

Federal Vaccination Mandates

OSHA COVID-19 Emergency Temporary Standard (ETS)

OSHA [announced](#) the [COVID-19 vaccination and testing emergency temporary standard](#) (ETS) on Nov. 4, 2021 to address the grave danger of COVID-19 infection in the workplace. The ETS affects private sector employers with **100 or more employees**.

Supreme Court Stay

On Jan. 13, 2022, the Supreme Court of the United States (SCOTUS) [ruled](#) to stay the Occupational Safety and Health Administration's (OSHA) vaccination and testing emergency temporary standard (ETS). The ETS was developed to establish a mandatory vaccination policy requirement for private employers with 100 or more employees. The ETS went into effect on and has been in litigation since Nov. 5, 2021. It was blocked by the 5th U.S. Circuit Court of Appeals early on but was reinstated by the 6th Circuit on Dec. 17, 2021.

In its published decision, SCOTUS stated that OSHA was not given the power to regulate public health more broadly than occupational dangers. In addition, SCOTUS explained that challenges to the ETS were likely to succeed on the merits because the agency lacks the authority to impose the mandate. Specifically, the OSH Act only allows the agency to set workplace safety standards, not broad public health measures.

Finally, the court argues that the requirement that employees either become vaccinated or undergo weekly testing is not an exercise of federal power. Instead, SCOTUS stated the ETS represents a “significant encroachment into the lives—and health—of a vast number of employees.”

Given this new stay, employers are not required to comply with the OSHA ETS vaccination and testing mandate at this time. However, because the case has been sent back to the 6th Circuit, employers will need to continue monitoring legal developments to learn about a final decision on the ETS.

ETS Withdrawal

On Jan. 25, 2022, OSHA provided notice that it is [withdrawing](#) its COVID-19 vaccination and weekly testing emergency temporary standard (ETS). The withdrawal will be effective once the notice is published in the Federal Register. The expected publication date is Jan. 26, 2022.

When the ETS was published, OSHA also stated it was using the ETS as a proposed rule. OSHA is required by federal law to publish and accept public commentary on proposed rules before promulgating a new permanent occupational safety and health standard. Because of the Supreme Court ruling, OSHA is withdrawing the ETS as an enforceable ETS. However, the agency is **not** withdrawing the ETS as a proposed permanent rule, and the standard rule-making process will continue.

States with OSHA-approved plans must implement and enforce workplace standards that are at least as effective as federal standards. However, since there are no new federal vaccination or testing requirements at this time, state plans are not required to take any action. Similarly, employers are not required to comply with OSHA's ETS at this time. However, employers are still expected to provide a safe and healthy workplace for their employees and follow other existing OSHA COVID-19 guidance. Employers should also monitor OSHA communications for information about the possible permanent standard.

Vaccination and Testing Requirements

The ETS requires employers to develop, implement and enforce a mandatory COVID-19 vaccination policy; or create a policy allowing employees to choose to get a vaccination or wear a face covering in the workplace and have weekly

COVID-19 testing done. As a result, employers will need to determine the vaccination status of each employee, obtain acceptable proof of vaccination and keep a roster of each employee's vaccinations status.

Employees who are not fully vaccinated must be tested weekly or within seven days before returning to work. The ETS does not require employers to pay for any costs associated with testing. However, employer payment for testing may be required by other laws or other collectively negotiated agreements. Employers will also need to immediately remove any employee who reports a positive COVID-19 test or diagnosis until return to work criteria are met.

Paid Leave

Employers are also required to allow reasonable time—including up to four hours of paid time—to receive a primary vaccination dose. Reasonable time and paid sick leave are also required to recover from any side effects of the vaccination.

Exemptions

- The requirements of the ETS do not apply to:
- Employees who do not work with other individuals present;
- Employees when they are working from home;
- Employees who work exclusively outdoors;
- Those covered under the Safer Federal Workforce Task Force;
- Those covered by the health care ETS;
- Employers that have fewer than 100 employees; and
- Public employers in states without State plans.

Vaccination Mandate for Federal Employees and Contractors

On July 29, 2021, President Biden [announced](#) new actions to strengthen safety protocols for federal employees and federal contractors. This announcement was not an executive order, but does impose new requirements for federal employees and contractors.

Every federal government employee and on-site contractor is now required to disclose their vaccination status. Federal employees and contractors who cannot attest to being fully vaccinated will be required to wear a mask while at work.

This new requirement applies regardless of whether employees are:

- In a location where COVID-19 cases are not surging (it does not matter where the employee is geographically located);
- Physically distancing from all other employees or visitors;
- Subject to restrictions on official travel; or
- Complying with weekly or twice weekly screening testing requirements.

Status and Legal Challenges

On Dec. 7, 2021, a Georgia federal judge [blocked](#) the federal contractors mandate nationwide.

This new order comes right after a Kentucky federal judge issued a [preliminary injunction](#) effectively blocking the implementation and enforcement of President Biden's COVID-19 vaccine mandate for federal government contractors and subcontractors for Kentucky, Tennessee and Ohio on Nov. 30, 2021.

On Nov. 10, 2021, the Biden administration updated its guidance for the Safer Federal Workforce Task Force, clarifying that federal contractor employees must be fully vaccinated by Jan. 18, 2022. This update was released in

conjunction with the Occupational Safety and Health Administration (OSHA) vaccine [mandate for private employers](#) and the Centers for Medicare & Medicaid Services (CMS) vaccine [mandate for health care workers](#), both of which have also since been blocked in federal court.

The injunction is effective immediately and applies nationwide. The order specifically states that the case in question is not about whether the government can require citizens to obtain vaccines. Rather, the court's opinion is that the Biden administration likely exceeded its authority to manage the federal procurement of goods and services when it imposed the vaccination requirement on federal contractors and subcontractor employees.

The injunction impacts federal contractors and subcontractors nationwide. However, federal contractors should continue monitoring this development to learn how court decisions ultimately affect their compliance obligations.

Vaccine Attestation Requirements

In addition to announcing this new requirement, the Biden administration also published [model safety principles](#). These principles are aligned with the latest instructions issued by the CDC and OSHA. As a result, federal departments and agencies are expected to:

- Review the model safety principles and incorporate them into their COVID-19 workplace safety plans;
- Address how COVID-19 safety protocols apply to contractors and promote workplace safety; and
- Implement local requirements and restrictions in federal buildings and lands when localities adopt additional requirements or restrictions.

Vaccine Mandate for Health Care Workers

The CMS rule applies to Medicare- and Medicaid-certified provider and supplier types that are regulated under the Medicare health and safety standards, including hospitals, clinics and long-term care facilities. The rule requires covered facilities to **establish a policy** ensuring that all eligible staff has received the first dose of a two-dose COVID-19 vaccine or a one-dose COVID-19 vaccine prior to providing any care, treatment or other services by Dec. 6, 2021. Under the rule, all eligible staff must have received the necessary shots to be fully vaccinated—either two doses of Pfizer-BioNTech or Moderna or one dose of Johnson & Johnson—by Jan. 4, 2022.

The regulation provides for exemptions based on recognized medical conditions or religious beliefs. **However, there is no weekly testing exception for unvaccinated workers.**

Status and Legal Challenges

On Jan. 13, 2022, the U.S. Supreme Court [dissolved](#) the temporary injunctions blocking enforcement of the Centers for Medicare & Medicaid Services (CMS) [emergency rule](#) requiring COVID-19 vaccination of certain health care workers. As a result, the emergency rule will now be reinstated and can be enforced as written.

As a result, facilities affected by this rule must **establish a policy** ensuring that all eligible staff are vaccinated against COVID-19. Under the rule's planned timeline, staff members had to receive the first dose of a two-dose COVID-19 vaccine or a one-dose COVID-19 vaccine prior to providing any care, treatment or other services by Dec. 6, 2021, and the necessary shots to be fully vaccinated—either two doses of Pfizer or Moderna or one dose of Johnson & Johnson—by Jan. 4, 2022.

CMS had previously indicated that it would not enforce the emergency rule while the injunctions prohibited enforcement. In light of the Supreme Court's ruling, it is likely that CMS will resume enforcement of the vaccination emergency rule. As a result, affected health care facilities that have not already implemented a vaccination policy should establish a policy requiring staff to be COVID-19 vaccinated as soon as possible. In addition, affected health care facilities should implement procedures to determine and document workers' vaccination status.
