

CHEYLYNN HAYMAN  
Attorney at Law  
chayman@parrbrown.com

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**UPDATE:**  
**OSHA EMERGENCY TEMPORARY STANDARD**

On December 17, 2021, the 6th U.S. Court of Appeals lifted a November injunction that had blocked the Occupational Safety and Health Administration's ("OSHA") Emergency Temporary Standard ("ETS"). Consequently, covered employers with 100 or more workers will once again be required to comply with the ETS.

**When do covered employers need to comply with the ETS?**

According to [new guidance](#) issued by OSHA:

To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance.

The 6th Circuit's ruling has been appealed on an emergency basis to the U.S. Supreme Court. At present, however, covered employers with 100 or more workers should begin making preparations to comply with the ETS, and to begin testing unvaccinated employees by no later than February 9, 2022, subject to the caveat below.

By way of reminder, the ETS requires employers with 100 or more employees to, in relevant part:

- determine the vaccination status of each employee, including obtaining proof of vaccination; and

- develop, implement, and enforce a COVID-19 policy, which either mandates vaccination or requires unvaccinated employees to wear a face covering in the workplace and elect weekly COVID-19 testing.

Helpful resources available to employers, including draft policies and frequently asked questions (“FAQs”), are available on OSHA’s website [here](#).

### **Is it possible for covered employers comply with the ETS and Utah’s new COVID-19 law?**

Yes. On November 16, 2021, Governor Cox signed into law [S.B. 2004](#), entitled “Workplace COVID-19 Amendments.” This law prohibits employers (excluding federal contractors and employers subject to Medicare or Medicaid regulations regarding COVID-19 vaccinations) from keeping or maintaining a record or copy of an employee’s proof of vaccination unless, in relevant part, maintaining such records is required by law. Because the ETS requires covered employers to obtain proof of vaccination status, covered employers may collect and maintain proof of vaccination in compliance with the Utah COVID-19 law.

Covered employers also may comply with both the ETS and Utah law as drafted by foregoing mandatory vaccination policies allowed under the ETS and adopting instead policies that require unvaccinated employees to wear face coverings in the workplace and submit to weekly COVID-19 testing, provided that testing is at the employer’s expense. Employers can still encourage employees to get vaccinated for COVID-19. However, to comply with the Utah law as drafted, employers cannot require vaccinations if an employee submits a statement that receiving a COVID-19 vaccine would be (1) injurious to the health and well-being of the employee or prospective employee, (2) conflict with a sincerely-held religious belief, practice, or observance of the employee or prospective employee, or (3) conflict with a sincerely held personal belief of the employee.

### **Does this mean covered Utah employers can no longer mandate vaccinations under the ETS?**

We have no definitive guidance on this issue yet. As reflected in OSHA’s response to [frequently asked questions](#), it is OSHA’s position that the ETS preempts states “from adopting and enforcing workplace requirements relating to the occupational safety and health issues of vaccination, wearing face coverings, and testing for COVID-19, except under the authority of a Federally approved State Plan. In particular, *OSHA intends for the ETS to preempt and invalidate any State or local requirements that ban or limit an employer’s authority to require vaccination, face coverings, or testing.*” (FAQ No. 1; emphasis added.)

To date, OSHA has not approved any state plan promulgated by the Utah Occupational Safety and Health Administration (“UOSH”) that bans or limits an employer’s authority to require COVID-19 vaccinations in the workplace. As such, as long as the ETS is in effect, covered Utah employers arguably may still adopt policies that require vaccination in accordance with the ETS, and which allow for accommodations or exemptions only for medical conditions or sincerely-held religious beliefs under applicable federal law.

When evaluating whether to adopt a mandatory vaccination policy under the ETS, employers should be aware that there is no judicial authority confirming that the ETS preempts Utah law. However, the new Utah law does not include any statutory remedy or enforcement mechanism and affords no private right of action that would allow an employee to bring a claim against his or her employer for violation of the Utah law. So the risk of any mandatory vaccination policy that otherwise complies with the ETS being challenged as violating the Utah law is likely lessened by the absence of any statutory remedy or enforcement mechanisms.

### **What is the caveat for Utah employers?**

UOSH is one of 22 states that has contracted with OSHA to administer and enforce its own state plan. Under that arrangement, UOSH is required to adopt, within 30 days of the issuance of OSHA’s federal safety standards, its own state safety standards that are at least as effective as OSHA’s standards. To date, UOSH has not yet adopted such a plan. Consequently, there is an argument that employers may be able to delay complying with the ETS and its deadlines until UOSH promulgates its own state law equivalent standard and implements state-specific deadlines.

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