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Compliance Advisor

## What every HR leader should know about compliance



# Supreme Court Strikes Down OSHA's Vaccine ETS: An Employer's Six-Step Priority List

Jan. 14, 2022

**Read time: 5 minutes**

The Supreme Court just blocked the U.S. Occupational Safety and Health Administration's (OSHA's) vaccine Emergency Temporary Standard (ETS) from being enforced for the foreseeable future, meaning your compliance to-do list has gotten significantly shorter – but it has by no means disappeared. While today's 6-to-3 Supreme Court decision means you no longer have to follow the January 10 deadline, this Advisor will provide you a practical six-step priority list to guide you on your way during the days ahead.

### What Happened?

Technically, the Court didn't kill the ETS for good, but the long-term prognosis is not looking good. SCOTUS reapplied the temporary injunction that once again blocks OSHA from enforcing the ETS for the time being while the parties continue to battle in lower courts over whether the emergency rule is valid. There are two ways that the rule could come back to life in its original or a revised form:

- There is an unlikely chance that the Sixth Circuit Court of Appeals – which will take over the case from here – could determine that the rule is valid and breathe new life into it sometime in the coming weeks and months. However, even if that happened, the ETS would face a steep hill to survive a challenge on the merits if the case is brought up before SCOTUS once again.
- OSHA's ETS was only designed remain in place for six months, after which it must be replaced by a permanent standard. If the workplace safety agency wants to continue this fight, stay tuned for a formal rulemaking process that could see a formal regulation published on or before May 5.

### 1. Highest Priority: Complete Your Administrative Obligations

If the ETS comes back online in the coming weeks and months as explained above, or if OSHA issues a permanent regulation along these lines, you can be sure that the agency will take an aggressive approach to enforcement. OSHA will most likely indicate that it expected employers to develop their compliance approach during this limbo period and be at the ready to launch their efforts



immediately. For this reason, the most conservative approach is continuing your work on the following key administrative obligations.

- **Create Roster** – You can gather vaccine status information on your workforce and develop the required vaccination roster for employees, noting whether or not they are fully vaccinated. [The EEOC has confirmed that you can lawfully ask employees their vaccination status without violating federal anti-discrimination laws](#) (provided the question is limited to a yes-or-no response) and [HIPAA does not prevent employers and businesses from asking their employees and visitors whether they have been vaccinated against COVID-19 and for proof of such vaccination](#).
- **Develop Policies** – Depending on your decision, develop vaccine and/or testing policies – and make sure they are adapted to your own unique workplace. While you have no immediate obligation to roll them out, you should have them at the ready just in case – or feel free to introduce them now. Most employers are permitted to institute such a policy at your workplace even if the government is not forcing you to do so ([unless you operate in a state restricting mandatory vaccine policies](#)). At a minimum, the policy should include requirements for:
  - employees to report positive COVID-19 tests;
  - positive COVID-19 employees to be removed from the workplace;
  - paid leave for employees to get vaccinated; and
  - ensuring unvaccinated and not fully vaccinated employees wear face coverings when indoors or when occupying a vehicle with another person.
- **Educational Sessions** – You may want to develop programs that would allow you to conduct compliance training for your managers and deliver information about your policies to your employees.

## 2. Decide if You Want to Impose Your Own Mandate

The next step is to decide if you want to require vaccinations at your workplace. It is still permissible to impose your own vaccine mandate in most locations, regardless of SCOTUS's decision. [Check this list of states](#) and coordinate with your workplace law counsel to determine if you can proceed with a mandate at your place of business.

But while the law may be squarely on your side, it is important to consider issues relating to vaccine mandates before acting. Accordingly, while most employers can require employees to receive the vaccination in order to remain in the workplace, you should not adopt such a policy before considering six important issues:

- Identify known concerns among your workforce and provide information to help employees understand how vaccinations can reliably promote health and safety for themselves, co-workers and others.
- Taking into account the unique environment at your business, figure out the best way to communicate your policy to employees, including how much notice to provide before implementing the requirement.



- Consider related logistics, including compensation issues that may be implicated.
- [Develop a robust and clear reasonable accommodation policy to address religious and disability issues](#), taking special care to communicate and administer the accommodation process in a thoughtful way, with emphasis on individualized, confidential consideration of each request.
- Spend time considering how your employees, customers, and other constituents are likely to respond to the policy, including how you will handle responses such as those described above.
- Develop a designated team for coordinating this entire process.

### 3. Consider Creating Safety Obligations for Non-Vaccinated Employees

You can also require those who do not prove their vaccinated status to comply with additional safety restrictions as necessary to maintain a safe working environment. These can include masking requirements, social distancing rules, restrictions on business-related travel, and other concepts relevant to your work environment. Whatever you decide, you will want to announce these requirements ahead of time, so it does not appear as if you are individually targeting certain workers. You will want to craft your policies thoughtfully, with regard to your specific workplace, and in coordination with your workplace law counsel so as not to create the perception that your rules are punitive or coercive.

### 4. Determine Whether You Will Institute a Testing Requirement for the Non-Vaccinated

You can require regular COVID-19 testing of all non-vaccinated personnel to ensure the highest level of workplace safety. To do so, you should consider four main points:

- Communicate the new policy with your workforce in a clear and direct manner. You may want to use a combination of methods: electronic through company digital services, an all-employee meeting where you can walk through the rationale and the new protocols, and through written materials handed out to all workers. Whatever forms of communication you choose, emphasize that the sole purpose of this policy is to maintain a safe workplace.
- Determine how often you will test those employees who do not or cannot prove they have been vaccinated, taking into account the unique safety-related concerns that arise at your workplace. You will want to require frequent-enough testing that the system reasonably catches potential outbreaks of COVID-19, but not so frequent that it seems your testing requirement is simply punitive in nature.
- Ensure that your protocols for required testing comply with applicable wage and hour laws. Time spent on receiving employer-required tests should almost always be treated as compensable.
- Finally, you may want to take into consideration the ability of your workers and your organization to obtain COVID-19 tests in your community before instituting your policy or setting its parameters. It is expected that tests will become more widely available in the coming weeks and months, so you might want to take a wait-and-see approach in this regard.



## 5. Consider Imposing a Health Insurance Surcharge on Non-Vaccinated Workers

Similar to a nicotine surcharge that many employers already have in place as part of their wellness programs, you can impose an additional surcharge on health insurance premiums for those who are unvaccinated. Before considering any health insurance surcharge, you should make sure you understand state and federal law regarding this option. For a comprehensive analysis of this option, please review our Insight: “[6 Employer Questions to Answer Before Imposing a Surcharge on Unvaccinated Workers.](#)”

## 6. Keep Vaccine Incentives in Mind

The final consideration falls into the “carrot” category, foregoing any “stick” – offering incentives to any workers who can prove they are fully vaccinated. The most common incentives employers have offered include cash, gifts, or paid time off. [Thanks to clear guidance from the EEOC](#), you have simple directions to ensure you don’t run afoul of any discrimination laws if you decide to offer incentives:

- If your employees voluntarily provide documentation confirming they have been vaccinated and got the shot on their own from a pharmacy, public health department, or other health care provider in the community, you can offer them any incentive you’d like with no apparent limitations.
- If your organization (or an entity acting on your organization’s behalf) administers the vaccine, you can still offer incentives – but they cannot be so substantial in value as to be considered coercive.

[More details on this option can be found in a Fisher Phillips June 1, 2021, Insight.](#)

## Conclusion

As we have done throughout the pandemic, we will monitor these developments and provide updates as events warrant.