TENNESSEE CHAMBER of Commerce & Industry

TENNESSEE MANUFACTURERS ASSOCIATION

INFORMATIONAL BULLETIN

What is the OSHA Emergency Standard and how does it affect my company?

Under the mandate, all workers at companies with 100 or more employees must be vaccinated against COVID-19 or get tested weekly. Those who are not vaccinated must also wear a mask at work.

What are the next expected legal steps?

On Wednesday, December 22, 2021, the U.S. Supreme Court announced they would be holding a special sitting to opine on whether the Biden administration can enforce Covid-19 vaccine or testing rules for employers of 100 or more. The sitting is scheduled for January 7, 2022.

Where do we currently stand with regard to the OSHA ETS?

On Friday, December 17, the Sixth Circuit Court of Appeals lifted the nationwide stay on OSHA's ETS. While the court decided to lift the stay, it has yet to opine on the legality of the actual rule. This means the court overrode the stay issued by the Fifth Circuit, saying it should remain in effect until the merits of legality are considered, potentially by the Supreme Court.

What are the key dates to be aware of with regard to implantation and enforcement of the ETS?

The U.S. Department of Labor has pushed back the compliance deadline for vaccination and testing requirements until Feb. 9 as long as the business is making an effort to comply. Enforcement of the other requirements, such as a mask mandate for unvaccinated employees working indoors, will start on Jan. 10. Tennessee utilizes an OSHA state plan through TOSHA. It is expected that TOSHA will announce final plans for the ETS by late January, assuming the rule remains in effect.

Does the OSHA ETS preempt Tennessee state law preventing employers from compelling proof of vaccination?

According to the text of the ETS, “State and local requirements that prohibit employers from implementing employee vaccination mandates, or from requiring face coverings in workplaces, serve as a barrier to OSHA's implementation of this ETS, and to the protection of America's workforce. State restrictions of this kind are clearly preempted.”

SOURCE

My company employs 100 or more employees. How do I know which law to comply with?

OSHA said the rule was designed to preempt any state laws or executive orders that bar private employers from enacting vaccine mandates.

Employers in Tennessee should remain extremely vigilant and consult legal counsel if there is any question about compliance, however one team of legal experts have stated, "Employers in states and localities that prohibit or restrict vaccination or face covering requirements must be mindful of state and local laws, ordinances, and executive orders that might limit the employer's ability to require vaccination or otherwise conflict with ETS requirements, particularly if an employer opts for the ETS's mandatory vaccination policy. While the Sixth Circuit lifted the stay, it has yet to decide the case on the merits, including arguments over whether the ETS overrides state or local laws due to federal preemption. Significantly, Tennessee (and others) have enacted measures that would restrict or impact vaccination requirements. Some of these states are OSHA State Plans and some are actually federal OSHA jurisdictions, creating additional compliance confusion."

SOURCE

Does TOSHA need to respond as to how it plans to enforce the OSHA ETS?

Yes, however, none of the 22 approved State Plans, including Puerto Rico, covering private employers have taken steps to enact an ETS, but they are required to notify OSHA of their intentions to do so within 15 days of promulgation of the standard, and to act within 30 days.

Could the OSHA ETS could be stayed again?

Yes, the U.S. Supreme Court has the ability and authority to stay the mandate. Currently, stay applications are being submitted to Justice Brett Kavanaugh, per court rules, and a response from the Biden administration is due by Dec. 30. The Supreme Court will determine the short-term fate of the ETS in early January.

Could there be final clarity given before the January 10 implementation date?

It is unlikely a final ruling will be handed down by courts by January 10. However, with the Supreme Court's anticipated sitting to determine whether or not to stay the rule, short-term clarity could be provided.

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