



When Will OSHA Vax-or-Test Standards Become Effective?

The Occupational Safety and Health Administration ("OSHA") recently issued its "Emergency Temporary Standard" for employers with more than 100 employees ("the OSHA Mandate"). The OSHA Mandate, which was to take effect on November 5, is not yet enforceable because a federal Circuit Court of Appeals granted an emergency injunction that has effectively suspended the OSHA Mandate until the case is heard and decided by the Court. The Court's injunction gave OSHA until Monday, November 8, to make its argument in favor of implementation of the OSHA Mandate. The court gave plaintiffs suing to have the OSHA Mandate unconstitutional until Tuesday, November 9 to respond. This means that the federal Court of Appeals has the injunction on a fast track, but there will still be substantial lag time while hearing dates are set and the parties submit motions that will be heard and ruled upon by the Court. Therefore, as of today and for the indefinite future, the OSHA Mandate is not in effect.

The federal Court of Appeals that issued the injunction is the Fifth Circuit, which has jurisdiction over federal District Courts in Texas, Mississippi, Louisiana, South Carolina, and Utah. Illinois is in the Seventh Circuit. In the event that the Fifth Circuit handling the current injunction litigation and a hypothetical future case in the Seventh Circuit result in contrary conclusions regarding the enforceability of the OSHA Mandate, Illinois employers would be obligated to follow the ruling of the Seventh Circuit Court of Appeals. Because there were numerous suits filed in different circuit courts of appeal, it may not be the Fifth Circuit that hears this appeal. In any event, a decision at this level will then be quickly appealed to the United States Supreme Court.

If allowed to stand by the Courts, what will the OSHA Mandate require?

[Click here](#) to view OSHA's own three-page summary of the OSHA Mandate ("the OSHA summary").

Lawyers, lobbyists, and others familiar with administrative rulemaking will recognize that the entire first page and at least half of the second page were prepared in anticipation of forthcoming litigation, because they make an effort to justify the jurisdictional authority of OSHA to implement the Mandate as a workplace safety measure.

Only when one gets to the right column on the second page do you find the substance of the OSHA Mandate. The summary of the definition of "covered" employers appears at the top of the right column on Page 2. The 100-employee threshold is the aggregate of all employees, wherever, and in how many separate offices, those 100 might be located. For example, if a company based in Chicago has offices throughout the state and its aggregate number of employees at all offices is 100, then at a kiosk in Effingham staffed by only two employees, those two employees would be subject the OSHA Mandate. Employees who are **not** covered include employees who work alone (i.e., work at home or otherwise

are not in the same building as other employees or customers/clients). Covered employers will be required to adopt a COVID-19 vaccination policy that requires employees to become fully vaccinated or, as an alternative, to undergo **weekly** COVID-19 testing and wear face masks. Employers must allow each employee up to four hours of paid leave time for receipt of each vaccination dose.

Employers would be required to provide employees with the information described in the right column on Page 3 "**Information provided to employees,**" which states that the information must be provided "at a literacy level the employees understand."

Even though the injunction is currently pending in the U.S. Court of Appeals for the Fifth Circuit and Illinois is in the Seventh Circuit, as a federal agency OSHA will not implement and enforce its Mandate in some states if it is unconstitutional in other states; therefore, unless and until the Seventh Circuit Court of Appeals adjudicates its own case, the ruling of the Fifth Circuit will impact Illinois employers having more than 100 employees. Please contact General Counsel [Jerry Cavanaugh](#) or CBAI Paralegal [Levette Shade](#) if you want any additional information.

CBAI is also offering a webinar on "**How to Develop a Vaccination Policy,**" that will include information regarding the newest OSHA Emergency Temporary Standard (ETS). This session covers the latest requirements set forth in the Emergency Temporary Standards, released by OSHA on November 4, 2021, with required action by December 6, 2021. Please [click here](#) for more information and to register.

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