



FEATURE

Navigating the Challenges of OSHA's Emergency Temporary Standard on COVID-19 Mandate

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President Biden issued the COVID-19 Executive Order – Vaccine Mandate on September 9, 2021, which was wide-ranging in scope. The ramifications are profound and almost certainly have long-term implications for contractors. In early November 2021, the Biden Administration's Secretary of Labor, acting through the Occupational Safety and Health Administration (OSHA), enacted the Emergency Temporary Standard (ETS) COVID-19 Vaccination Mandate for much of the United States' workforce. The mandate, which employers were required to enforce,

applied to roughly 84 million workers and covered virtually all contractors with at least 100 employees. It required workers to receive a COVID-19 vaccine, preempting state laws. The only exception is for workers who obtain a medical test each week at their own expense and on their own time and wear a mask each workday. Historically, OSHA nor Congress have ever before imposed such a mandate.

On January 13, 2022, the United States Supreme Court struck down the OSHA ETS. It stated the vaccine mandate was "a significant

encroachment into the lives—and health—of a vast number of employees." ¹

Legally, the court did not permanently end the ETS, but the future outlook is questionable. The Supreme Court reinstated the temporary restraining order, preventing OSHA from implementing the ETS. At the same time, the legal battles continue in the lower courts over the validity of the emergency rule. We view this as highly unlikely; however, OSHA may press on and develop a similar permanent standard to the initial ETS.

¹ *National Federation of Independent Business, et al. v. Department of Labor, Occupational Safety and Health Administration, et al., Ohio, et al. v. Department of Labor, Occupational Safety and Health Administration, et al., Volume 595 U. S. ____ (2022).* https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf

The case has been remanded to the Sixth Circuit Court of Appeals to consider further OSHA's power to issue the ETS. In restraining the ETS, the Supreme Court majority determined that the plaintiffs in the case are likely to prevail on the merits. Although the result is not conclusive, it will likely affect the Sixth Circuit's ruling. Additionally, the ETS is valid for six months from the date of issuance—or until May 5, 2022. The Sixth Circuit may not make a ruling before the ETS ends, depending on the briefing and argument timetable.

Contractors need to be aware of potential impacts in specific areas. They should decide if the following is appropriate for their companies, as customers may require compliance to perform onsite work.

- Determine whether you wish to impose a company mandatory vaccination policy for specific business areas. Some of our clients focus solely on federal contracts, which are now implementing a number of vaccination requirements. If this is a significant percentage of your business, consider the pros and cons of such a policy.
- Create a list of vaccinated employees. Some contracts will be requiring subcontractors to use only fully-vaccinated employees to work on jobs. Having this list ready to go will position your company to deploy workers to those job sites quickly.
- Institute a no-cost periodic testing option for your company. This will benefit both vaccinated and non-vaccinated workers and prevent the spread of the virus and the financial impact on jobs. Have a plan of how compensation will be handled with these employees who self-report a COVID infection to drive honesty with testing results.
- Consider establishing a confidential HR or management contact person to handle the expected reactions of your workers and customers to

the company approach, including how you will manage responses. Remember, these are politically charged issues and should be treated as such.

- Decide whether you will have an accommodation policy to meet religious and health concerns, focusing on communication and administration of the accommodation process, and emphasizing the confidential evaluation of each discussion.
- Assess any cost impact that might require a fair contract modification. One may argue that the cost and schedule effects are not entirely quantifiable at the moment; however, contractors must reserve their rights to pursue change orders.
- Ensure that you understand your contract and your right to withdraw from a project (work stoppage).
- Check with your insurance company to see whether this qualifies as a business interruption claim.
- Conduct a review of your contracts and the flow-down provisions (supplier and vendor agreements, subcontracts, etc.) and make required updates.
- Review the most recent Safer Federal Workforce Task Force standards at <https://www.saferfederalworkforce.gov>.

The Supreme Court's decision potentially sets a precedent for how the Court would rule in these matters once they reach the lower courts. Keep in mind that these judgments do not prevent employers from imposing vaccination and testing mandates independently, nor do they preclude state and municipal governments from issuing mandates.

While the Supreme Court seems to have temporarily suspended OSHA's ETS through its ruling, no regulatory requirements need to be met under the ETS. Employers must now evaluate whether they are making

reasonable measures to safeguard their workers against pandemic threats due to the many CDC and OSHA recommendations for COVID-19 workplace practices.

Almost all construction trade organizations recognize the importance of these challenges and are dedicated to providing ongoing updates to keep members and the broader contracting community informed of critical developments. Contractors are encouraged to remain current on these challenges and the latest developments.

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