

OSHA's Emergency Temporary Standard Goes Into Effect January 10, 2022

Employers Can Balance OSHA's ETS With The CDC's Latest Return To Work Guidance

January 3, 2022

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Porzio Client Alert

On Friday, December 17, 2021, the U.S. Court of Appeals for the Sixth Circuit dissolved the Fifth Circuit's stay of the Occupational Safety and Health Administration's (OSHA) COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS). The Sixth Circuit held that OSHA did not exceed its statutory authority in issuing the ETS because the Occupational Safety and Health Act requires the Administration "to issue an emergency standard if necessary to protect workers from a 'grave danger' presented by 'exposure to substances or agents determined to be toxic or physically harmful or from new hazards.'" The court concluded that regulating an agent (such as a virus) that causes bodily harm is well within OSHA's authority.

Since the Sixth Circuit decision was issued, multiple plaintiffs have filed emergency applications for an immediate stay of the ETS with the Supreme Court of the United States which subsequently announced that it has scheduled a hearing on January 7, 2022, to review the legality of the ETS.

For now, OSHA is moving forward with its implementation of the ETS and issued new compliance deadlines to provide employers with sufficient time to come into compliance. Employers with at least 100 employees companywide must comply with the requirements of the ETS before January 10, 2022. If an employer elects to permit employees to test in lieu of vaccination, then testing of unvaccinated employees must be implemented on or before February 9, 2022. We previously outlined the requirements of the ETS [here](#). To recap, the new requirements for employers include the following:

1. Implementing and enforcing a mandatory COVID-19 vaccination policy with a testing alternative;
2. Monitoring the vaccination status of employees;
3. Maintaining certain specifically required documentation relative to vaccination status and testing;
4. Providing written notice to employees, including specific documentation identified by OSHA; and
5. Enforcing masking and quarantine/isolation periods for exposed and infected employees based upon guidance issued by the Centers for Disease Control and Prevention (CDC) in early 2021.

To complicate matters, on December 27, 2021, the CDC released updated guidance significantly shortening the recommended time periods for isolation and quarantine following COVID-19 exposure and infection. Under the new guidance, if an individual tests positive, regardless of vaccination status, the CDC recommends isolation for 5 days. If the employee experiences no symptoms or if the symptoms resolve after 5 days, the individual may return to work. However,

the employee must continue to wear a mask around others for an additional 5 days.

For fully vaccinated persons who have been exposed to someone with COVID-19, the CDC says no quarantine is necessary but recommends the individual wear a mask around others for 10 days and test on day 5 if possible. For purposes of this guidance, "fully vaccinated" only includes people who have been boosted; completed the primary series of Pfizer or Moderna vaccine within the last 6 months; or completed the primary series of J&J vaccine within the last 2 months. Individuals not fully vaccinated must quarantine for 5 days, test negative, then mask for 5 days.

The new CDC guidance puts employers in a difficult spot because OSHA's ETS incorporated the CDC's earlier guidance in effect on February 18, 2021, which requires infected employees to isolate up to 10 days or until the employee's symptoms improve. Unlike the CDC, however, OSHA cannot react so quickly to the fluid nature of the pandemic, and must republish the ETS in the Federal Register prior to implementing any changes. This essentially means the ETS will be outdated by scientific standards the day it goes into effect -- potentially depriving employers and workers of the CDC's new business-friendly model of shortened isolation periods.

Fortunately, there is one section of the ETS that can be used as a work-around for the regulation at odds with the latest CDC guidance. Under the ETS, employees must follow the criteria in the CDC's early 2021 "Isolation Guidance" or receive a recommendation to return to work from a licensed healthcare provider (Sec. 1910.501(h)(2)(iii)). The majority of healthcare providers consider and follow CDC recommendations as sound and science-based guidance, and a doctor's note would satisfy the ETS requirements for return to work following COVID-19 infection or exposure.

To assist employees in obtaining the necessary documentation, and ensure full compliance with the ETS, we recommend employers make available a company form the individual can present to their healthcare provider which also can be conveniently submitted and signed electronically via the ever-growing TeleMed services available. In addition, if the employer has an inhouse licensed healthcare provider or contracts with one, the provider can complete the form for the employee. Employers will want to ensure the medical form is carefully drafted to limit liability and withstand any OSHA scrutiny.¹

Recommendations and requirements are frequently changing in this area of employment law and employers need to ensure they are receiving the most current guidance. Porzio's Employment Team can assist your business in preparing its mandatory COVID-19 vaccination policy, infection prevention safety policies, and a universal medical form to assist in getting employees back to the workplace safely and sooner.

1. While OSHA is unlikely to cite employers who follow the CDC's most up to date recommendations, it is possible that field investigators would take issue with an employer's failure to follow the mandates of the ETS.