



January 6, 2022

WHAT YOU NEED TO KNOW ABOUT

## OSHA's Vaccine-or-Test Rule

### PRO POINTS

- ❁ **If the Labor secretary determines that workers are in “grave danger”** due to exposure to new hazards or toxic substances, the Occupational Safety and Health Administration can issue a six-month emergency temporary standard that takes effect immediately, exempting it from the agency’s usual rulemaking process.
- ❁ **The agency issued an ETS in November requiring all private employers with 100 employees or more to see that their workers get vaccinated against Covid-19 or wear a mask and submit to weekly testing.**
- ❁ **After an array of legal challenges, the Supreme Court is slated to hear arguments for and against OSHA’s authority to issue the ETS in a special session on Jan. 7.**

### HOW WE GOT HERE

As the Covid-19 pandemic worsened and more frontline workers took the brunt, unions, advocacy groups and Democrats called on the Occupational Safety and Health Administration, a Labor Department agency, to issue an emergency temporary standard to protect employees from Covid-19 in the workplace.

The Trump administration refused, maintaining that to do so would be too much of a burden on employers in the midst of a recession. Meanwhile, Joe Biden released a plan while campaigning for president in November 2020 calling on then-President Donald Trump to issue an ETS immediately. Once elected, one of the first executive orders Biden signed in January 2021 upon taking office called on his Labor secretary to determine whether any emergency temporary standards targeting Covid- 19 were necessary and, if so, to issue them by March.

OSHA began work on an ETS that would require private-sector workers to get vaccinated, sending it to OMB for review in October and publishing it at the beginning of November. The rule mandated that all private employers with 100 or more employees ensure that their workers are vaccinated — or wear masks and submit to weekly testing.

Several states, employers, unions and individuals filed suit in all 12 federal circuit courts of appeals, challenging OSHA’s authority to issue the ETS as well as the basis for the standard. The 5th Circuit placed a stay on the ETS, siding with the challengers’ claims.

Later in November, the 6th Circuit appeals court was selected in a random draw to hear the challenges in one, consolidated case. On Dec. 17, the court dissolved the earlier stay on the ETS, allowing it to take effect.

Within hours, the challengers appealed to the Supreme Court.



## OSHA's emergency temporary standard authorization process

Under certain limited conditions, the Occupational Safety and Health Administration is authorized to set an emergency temporary standard to protect public health in workplaces. An ETS takes effect immediately and is followed until superseded by a permanent standard. Here is how the Covid-19 vaccine mandate President Biden initiated Jan. 21, 2021 progressed along OSHA's ETS authorization process.

### The ETS authorization process

**1** The secretary of Labor determines if an ETS is necessary. An ETS is issued if workers are determined to be exposed to grave danger from exposure to toxic or physically harmful substances or agents, or from new hazards.

**2** OSHA sends the ETS to the Office of Management and Budget for review.

**3** OSHA publishes the ETS in the Federal Register. The ETS also serves as a proposal for normal rulemaking for a final standard, which must replace it within 6 months. OSHA seeks comment on all aspects of the ETS and whether the agency should adopt it as a final standard.

**4** The ETS is effective immediately upon publication. Employers must comply with most requirements within 30 days of publication and with testing requirements within 60 days of publication. The validity of an emergency temporary standard may be challenged in an appropriate U.S. Court of Appeals.

**5** The implementation period of the ETS expires. DOL must replace it with a permanent version of the rule or let it lapse.

### Progress of the ETS for Covid-19 vaccination

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**Jan. 21, 2021**

Biden signs an executive order directing OSHA to consider whether an ETS targeting Covid-19 is necessary and if so, to issue one by March.

**Oct. 12, 2021**

DOL sends a draft of the ETS to OMB to review. The ETS would require private employers with 100 or more employees to ensure workers are vaccinated against Covid-19 or wear a mask and submit to weekly testing. It is estimated to affect about 84 million workers.

**Nov. 4, 2021**

The ETS is posted in the Federal Register for public comment. Several states\*, private employers, labor unions and individual citizens challenge OSHA's authority to issue the ETS as well as the basis for the ETS.

**Nov. 6, 2021**

The 5th Circuit places a stay on the ETS.

**Dec. 17, 2021**

The U.S. Court of Appeals for the 6th Circuit dissolves the 5th Circuit's stay of the ETS.

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**Jan. 10, 2022**

The deadline for complying with the ETS.

**May 4, 2022**

The ETS is set to expire 6 months after it is implemented.

\*Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wyoming

Sources: OSHA, National Law Review, POLITICO staff reports



## WHAT HAPPENS NEXT

The Supreme Court will hear arguments for and against OSHA's authority to issue the ETS on Jan. 7 in a special session. It will also consider a similar rule by the Centers for Medicare and Medicaid that covers health care workers at facilities that receive Medicare or Medicaid funding.

If the Supreme Court allows the private-sector ETS to take effect, economists say they don't expect it to have much effect on the labor market, as many employers have already taken action to come into compliance.

A ruling against the Biden administration would blow a hole in its efforts to get more people vaccinated against Covid-19 amid pockets of stiff resistance to the vaccine. It's uncertain what its next step may be in that event.

OSHA has moved its deadline for complying with the vaccine mandate to Jan. 10 and for complying with its testing requirements to Feb. 9, "so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard."

OSHA plans to accept written comments on the ETS until Jan. 19 as it considers whether to make it a permanent standard. The ETS is set to expire May 4, when OSHA will have to decide whether to make it a permanent regulation — subject to the usual rulemaking process — or let it lapse.

### POWER PLAYERS

- ✿ **Marty Walsh, Labor Secretary:** Issuing the ETS was Walsh's call, and he undoubtedly played a role in what the agency's final product would look like.
- ✿ **Doug Parker, OSHA Chief:** Drafting the ETS was Parker's responsibility. He will also oversee its implementation if it is allowed to stand.
- ✿ **Job Creators Network:** The small business advocacy group is among those who led the charge in challenging the ETS in court.