid to have received the necessary shots to be fully vaccinated – either two doses of Pfizer or Moderna, or one dose of Johnson & Johnson – by January 4th. The rule covers approximately 76,000 health care facilities and more than 17 million health care workers – the majority of health care workers in America – and will enhance patient safety in health care settings. The rule applies to employees regardless of whether their positions are clinical or non-clinical and includes employees, students, trainees, and volunteers who work at a covered facility that receives federal funding from Medicare or Medicaid. It also includes individuals who provide treatment or other services for the facility under contract or other arrangements. Among the facility types covered by the rule are hospitals, ambulatory surgery centers, dialysis facilities, home health agencies, and long-term care facilities. Today’s action will help provide patients assurance about the vaccination status of those delivering care, create a level playing field across health care facilities, and help to address challenges facilities have faced with staff sickness and quarantines impacting delivery of care.

Streamlining Implementation and Setting One Deadline Across Different Vaccination Requirements: The rules released today ensure employers know which requirements apply to which workplaces. Federal contractors may have some workplaces subject to requirements for federal contractors and other workplaces subject to the newly-released COVID-19 Vaccination and Testing ETS. To make it easy for all employers to comply with the requirements, the deadline for the federal contractor vaccination requirement will be aligned with those for the CMS rule and the ETS. Employees falling under the ETS, CMS, or federal contractor rules will need to have their final vaccination dose – either their second dose of Pfizer or Moderna, or single dose of Johnson & Johnson – by January 4, 2022. This will make it easier for employers to ensure their workforce is vaccinated, safe, and healthy, and ensure that federal contractors implement their requirements on the same timeline as other employers in their industries. And, the newly-released ETS will not be applied to workplaces subject to the federal contractor requirement or CMS rule, so employers will not have to track multiple vaccination requirements for the same employees.

²<https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf>

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