

Federal Appellate Court Takes Brakes off COVID-19 Vaccine Mandate Carousel

December 20, 2021

Last week we updated you on the lifting of the injunction staying the CMS mandate for health care workers. The carousel is spinning even faster now!

Over the weekend, the injunction staying the Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard (ETS) mandating vaccines for employers with 100 or more employees was also lifted by the U.S. Court of Appeals for the Sixth Circuit.

While Michigan employers are not bound by the OSHA rule, they must comply with the rules of the Michigan Occupational Safety and Health Administration (MIOHSA). MIOSHA has not issued its rule yet, but based on past rule making, it is likely to mirror the OSHA rule. As you wait for MIOSHA to publish its rule, employers would be well advised to become familiar with the OSHA rule and prepare to comply with similar requirements under MIOSHA.

OSHA will not begin enforcing the requirements of the ETS, which would have taken effect on Dec. 6 until Jan. 9, so employers have a little time to comply. In addition, OSHA announced it will not issue citations for non-compliance with the standards' testing requirements before Feb. 9, as long as the employer is exercising reasonable, good-faith efforts to come into compliance with the standard.

The ETS generally applies to employers in all workplaces that are under OSHA's authority and jurisdiction, including industries as diverse as manufacturing, retail, delivery services, warehouses, meatpacking, agriculture, construction, logging, maritime and health care. Within these industries, all employers that have a total of at least 100 employees, firm or company-wide at any time the ETS is in effect, are covered.

Employees in health care are subject to the health care ETS which has been in effect for some time. In addition, federal contractors may be covered by a separate executive order (Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors).

The ETS requires covered employers to develop, implement and enforce a mandatory COVID-19 vaccination policy. A mandatory vaccination policy is defined as an employer policy requirement for each employee to be fully vaccinated. The policy must require vaccination of all employees, including vaccination of all new employees as soon as practicable, other than employees:

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- For whom a vaccine is medically contraindicated;
- For whom medical necessity requires a delay in vaccination; or
- Who are legally entitled to a reasonable accommodation due to a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.

For those employees, the employer must establish, implement and enforce a policy allowing employees who are not fully vaccinated to undergo weekly COVID-19 testing and to wear a face covering at the workplace.

To comply with the ETS, employers must:

- Determine the vaccine status of each employee by collecting copies of vaccination records and maintaining a roster of each employee's vaccination status
- Provide employees reasonable time, including up to four hours of paid time, to receive each vaccine dose and reasonable time and paid sick leave to recover from side effects after each dose. The rule is silent on whether the time has to be paid if the employee has exhausted PTO.
- Ensure that each employee who is not fully vaccinated is tested for COVID-19 at least weekly if the employee comes into the workplace once a week or more, or within seven days before returning to work (if away from the workplace for a week or longer).

Employers do not have to pay for the costs associated with testing unless required by a collective bargaining agreement, or other contract or law. Michigan law does not require employers to pay for testing.

In addition, the ETS requires employers to:

- Require employees to promptly provide notice when they receive a positive COVID-19 test or diagnosis;
- Immediately remove any employee from the workplace, regardless of vaccination status, who received a positive COVID-19 test or diagnosis by a licensed health care provider;
- Keep removed employees out of the workplace until they meet criteria for returning to work; and
- Ensure that each employee who is not fully vaccinated wears a face covering when indoors, or in a vehicle for work purposes with another person and allow anyone who wants to voluntarily wear a face covering to do so.

The ETS requires notifications be given to employees in a language and at a literacy level the employees understand. The employees must be given:

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- The requirements of the ETS and workplace policies and procedures established to implement the ETS;
- The CDC document “*Key Things to Know About COVID-19 Vaccines*,”
- Information about protections against retaliation and discrimination; and
- Information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.

This remains an evolving situation, and it is very likely that the U.S. Supreme Court will become involved, as numerous petitions were filed with the U.S. Supreme Court, asking it to immediately block the mandate within hours of the ruling.

In the meantime, employers subject to the CMS vaccine mandate and the OSHA ETS should put policies in place in anticipation that enforcement could begin shortly, if there aren’t new injunctions entered.

Employers need to stay current on the vaccine mandates that affect their business and the CDC guidance as well. It is important to work closely with your legal counsel to stay up to date on the quickly changing rules and requirements.