



COVID-19 GUIDANCE

(AS OF JANUARY 14, 2022)

OSHA's COVID-19 Vaccination Mandate Standard for Large Employers

This guidance provides brief responses to a series of questions concerning the federal Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard (ETS) regarding COVID-19 employer vaccine mandates [issued on November 5, 2021](#). The ETS established minimum requirements for select workplace mandatory vaccination policies affecting employers with more than 100 employees (with some key exceptions noted below). As discussed further below, on January 13, 2022, [the U.S. Supreme Court temporarily blocked the ETS](#), concluding that the Secretary of Labor lacked authority to issue it. The Court's decision seriously calls into question the future status of the ETS. FAQs below, updated as of January 14, 2022, generally address the ETS in detail prior to issuance of the Court's decision.

What is the current status of the OSHA ETS?

On January 7, 2022, the U.S. Supreme Court held a special hearing to consider the legality of the ETS, in a joint session also considering the CMS Mandate (discussed above). [On January 13, in a 6-3 decision, the Court](#) blocked the ETS from going into effect nationwide, holding that the Standard's challengers were likely to succeed on their claims that the Secretary of the Department of Labor lacked authority to impose the vaccine mandate.

The Court held that the Secretary's order exceeded congressional authority, and was no "everyday exercise of federal power," but a "significant encroachment in the lives—and health—of a vast number of employees." The OSH Act, wrote the Court, is a statute on workplace hazards, and cannot stretch to ordering 84 million Americans to either obtain a COVID-19 vaccine or undergo weekly testing at their own expense. The Court noted that the Secretary was only authorized to set "*workplace* safety standards, not broad public health measures" (emphasis in original). "[P]ublic health more generally" falls outside OSHA's "sphere of expertise."

In a dissenting opinion, Justices Breyer, Sotomayor, and Kagan lamented that the Court would not uphold "the administrative agency charged with ensuring health and safety in workplaces" doing what Congress commanded it to do by taking action to address COVID-19.



What is the scope of OSHA's COVID-19 employer mandate standard?

The [standard](#) requires all covered employers to ensure that their employees either receive the COVID-19 vaccine(s) (subject to medical exemption and religious- or disability-based accommodations) or submit to weekly COVID-19 testing. Individuals who are not fully vaccinated must wear face coverings indoors, subject to certain exceptions. The standard also requires employers to provide up to 4 hours of paid time off for vaccination doses, including travel time, as well as paid sick leave for employees experiencing side effects.

Who does OSHA's standard principally apply to?

The standard applies to all private employers with more than 100 employees and to state and local government employers with more than 100 employees in states with OSHA-approved state-based occupational safety plans. The standard does not apply to public employers in states without state-based plans. OSHA's standard does not apply to employees who are (a) not reporting to a workplace where other persons are present; (b) working exclusively from home; or (c) working outdoors (where the risks of COVID-19 spread are significantly reduced).

OSHA's ETS also does not apply in certain workplaces, including the following settings:

- (1) federal agencies or contractor workplaces covered by the [Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors](#);
- (2) health care or support entities subject to OSHA's previously promulgated [Healthcare ETS](#).


[CMS' ETS](#), issued officially as well on November 5, 2021, sets stricter vaccination standards for Medicare and Medicaid providers in that it does not include a testing option. Health care providers must still provide for medical exemptions and reasonable accommodations for religious or disability-based objections to vaccination. If a provider falls under both its standard and OSHA's ETS (or other federal mandates), [it should look to CMS' ETS first](#). Whether testing may be pursued in providing such accommodations is not specifically elucidated by CMS, [but its FAQs explain](#) that employers granting accommodations "must ensure that they minimize the risk of transmission of COVID-19 to at-risk individuals." CMS recommends that providers review the Equal Employment Opportunity Commission's [\(EEOC's\) guidance on accommodations](#) for additional information.

Which states currently prohibit vaccine mandates?

According to the National Academy for State Health Policy, many states have implemented [legislation](#) or executive orders limiting COVID-19 vaccine mandates. As of January 14, 2022, 21 states have instituted bans on [vaccine passports](#). Six states ban [health care worker](#) vaccine mandates, 10 states ban state [government employee](#) vaccine mandates, 2 states ban [private employer](#) vaccine mandates, 11 states ban [school faculty/staff](#) vaccine mandates, and 17 states ban [student vaccine mandates](#).

Are these states' laws preempted by OSHA's ETS?

As applied to private employers, OSHA's standard expressly preempts adoption and enforcement by state or local governments of workplace requirements relating to vaccination, face coverings, and COVID-19 testing [unless a state has its own OSHA-approved workplace agency](#). Approximately half of the states have such programs that include private sector employees. States with their own plans have [30 days](#) from the date of publication to adopt their own standard that is [at least as effective](#) as the federal standard. Some states which currently prohibit vaccine mandates do not have OSHA-approved state plans. OSHA expressly addressed



preemption of these kinds of laws [in its guidance FAQs](#), explaining that it “intends for the ETS to preempt and invalidate any State or local requirements that ban or limit an employer’s authority to require vaccination, face covering, or testing.”

Does OSHA’s ETS apply to local or state government employers?

OSHA’s ETS does not apply to state and local governments, as the [OSH Act’s definition of “employer”](#) excludes states and political subdivisions of states. The standard therefore does not apply *directly* to state or local government employers. However, as discussed above, states may directly follow the OSH Act’s requirements, or submit for OSHA approval a [separate state plan](#) which is [at least as effective as the OSH Act](#). State-based plans [cover state or local government employees](#).

Pursuant to [29 C.F.R. § 1953.5\(b\)](#), OSHA-approved state plans have [30 days from publication of the standard](#) to update those plans to ensure that they are at least as effective as OSHA’s standards. Some states may choose to incorporate OSHA standards into state-based plans verbatim to ensure matching efficacy, while other states may choose to adopt more protective requirements.

What if state workplace safety agencies do not comply with OSHA’s ETS?

States with federally-approved workplace agencies that do not satisfactorily meet OSHA requirements may have their regulatory powers removed or limited. OSHA previously issued a standard in [June 2021](#) related to COVID-19 workplace safety measures. In [October 2021](#), OSHA declared that Arizona, South Carolina, and Utah, states with federally-approved workplace safety agencies, had failed to appropriately implement the measure or an equivalent state standard. Consequently, OSHA initiated a process to potentially strip these states of their workplace safety authority.

On October 19, 2021, [Arizona](#) Governor Doug Ducey stated federal attempts to strip Arizona of its workplace safety authority, as discussed above, were “nothing short of a political stunt and desperate power grab,” potentially foreshadowing similar future arguments against additional OSHA measures. After OSHA publishes its findings in the Federal Register, a 35-day comment period will follow, with the possible eventual rescission of either partial or full state workplace safety authority. Similar measures may be considered if states do not comply with the vaccination standard.

What is OSHA’s jurisdictional authority to implement the ETS under the Occupational Safety and Health Act of 1970?

The [Occupational Safety and Health Act of 1970](#) authorizes the federal government to enact workplace standards to ensure employee health and safety. To implement the COVID-19 vaccination requirement, [OSHA issued an ETS](#) pursuant to [Section 6\(c\)](#) of the Act. This law authorizes the Secretary of Labor to temporarily bypass administrative rulemaking procedural requirements if the Secretary determines “(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.” Such standards can remain in effect for up to [6 months](#) without going through standard rulemaking processes. OSHA’s use of this emergency authority has been [rare](#) since the courts struck down an ETS on asbestos in 1983.



Are there any specific potential or actual constitutional issues or objections to OSHA's standard?

To bypass administrative rulemaking consistent with the Administrative Procedures Act and principles of procedural due process to issue this standard as an ETS, OSHA must establish that COVID-19 presents a grave danger to covered workplaces which necessitates the standard to protect employees. Opponents have challenged these findings. OSHA's broad regulatory authority raises additional constitutional questions concerning [non-delegation](#) and separation of powers, and whether OSHA has the [authority](#) to mandate COVID-19 vaccines under the [Commerce Clause](#).

What legislative or executive objections have arisen from state or local governments related to OSHA's ETS?

Several state-based lawmakers adamantly opposed the standard prior to its issuance. [South Dakota](#) Governor Kristi Noem called the standard "unconstitutional" and promised legal action. [Texas](#) Governor Greg Abbott called the standard an "assault on private businesses" and emphasized his [Executive Order](#) preventing vaccine mandates. Promising a legal battle, [Missouri](#) Governor Mike Parson declared the anticipated standard an "insult to our American principles of individual liberty and free enterprise." [Wyoming](#) Governor Mark Gordon directed the state attorney general to "take all actions to oppose this administration's unconstitutional overreach of executive power." On September 16, 2021, 24 state attorneys general issued a [letter](#) to President Biden challenging the federal government's authority to promulgate the standard, alleging constitutional and other violations, and positing that the standard would be an ineffective public health measure.


On November 12, Tennessee Governor Bill Lee signed [COVID-19 legislation](#) that takes effect immediately. It restricts employers' ability to require proof of vaccination and limits business' adverse actions against non-vaccinated workers. Public employers, including public schools, are prohibited from mandating vaccination or requiring masks unless certain conditions are met. Finally, the law provides that workers may collect unemployment benefits following any job loss resulting from failure to obtain the vaccine. Also on November 12, North Dakota Governor Doug Burgum signed [House Bill 1511](#), which bans state-level government-ordered vaccine mandates. The bill however allows private companies to require workers be vaccinated, but greatly expands the list of permissible exemptions to include "morals," proof of antibodies over the past six months, or a doctor's note, and exempted higher education, health care, and prison workers from vaccine requirements. Similarly, [Florida Governor Ron DeSantis](#) on November 18 signed a legislative ban on private employers mandating COVID-19 vaccination unless medical, religious, and other exemptions are offered. The new vaccine mandate law will be enforced by the state Department of Legal Affairs in the Attorney General's office.

At the federal level, on December 8, the [U.S. Senate](#) voted to dissolve the Biden administration's vaccine mandates, but to date there is no comparable passage of a similar bill in the House of Representatives.

Not all governments oppose the OSHA standard. On November 15, Puerto Rico Governor Pedro Pierluisi issued an [executive order](#) requiring private sector employers with 50 employees or more to adopt vaccine or testing requirements, which expands the scope of OSHA's ETS to a wider swath of employees.

What litigation did states or localities raise related to OSHA's ETS?

After President Biden announced OSHA's forthcoming vaccine mandates, but before the standard was released, Arizona Attorney General Mark Brnovich [filed a lawsuit](#) on September 14 arguing that federal government



vaccine mandates which are inapplicable to undocumented immigrants violate equal protection principles, among other claims.

Upon the actual release of the standard on November 5, a [deluge](#) of additional legal challenges arose in several states. On November 6, the [Fifth Circuit](#) Court of Appeals in New Orleans temporarily blocked OSHA's standard, claiming it raised "grave statutory and constitutional issues." This order was upheld on [November 12](#). In a terse decision, the [Fifth Circuit](#) characterized the standard as a "one-size-fits-all sledgehammer" which was simultaneously over- and under-broad. By [November 15](#), more than [half](#) the states and multiple private entities filed suits in all the 12 Circuits. On November 16, a Judicial Panel on Multidistrict Litigation announced that the [Sixth Circuit Court of Appeals](#) based in Cincinnati, Ohio was selected via lottery among all the Circuit Courts to hear and initially decide the consolidated cases.

While OSHA announced initially that it would temporarily [suspend enforcement](#) of the standard after the Fifth Circuit issued its opinion, after the lottery process lodged the cases in the Sixth Circuit, the Biden administration petitioned the Sixth Circuit on [November 23](#) to immediately dissolve the Fifth Circuit's stay. The Department of Justice argued that "Congress charged OSHA with addressing grave dangers in the workplace, without any carve-out for viruses or dangers that also happen to exist outside the workplace." On December 3, the Sixth Circuit [denied OSHA's petition for expedited review](#). On December 15, the court [denied several petitions](#) for initial hearing en banc of the consolidated challenges to the OSHA standard. According to the court's order, "less than a majority of the active judges" voted in favor of initial hearing en banc.


Consequently, the challenges were heard by a three-judge panel on the Sixth Circuit. On December 17, in a 2-1 decision, [the court lifted the Fifth Circuit's stay](#), upholding and reinstating OSHA's authority to promulgate rules to respond to evolving public health threats. Construing OSHA's statutory authority to include all physically harmful agents, including viruses, the court determined that the Fifth Circuit's stay was wrongly granted based on incorrect and limited interpretations. Longstanding precedent underscored OSHA's authority to protect "against infectious diseases that present a significant risk in the workplace," and OSHA demonstrated "the pervasive danger" posed by COVID-19 to employees (particularly the unvaccinated) in the workplace. Thus, OSHA's ETS is not a "novel" or "enormous expansion of [OSHA's] regulatory authority," noted the Sixth Circuit panel, but rather an "existing application of [the OSH Act] authority to a novel and dangerous worldwide pandemic." While the Sixth Circuit lifted the prior stay, the court had not fully decided the case on the merits, including determining whether the ETS overrides state or local laws via federal preemption.

On December 18, [OSHA moved forward with the ETS](#) while noting it would not issue citations for (1) noncompliance before January 10, 2022, or (2) testing requirement violations before February 9, 2022, so long as the employer is making reasonable, good-faith efforts to comply.

Following numerous requests for emergency relief from enforcement of the ETS, on December 22, the Supreme Court [agreed to hold a special hearing](#) on January 7, 2022 to assess the legality of the OSHA ETS, as well as the [Centers for Medicare and Medicaid Services \(CMS\) vaccine mandate](#) for health care workers. On January 13, 2022, as discussed in detail above, the Supreme Court [temporarily blocked the OSHA standard](#).

What legal objections or litigation arose via the private sector related to OSHA's standard?

After OSHA published its standard on [November 5](#), several organizations immediately filed suit to block its enforcement. Numerous private sector lawsuits had already been brought by [November 15](#). [Construction industry trade groups](#) filed cases in the [Fourth Circuit](#) and elsewhere claiming the standard "forces employees to choose between their jobs and getting vaccinated." [Multiple labor unions](#) sued claiming OSHA's mandate is



too narrow in scope and should be expanded to include workplaces with under 100 employees and require employers to financially cover testing and mask requirements.

After the Department of Justice petitioned the Sixth Circuit to dissolve the Fifth Circuit’s stay of OSHA’s standard (see above), an advocacy group called [The Jobs Creators Network](#) sued to oppose the request, arguing that the stay was necessary to protect companies from incidental costs and employees from potential job losses. On November 29, the [Heritage Foundation](#) filed suit in the U.S. Court of Appeals for the D.C. Circuit, alleging that the standard represents a “gross abuse of power” and “clearly encroaches on the police power of states expressly reserved by the Tenth Amendment.” The Foundation argued that the mandate "exceeds the federal government’s authority under the Commerce Clause" and "impermissibly" compels citizens "to act as the Government would have them act."

For additional updates on current pleadings and cases, check the following [link](#).

This document was developed, drafted, and updated by **James G. Hodge, Jr., J.D., L.L.M.**, Director, **Jennifer L. Piatt, J.D.**, Deputy Director, **Erica N. White, J.D.**, Staff Attorney, and **Rebecca Freed** and **Nora Wells**, Senior Legal Researchers, with the Network for Public Health Law – Western Region Office, Sandra Day O’Connor College of Law, Arizona State University (ASU).

The Network for Public Health Law provides information and technical assistance on issues related to public health. ***The legal information and assistance provided in this document do not constitute legal advice or legal representation. For legal advice, please consult specific legal counsel.***

Support for the Network provided by the Robert Wood Johnson Foundation. The views expressed in this document do not necessarily reflect the views of the Foundation.



Robert Wood Johnson Foundation