

OSHA ETS “Vaccinate or Test” Rule for Large Employers Back in Effect

Article
12.20.2021

Related Attorneys

Rachel D. Gebaide

Late Friday, December 17, 2021, the Sixth Circuit Court of Appeals dissolved the stay of OSHA’s “vaccinate or test mandate” rule for large employers (ETS) in a 2-1 split ruling. Hence, the ETS (summary of general requirements) is no longer paused and is now in effect nationwide for all employers with 100 or more employees.

In response to the dissolution of the stay, OSHA announced it will not issue any citations prior to January 10, 2022, for noncompliance with any of the ETS’s requirements “so long as an employer is exercising reasonable, good faith efforts to come into compliance.”

Subject to the same condition, OSHA will not issue citations for noncompliance with the ETS’s testing requirements before February 9, 2022.

What does this mean for employers in Florida?

Large employers operating in Florida should take reasonable good faith efforts to comply with the ETS while bearing in mind that Florida’s new law requires that employers with a mandatory vaccine policy offer employees five different exemptions or risk investigation and fines by the Florida Department of Legal Affairs.

There are several strategies employers of 100 or more employees in Florida may consider, but there are no clear answers at present on how best to comply with both the ETS and Florida law, including who pays for testing. The prudent path continues to be consulting with legal counsel to determine the best way forward in this changing and, seemingly, conflicting regulatory environment.

Florida is one of several states challenging the ETS and has appealed the dissolution of the stay to the United States Supreme Court. The Supreme Court may act at any time, taking up the issue or denying review of the same.

Although matters remain in flux, as of now, the ETS is in effect, and employers should assess how they will comply with the ETS in light of Florida law prior to the revised January 10 and February 9 deadlines.

Please note this article only covers the OSHA ETS. There are other vaccine mandates employers may be subject to, including the Centers for Medicare & Medicaid Services’ interim final rule mandating COVID-19 vaccination for staff and employees of Medicare and Medicaid certified providers and suppliers (which CMS mandate is in also back in effect now for Florida and in 25 other states but remains stayed in 24 other states) and the Federal Contractor vaccine mandate (currently stayed nationwide).

Lowndes will continue to provide updates as legal developments occur and remains available to answer questions in the meantime. In the meantime, please contact any Lowndes Labor and Employment lawyer to discuss and strategize about the approach that your business will follow as you navigate this federal regulatory and state statutory maze.