

## Vaccines and Masks: Employers Should Not Forget About State and Local Obligations

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### Where Have we Been?

Over [three months ago](#), the Occupational Safety and Health Administration (“OSHA”) released its Emergency Temporary Standard for large employers (the “ETS”) regarding the obligation to require employees to either get vaccinated or get tested weekly prior to entering the workforce. Weeks later, the [Fifth Circuit](#), suspended the implementation and enforcement of the ETS “until further court order.” Next, the Sixth Circuit, [after winning a multi-circuit litigation lottery](#) under the federal rules, [muddied the waters](#) by lifting the Fifth Circuit stay, and granting OSHA authority to implement and enforce the ETS, to which OSHA responded by updating its enforcement deadlines of:

- January 10, 2022 (regarding a number of items, including: adopt a compliant policy, collect vaccination status from all covered workers, and require unvaccinated workers to wear a mask), and
- February 10, 2022 (including testing of unvaccinated workers).

Due to ongoing legal challenges to the ETS and the Centers for Medicare and Medicaid Services rule (the “CMS rule”), the Supreme Court of the United States (“SCOTUS”) heard oral argument regarding the fate of the ETS and CMS rule on January 7, 2022. By January 10, the ETS’s first enforceable compliance deadline, SCOTUS still had [not ruled](#) on the

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enforceability of the ETS or CMS rule, leaving employers in a scramble to implement, or make plans to implement, a compliant plan.

As earlier [reported](#), on January 13, 2022, SCOTUS issued a 9-page opinion reversing the Sixth Circuit's decision to lift the administrative stay. SCOTUS reasoned:

"Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category."

### Where are we Going?

Although the January 13 opinion was not technically the final nail in the coffin for the ETS, most experts believe OSHA will not get the opportunity to enforce this ETS during its six-month life span as an emergency standard.

### What About our State and Local Obligations?

Notwithstanding the fate of the federal mandates, there are still state and local obligations to navigate with respect to COVID-19, vaccinations, masks, and other safety protocols.

- **State OSHA plans.** There are currently 22 State Plans<sup>[1]</sup> covering both private sector and state and local government workers. State Plans are OSHA-approved workplace safety and health programs operated by individual states or US territories. Under the ETS, state Plans were required to adopt and enforce occupational safety and health standards that are at least as effective as Federal OSHA's requirements. The response from the 22 states was a mixed bag:
  - *Iowa says 'pass' on adopting ETS.* According to the Iowa Office of the Governor, the state will not adopt or enforce the ETS as a part of its state plan, as "Iowa has concluded that it is not necessary because Iowa's existing standards are at least as effective as the federal standard change."
  - *Cal/OSHA continues to refine its stringent ETS.* Since June 2021, California's Occupational Safety and Health Standards Board ("OSHSB") has adopted and enforced COVID-19 Prevention Emergency Temporary Standards (the "Cal/OSHA ETS"). While the Cal/OSHA ETS is different than the now-blocked federal ETS, it still imposes strict requirements, including illness prevention measures, exposure notification obligations, and provision of COVID-19 testing at the employer's cost for close contact occurring in the workplace.

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All State Plans will continue in full force and effect unless and until updated or revised by the individual states. While State Plans may no longer be required to adopt similar requirements to the federal ETS, many State Plans, such as the one administered by Cal/OSHA, continue to update their statewide requirements.

- **State and Local Mandates.** On top of federal and state OSHA requirements (or the lack thereof), various state and local mandates also control what measures employers are being required to implement to promote the health and safety of their employees, vendors, and patrons. For instance:
  - *NYC Requiring Proof of Vaccination for Workers.* As of December 27, workers in New York City who perform in-person work or interact with the public in the course of business must show proof they have received at least one dose of a COVID-19 vaccine. Workers will then have 45 days to show proof of their second dose (for Pfizer or Moderna vaccines). Business in the Big Apple may not allow any unvaccinated workers to come to their workplace. A workplace is considered any location — including a vehicle — where the worker works in the presence of at least one other person.
  - *Up In The Air: Omaha Mask Mandate.* Douglas County Health Director Dr. Lindsay Huse issued a [temporary mask mandate](#), effective Wednesday, January 13, 2022. Subject to a number of exceptions, the Omaha mask mandate generally applies to all individuals above the age of 5 entering places open to the general public (including most private commercial operations that employ or engage workers). Omaha Mayor Jean Stothert, Nebraska Governor Pete Ricketts, and Attorney General Douglas Peterson have all expressed concerns that the Omaha mask mandate was not properly issued. In fact, on Wednesday, January 12, 2022, the State of Nebraska Attorney General's Office filed suit to block the Omaha mask mandate, arguing that the Douglas County Health Director has overstepped her authority. A hearing on the case will be held on January 24, 2022, so until then the mask mandate will remain in effect.

It is imperative that all employers are aware of, and continue to monitor, their specific state and local situations to confirm compliance with all applicable health and safety rules for the workplace. The Koley Jessen Employment and Health Care teams are actively monitoring this situation and will continue to publish guidance as more information becomes available. Employers with questions or requests for form policies, procedures, or communications to employees should contact a member of the Koley Jessen team today to ensure their business is equipped with the right tools and knowledge to navigate these ever-changing requirements.

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[1] The following 22 states or territories have OSHA-approved State Plans that cover both private and state and local government workers: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.