

Federal OSHA Threatening to Pull the Plug on State Plans Refusing to Enforce Healthcare ETS

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Many states have Occupational Safety and Health Administration (OSHA)-approved workplace safety and health programs (OSHA State Plans) and enjoy enforcement autonomy over workplace safety and health in those states, particularly with respect to the COVID-19 pandemic. OSHA State Plans that have not adopted OSHA's Emergency Temporary Standard (ETS) related to COVID-19 — the [healthcare ETS](#) issued for healthcare employers on June 17, 2021 (Healthcare ETS) and the forthcoming vaccine ETS — may soon be feeling the wrath of the federal government and risking revocation of their OSHA State Plan status.

In written notice to the Industrial Commission of Arizona on October 19, 2021, OSHA said it is “reconsidering” its approval of Arizona’s OSHA State Plan. OSHA’s warning was prompted by Arizona’s failure to fully adopt the Healthcare ETS OSHA issued for healthcare employers or an “at least as effective” alternative.

The Healthcare ETS took effect on June 21, 2021, although employers had additional time to implement certain portions of the standard. The Healthcare ETS imposes extensive requirements on covered healthcare employers, including implementing numerous safety controls, requiring paid leave to obtain vaccinations and job-protected leave for employees with symptoms or close contact with someone with COVID-19 who must be excluded from the work environment (with pay in some circumstances), and developing a detailed COVID-19 plan, among other requirements.

OSHA State Plans must maintain standards that are at least as effective as OSHA standards. When OSHA establishes a new standard, State Plans typically have six months to adopt the new standard. However, State Plans have only 30 days to adopt an ETS.

Despite these obligations, Arizona, South Carolina, and Utah have yet to adopt the Healthcare ETS or what OSHA is considering to be an equally effective alternative.

OSHA indicated that the Arizona Division of Occupational Safety and Health (ADOSH) was untimely in providing notice to OSHA of its intent to adopt only portions of the Healthcare ETS and otherwise relying on existing state law. According to OSHA, the state agencies and OSHA “came to a mutual understanding” that ADOSH’s proposal would not be “at least as effective” as the Healthcare ETS and ADOSH never adopted any provisions of the Healthcare ETS.

OSHA also has announced plans to revoke approval of the State Plans in Arizona, South Carolina, and Utah for their failure to adopt the Healthcare ETS, which could mean that they lose federal funding for safety and health and that OSHA would then take over those OSHA State Plans.

South Carolina Governor Henry McMaster has indicated that South Carolina intends to fight back. He wrote on a social media site, “This is clearly a preemptive strike by the

federal government. With no state regulators in the way, the federal Labor Department will be free to penalize employers who do not comply with President Biden's unconstitutional vaccine mandate." Governor McMaster also wrote, "To protect South Carolina employers, I have instructed LLR [Labor, Licensing and Regulation] Director Emily Farr to begin immediate preparations for a vigorous and lengthy legal fight."

These developments come just weeks after the Biden Administration announced that OSHA will implement another ETS requiring employers with at least 100 employees to ensure their workers are fully vaccinated or require weekly COVID-19 testing of unvaccinated workers. The anticipated, forthcoming ETS has been met with criticism in many conservative states (including Arizona, South Carolina, and Utah). Observers have speculated about the fate of the new ETS, including how State Plans might resist it. However, OSHA's actions signal the likely consequences for State Plans that attempt to bypass the requirements of the new ETS once it is issued. Such consequences could affect employers in the form of greater enforcement in those affected states than previously.

If you have questions about or need assistance on OSHA compliance obligations, please contact a member of the Jackson Lewis [Workplace Safety and Health Practice Group](#) or the Jackson Lewis attorney with whom you regularly work.

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