

# HR Insights

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## How Employers Can Move Forward Following the OSHA ETS Block

On Jan. 13, 2022, the Supreme Court of the United States (SCOTUS) ruled to halt OSHA's COVID-19 vaccination and testing emergency temporary standard (ETS). This means that employers are no longer required to develop COVID-19 vaccination or testing policies for their workplaces. However, employers may still want to take steps to reduce potential COVID-19 exposures for their employees. This article provides more information about the current status of the OSHA ETS and ongoing COVID-19 safety considerations for employers.

### OSHA ETS Litigation Overview

OSHA issued the COVID-19 vaccination and testing ETS on Nov. 5, 2021, for private employers with 100 or more employees. Since then, the ETS has been through a series of litigation. First, the 5th U.S. Circuit Court of Appeals granted a stay for the ETS. Then, the 6th U.S. Circuit Court of Appeals removed the stay. Most recently, the SCOTUS decided to reissue the stay, officially halting the ETS for the time being.

Employers have had to deal with much litigation surrounding the implementation of the ETS. For now, since the ETS is not required, employers can decide on their own if they would like to implement a COVID-19 vaccine mandate, conduct weekly testing or do neither. Regardless of the ETS, employers must remember that if OSHA inspects their business and discovers safety or health issues related to COVID-19, the agency can still issue citations under the general duty clause.

OSHA emphasized this after the SCOTUS made its ruling to halt the ETS. The agency released the following [statement](#):

“Regardless of the ultimate outcome of these proceedings, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the COVID-19 National Emphasis Program and General Duty Clause.”

Furthermore, although OSHA does not currently mandate the ETS requirements, it is important for employers to determine whether any applicable state or local laws require them to implement COVID-19 vaccination rules.

### Can the OSHA ETS Return?

The SCOTUS did not permanently get rid of the OSHA ETS. The stay that has been issued is temporary in nature; OSHA could bring back the ETS through a permanent rule, which the agency has already started to implement and is currently in the comment period. If the permanent rule for the ETS gets finalized, it would likely be met with further litigation. In other words, although the ETS has not been ultimately struck down, the prognosis of future ETS implementation remains uncertain.

Amid this evolving ETS landscape, employers are encouraged to stay updated on their current requirements. They should also continue to utilize health and safety measures to minimize COVID-19 cases in the workplace and exposures.



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## Determining a COVID-19 Vaccination Policy

Considering the current state of the OSHA ETS, employers should determine what their specific policies will be regarding COVID-19 vaccination. In particular, employers need to decide whether they plan to issue vaccine mandates in their workplaces or have policies for preventing and responding to COVID-19 exposures. Employers are able to require all employees who physically enter the workplace to be vaccinated against COVID-19 so long as they provide reasonable accommodations under the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964. In any case, employers should remember to check their state and local requirements to ensure any policies they adopt are compliant.

Key questions employers should consider when determining whether they should implement a COVID-19 vaccine mandate include:

- What does the workforce think about the mandate? What are the general concerns employees have with a vaccine mandate?
- How will the mandate be introduced to employees? Will there be an informational session to address any questions or concerns employees may have prior to mandating the vaccine?
- How will exemption requests for religious concerns or disability issues be handled? Will these issues be addressed consistently and in a timely fashion to prevent any legal issues?
- Will the mandate create difficulties in retaining employees or motivate employees to seek other employment with businesses that don't require the vaccine?
- Will any employees need to be hired to deal exclusively with all COVID-19 related policies, or can the HR team handle any questions, concerns and issues that may arise from such policies?

If employers decide against a vaccine mandate, they should make sure they have effective health and safety policies and procedures in place to protect their unvaccinated employees. Doing so can help create a safer environment for all workers. Some COVID-19 safety precautions to consider include the

implementation of physical distancing expectations, face-covering requirements and weekly COVID-19 testing.

If employers decide to require weekly testing, they can use the OSHA ETS as a guide for keeping records as well as developing and implementing such a policy. Some matters employers should examine when requiring COVID-19 testing include:

- Whether tests are readily available
- Who will manage testing procedures
- What recordkeeping processes are required for collecting test results
- Whether recordkeeping processes are compliant with applicable regulations
- Whether employees are able to obtain tests in the areas in which they live (if the tests are not provided at work)

These are all important factors for employers to review before introducing COVID-19 testing requirements into the workplace. Employers should carefully weigh the pros and cons of each factor before making a final decision.

## Vaccine Incentives

If employers decide to encourage employees to receive the COVID-19 vaccine instead of requiring it, they may want to consider providing vaccine incentives. Some common incentives include monetary bonuses or additional paid time off. According to the Equal Employment Opportunity Commission, employers are permitted to provide these incentives to their employees. Employers are not limited or prevented from doing so, provided that employees voluntarily provide documentation or other confirmation of their vaccination status from a third-party provider.

To clarify, employers are permitted to offer vaccine incentives as long as they are not coercive in nature. Since the vaccination process typically entails employees filling out pre-vaccination questionnaires, providing significant incentives could make employees feel pressured to provide medical information they may not want to share. It's also important to note that employers cannot offer incentives to employees to have their family members get vaccinated.

## Health Insurance Considerations

Apart from implementing COVID-19 vaccine mandates or incentives, employers may want to consider placing a surcharge or higher premium costs on their health insurance plans for employees who choose not to get vaccinated. This practice has been utilized to discourage other activities among employees, such as smoking. However, employers must ensure that any changes in health insurance offerings related to vaccination status are compliant with applicable federal, state and local employment laws. Specifically, employers should be aware of potential violations of the Health Insurance Portability and Accountability Act and the Affordable Care Act. Above all, it's crucial for employers to do their research on laws and regulations they must follow to prevent violating employee rights.

## Conclusion

Regardless of any future developments with the OSHA ETS, there are a range of different measures employers should consider to help prevent or reduce COVID-19 exposures in their workplaces. However, it's vital for employers to understand the legal implications of each policy they put in place and make sure they are not violating employee rights when doing so.

Contact Wallace Welch & Willingham today for additional COVID-19 updates and workplace resources.