

**Alert | Health Emergency Preparedness Task Force:  
Business Continuity Amid COVID-19**



November 2021

## **OSHA COVID-19 Emergency Temporary Standard Takes Effect Dec. 5: Are Employers Ready?**

On Nov. 5, the Occupational Safety and Health Administration (OSHA) issued the [Emergency Temporary Standard \(ETS\)](#) regarding Coronavirus Disease 2019 (COVID-19), requiring employers with more than 100 employees to develop, implement, and enforce either: (1) a mandatory COVID-19 vaccination policy; or (2) a policy requiring employees to choose between getting vaccinated or undergoing weekly COVID-19 testing and wearing a face covering at work. [See GT Alert, The COVID-19 Vaccine/Testing Mandate Is Here: What Does It Mean for Employers?](#) Subsequently, 26 states and numerous employers have filed lawsuits seeking to stay enforcement of the ETS in various courts of appeals throughout the United States. These lawsuits will shortly be consolidated in multi district litigation (MDL). A lottery will take place to determine which court of appeals will decide the merits of the case. Meanwhile, the Fifth Circuit Court of Appeals temporarily enjoined the enforcement of the ETS in *BST Holdings v. OSHA*, Docket No. 21-60845 (5th Cir. Nov 05, 2021) and has asked the parties to submit briefs on an expedited basis regarding whether the Court should enter a permanent injunction. Whichever court of appeals is selected in the lottery will ultimately decide whether to dissolve or keep the 5th Circuit's injunction in place until the merits of the case are resolved.

Until the court of appeals issues an order on the enforceability of the ETS, covered employers should understand and/or be prepared to comply with the upcoming Dec. 5 ETS effective date on determinative policy, masking requirements, and education of employees noted below:

- Employers must develop a written vaccination and/or testing program for their workforce. To this end, employers must obtain information on the vaccination status of their workforce and develop and maintain a tracking system for the collection of this information. Employers will use this same system to collect and maintain COVID-19 testing results if they choose to implement a testing program for employees who opt not to get vaccinated. OSHA has provided sample vaccination and/or testing and masking policies on its website. [Note: until the Supreme Court deems the ETS invalid, or a permanent injunction is issued prohibiting its enforcement, the ETS preempts any state law that prohibits or inhibits an employers' ability to collect this information.]
- Employers must ensure unvaccinated employees are adhering to mask requirements. Employers will also need to make sure that any policies comply with any state and/or local laws stricter than the ETS, e.g., jurisdictions that have mandatory indoor masking policies.
- Employers must provide four (4) hours of paid leave for employees to receive any and all doses necessary for an employee to be deemed fully vaccinated. Employers may not substitute existing paid time off that an employee has accumulated for paid leave to receive vaccination shots. An employer, however, can substitute accrued paid time off for the two days it must provide for employees to recover from any reaction to the vaccine. Employers do not have to provide additional paid leave if an employee experiences a reaction requiring more than two days off from work.
- If an employer implements a vaccine mandate, such policy should include a standard protocol for evaluating requests for religious and disability exemptions to testing and masking. This is particularly important where an employer mandates vaccination because in such an instance, the employer must pay the costs of testing employees legitimately exempted from its vaccine requirement. (This is in contrast to instances in which an employer does not mandate vaccination; in which case an employer need not pay for testing of employees who opt not to get vaccinated). This policy should also account for the [guidance focused on religious exemptions](#) issued by EEOC Commission Chair Burrows on Oct. 25, 2021, and further updated on Oct. 28. See GT Alert, "[EEOC Issues Guidance on Title VII and Religious Objections.](#)"
- Employers will need to provide employees with educational materials in a language that its employees can understand on the following: (1) the requirements of the ETS and the workplace policies and procedures it is implementing in response; (2) a copy of the CDC document "Key Things to Know About COVID-19 Vaccines"; (3) information about protections against retaliation and discrimination; and (4) information about laws that provide for criminal penalties for knowingly supplying false statements or documentation. One can find these documents on the OSHA website.

Presuming that the ETS stands, employers will need to adhere to further requirements by Jan. 4, 2022. Until then, employers should prepare for compliance with the Dec. 5 requirements. Planning for implementation will help employers assess whether to adopt a vaccination mandate or a policy that provides for vaccination or testing.

For more information and updates on the developing situation, visit [GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#) and [Business Continuity Amid COVID-19](#) page.

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