

Will Some State Plans Defy OSHA's COVID-19 Vaccination, Testing Emergency Temporary Standard?

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If President Joe Biden's Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS) vaccine or testing mandate for employers goes forward, nearly half the states have the option of going their own way.

The U.S. Court of Appeals for the Sixth Circuit is considering whether to lift a legal stay on the ETS requiring employers with at least 100 employees to mandate COVID-19 vaccinations or weekly testing and masking for unvaccinated employees. If the bar on enforcement is lifted, the ETS will have immediate effect in only some states. That is because the Occupational Safety and Health Act of 1970 (OSH Act) sets up a federal-state regime governing private employers that provides autonomy to 21 approved State Plans and one U.S. territory. (Five states and one territory have State Plans for state and local government workers only. These do not apply to private employers.)

State Plan states enjoy limited flexibility in the development and enforcement of workplace safety and health standards. The U.S. Secretary of Labor's approval of a State Plan depends on whether that State Plan "provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be *at least as effective* in providing safe and healthful employment and places of employment as the standards promulgated." 29 U.S.C. §667(18)(c)(2) (emphasis added). This "at least as effective" standard has never been defined in the courts. (For a suggested application of the "at least as effective" standard, see "[OSHA Enforcement of the 'As Effective As' Standard for State Plans: Serving Process or People?](#)," 46 U. Rich. L. Rev. 323, 345 (2011).)

States electing to develop and execute a State Plan do so under matching federal grants that provide 50 percent of funding for compliance programs (including compliance safety and health officers and industrial hygienists who inspect workplaces and their superiors) and 10 percent of funding for compliance assistance programs (such as consultation or voluntary compliance programs).

While State Plans often adopt standards identical to OSHA's, they also adopt state-specific standards, such as California's Injury and Illness Prevention Program. State-specific standards gained particular notice during the COVID-19 pandemic, when California, Michigan, Oregon, and Virginia, adopted emergency temporary standards to address COVID-19 exposures in workplaces. (Courtney Malveaux served on the Virginia Safety and Health Board that promulgated the Virginia Emergency Temporary Standard and the subsequent Permanent Standard.)

State Plan regulations should not be confused with the myriad state laws and executive orders seeking to impose, ban, or restrict vaccinations, testing, or face covering requirements in workplaces. In some cases, federal courts have recognized that the OSH Act may preempt certain state and local laws, ordinances, and executive orders. The preemptive

effect of the ETS is one of the questions in the case before the Sixth Circuit.

If OSHA's ETS goes forward, employers may see a variety of approaches in the 22 State Plans that govern private employers. Some states, like [California](#), may promulgate standards stricter than OSHA's. Many State Plans likely will adopt a federal-identical standard mirroring OSHA's. Other State Plans may decline to adopt any standard at all. Significantly, Arizona and Utah have declined to adopt OSHA's Emergency Temporary Standard for healthcare employers, and OSHA has taken steps to revoke their State Plan status. Additional states (potentially including those that have joined litigation seeking to enjoin the ETS) may decline to adopt a vaccination or testing ETS as well, setting up a legal battle that could outlive the pandemic.

Jackson Lewis attorneys have developed [an interactive map](#) to help employers determine the real-time status of the ETS in each of the 50 states and U.S. territories. Employers are encouraged to understand the requirements in each state and seek advice when a State Plan employs a state-specific standard or no standard at all.

If you have questions or need assistance on the OSHA ETS, please reach out to the Jackson Lewis attorney with whom you regularly work, or any member of our [Workplace Safety and Health Practice Group](#) or our [OSHA ETS Team](#).

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