



Omicron Update: Employers' Responsibilities & Employees' Rights

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Latest Updates

Blow to OSHA Emergency Temporary Standard (ETS)

The U.S. Supreme Court Ruling & Practical Significance

Common Issues

- Employees' Rights
- Employers' Obligations

Employer Guidelines

Immigration Implications



What was the ETS about?

- Occupational Safety and Health Administration
- Vaccination Requirement
- Weekly Testing
- Paid Time for Vaccination
- Mask Requirement
- Other Requirements:
 - Reporting and recordkeeping.



OSHA ETS - Vax-or-Test Rollercoaster

- November 5, 2021 - OSHA issued the ETS
 - Vax or Test
- Lawsuits Ensued.
- Supreme Court stayed the enforcement of the OSHA mandate for large employers by a vote of 6-3. However, the Supreme Court allowed the Centers for Medicare and Medicaid Services vaccination mandate to go into effect.



SCOTUS on Vaccine Mandate

- “That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. **Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA’s regulatory authority without clear congressional authorization.**”
- OSHA is charged with regulating “**occupational**” hazards and the safety and health of “**employees.**”



SCOTUS on Vaccine Mandate

- **Where the virus poses a special danger because of the particular features of an employee’s job or workplace, targeted regulations are plainly permissible.** We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments.”
- “But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA’s indiscriminate approach fails to account for this crucial distinction—between **occupational risk** and **risk more generally**—and accordingly the mandate takes on the character of a general public health measure, rather than an “occupational safety or health standard.”



SCOTUS on Vaccine Mandate

- Current version of the ETS is not likely to pass constitutional scrutiny and survive.
- OSHA may issue narrower, targeted, industry-specific rules and regulations.



Employers' OSHA Responsibilities

- **Employers have a responsibility to provide a safe workplace.**
- **This is a short summary of key employer responsibilities:**
 - Provide a workplace free from serious recognized hazards;
 - Comply with standards, rules and regulations;
 - Examine workplace conditions;
 - Provide safety training and personal protective equipment;
 - Provide medical examination when required medical records to employees or their authorized representatives;
 - Keep records;
 - Not discriminate against employees who exercise their rights.



Practical Significance

- Private employers & Company Policies
 - Private employers may implement their own mandatory vaccination policies to protect their employees, customers, vendors and communities.
- Local & State Mandates
 - The Supreme Court's ruling does not apply to, undermine, or affect the validity of state or local mandates already in place.
 - No such mandate in Texas.




Private Employers

- The COVID-19 isn't going away.
- General Duty under OSHA.
- Employers' Options
 - Cancel established policies (vaccination and/or testing(s))
 - Retain established policies
 - Adopt new policies
- Vaccination Encouragement



Practical Guidance

- Reduce exposure through social distancing.
- Decide when to recommend or require masks.
- Communicate exposures
- Encourage testing
- Develop policy and plan accordingly



Expiration of Families First Coronavirus Response Act

- The Families First Coronavirus Response Act (FFCRA) has expired and is currently no Texas or federal law that says your employer must give you paid leave if you become ill with COVID or need to take care of someone due to COVID.
- Employees that took time off due to COVID prior to December 31, 2020, may still be owed paid leave.
- Employers may still be able to claim tax reimbursements for COVID-related paid leave given through September 30, 2021. However, employers were not required to give paid leave for COVID after December 31, 2020.
- Self-employed persons may also qualify for FFCRA tax credits for time taken off due to COVID prior to September 30, 2021.



Common Issues

- **Can an employer require an employee to show proof of vaccination?**
 - YES.

**Employers can generally require that their employees provide proof of vaccination against COVID-19 if the employees are physically present in the workplace.

But an employer cannot impose a COVID-19 vaccine mandate on an employee who qualifies for an exemption for religious or medical reasons.



Proof of Vaccination - Samples

- the record of immunization from a health care provider or pharmacy;
- a copy of the U.S. COVID-19 Vaccination Record Card;
- a copy of medical records documenting the vaccination;
- a copy of immunization records from a public health, state, or tribal immunization information system; or
- a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).



If an employee loses proof of vaccination?

- If an employee lost their proof of vaccination and is unable to obtain such document, **then the employee may instead make a statement to the employer.**
- **The Statement should contain certain info:**
 - Their vaccination status (fully or partial)
 - They can't get proof
 - They understand criminal penalties for fraud
 - When, Who, Where, What re their Vaccination (to their best memory)



Common Issues

- **What are employers obligated to do if their employees cannot take vaccination for qualified reasons?**
 - To provide a reasonable accommodation, unless the accommodation would place an “undue hardship” on the employer.
- **What is an “undue hardship?”**
 - An “undue hardship” is a legal limitation on an employer's obligation to provide reasonable accommodation, and it means significant difficulty, including accommodations that are overly extensive or disruptive, or which could impact the actual running of a business.



Common Issues

- **What steps they can take to screen employees for COVID-19 when entering the workplace besides requiring proof of vaccination?**
 - For example, employers may continue to take temperatures and ask questions about symptoms (or require self-reporting) **of all those entering the workplace.**
 - An employer may require employees to wear protective gear
 - for example, masks and gloves
 - An employer may adopt infection control practices
 - for example, regular hand washing and social distancing protocols.
 - Reasonable accommodation & undue hardship consideration.



Common Issues

- **If an employer requires an employee to undergo COVID-19 (or Omicron) testing, does the employee need to be paid for the time spent undergoing the COVID-19 testing during the workday?**
 - YES.
 - Include time spent waiting for and receiving medical attention at the employer's direction or on their premises during normal working hours.



Common Issues

- **Must employers paid sick leave to employees who are impacted by COVID-19/Omicron Variant?**
 - NO
 - Some amount of unpaid leave may be necessary as a reasonable accommodation.
 - Written policy or agreement will be enforced if such leave is covered.



Common Issues

- **What can an employer require from an employee who requests reasonable accommodation for medical conditions?**
 - The employer may ask questions or require medical documentations to decide if the individual has a disability and if there is a reasonable accommodation, barring under hardship, that can be provided.
- **What can an employer require from an employee who requests reasonable accommodation for religious belief?**
 - Employers should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance.
 - If an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.



Fraud Deterrence Mechanism – Penalties for Fraud Under OSHA

- Penalties for Employees who lie about their vaccination status &
Penalties for Employers who knowingly accept false documents:
 - Fines no more than 10,000 USD OR Imprisonment no more than 6 months OR both.



Post-ETS Options

- Proceed according to the plan.
- Remain in a holding position.
- Back-pedal as if the ETS never happened.
 - Must comply with existing federal and state requirements, nonetheless.



Texas Government's Guidance on Returning to Work after Covid Infection

Texas Department of State Health Services' official website claims that patient with mild to **moderate illness can stop self-isolating** when he or she meets all of the following criteria:

- It has been at least 10 days since the symptoms first appeared, or, if the patient never had symptoms, since the date patient had a positive test; **and**
- Patient is fever-free for one full day (24 hours) without the use of fever-reducing medications; **and**
- Patient's symptoms are improving.
- In **severe to critical cases**, where patient is hospitalized, or patient is immunocompromised, the patient is advised to talk to their doctor about when they can end isolation.



Federal Government's Guidance on Returning to Work after Covid Infection

CDC has released a medical statement on December 27, 2021, that claims that every person, regardless of their vaccination status, who tests positive, should:

- Stay home for 5 days.
- If the patient has no symptoms or the patient's symptoms are resolving after 5 days, patient can leave the house.
- Continue to wear a mask around others for 5 additional days.
- If the patient has a fever, the patient should continue to stay home until the patient's fever resolves.




CDC Guidelines – If You Were Exposed to Someone with COVID-19

- **If you:**
- Have been boosted
- **OR**
Completed the primary series of Pfizer or Moderna vaccine within the last 6 months
- **OR**
Completed the primary series of J&J vaccine within the last 2 months
- Wear a mask around others for 10 days.
- Test on day 5, if possible.
- *If you develop symptoms get a test and stay home.*




CDC Guidelines – If You Were Exposed to Someone with COVID-19

- **If you:**
- Completed the primary series of Pfizer or Moderna vaccine over 6 months ago and are not boosted
OR
Completed the primary series of J&J over 2 months ago and are not boosted
OR
Are unvaccinated
- Stay home for 5 days. After that continue to wear a mask around others for 5 additional days.
- If you can't quarantine you must wear a mask for 10 days.
- Test on day 5 if possible.
- *If you develop symptoms get a test and stay home*



Immigration Implications of Non-payment of Wages due to Covid-19 (in the case of H-1B)

- Failing to pay H-1B worker's wage stated in the H-1B petition VIOLATES U.S. Immigration law.
- However, not paying the employee because of nonproductive period that is due to "conditions unrelated to employment" at the employee's "voluntary request and convenience" is okay.



Immigration Implications of Non-payment of Wages due to Covid-19 (in the case of H-1B)

- If in the long-term the employee cannot perform the hours or the work, then employers should amend the employee's H1B petition to reflect a new sustainable working condition.



Q & A