

# Employer Alert: OSHA Emergency Temporary Standard is Imminent



By [Angela M. Buchanan](#)

Last June, OSHA adopted an emergency temporary standard (“ETS”)—29 C.F.R. Part 1910, Subpart U, [86 Fed. Reg. 32376](#) (June 21, 2021)—that set forth numerous requirements for healthcare employers aimed at combatting the spread of COVID-19. On September 9, 2021, as part of his COVID Action Plan, President Biden directed OSHA to issue a new and broader ETS requiring all private employers with 100 or more workers to mandate COVID-19 vaccination or a weekly test for all employees. Since that time, OSHA has been working towards meeting President Biden’s directive, and, on October 12, 2021, OSHA sent a draft ETS requiring either vaccination or weekly testing of workers for employers with 100 or more employees to the White House’s regulatory office for approval. The White House is expected to review and approve the new ETS quickly.



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According to Ann Rosenthal, Senior Advisor at OSHA, the ETS will be published “in the coming weeks.” If the new ETS is like the healthcare ETS in its implementation schedule, the new standard will take effect shortly after its publication in the Federal Register. By way of comparison, the healthcare ETS has some provisions that became mandatory 15 days after publication, while compliance with others was required a month after publication. 29 C.F.R. § 1910.502(s)(2). The ETS can remain in effect for six months.

Violations of the new ETS would likely be considered either “serious” or “willful.” The current maximum penalty for a “serious” violation is \$13,653 per violation. The current maximum penalty for a “willful” violation is \$136,532. 29 C.F.R. § 1903.15(d), 86 Fed. Reg. 2964 (Jan. 14, 2021).

Preemptively, Governor Abbott responded to the expected ETS on October 11, 2021 by issuing [Executive Order GA-40](#), stating that no entity in Texas can “compel” any individual, including any employee or consumer, to receive a COVID-19 vaccination who objects “for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19.” The order establishes a maximum criminal penalty of \$1,000.

Governor Abbot’s Order highlights the fact that the new ETS is likely to be challenged. States, companies, and others will like challenge the ETS on the grounds that the required prerequisites for OSHA issuing an ETS are not met. Specifically, to make an ETS, OSHA must determine (A) that employees are exposed to grave danger from exposure to

substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.” 29 U.S.C. § 655(c)(1). In the ten times OSHA has issued an ETS, the courts have fully vacated or stayed the ETS in four cases and partially vacated the ETS in one case.

Whether or not the ETS is eventually challenged, Companies still need to prepare for the new ETS mandates by proactively reviewing and updating their COVID-19 vaccination policies. Phillips Murrah’s [Labor and Employment](#) attorneys regularly advise employers on complex issues relating to COVID-19 vaccination policies and OSHA standards.

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