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Must State and Local Governments Follow OSHA's Vaccine and Testing Mandate?

As most employers are now well-aware, on November 4, the Occupational Safety and Health Administration (OSHA) released an Emergency Temporary Standard (ETS) requiring, among other things, that employers with 100 or more employees mandate that all employees be vaccinated against COVID-19 or undergo weekly testing. Our comprehensive summary of the ETS's requirements can be [found here](#).

Given the magnitude of this mandate, state and local governments may understandably be wondering whether the ETS requires them to enforce vaccine and testing mandates for their employees. While OSHA does not, generally, have jurisdiction over public sector entities, the answer may depend on whether the employer is in a Federal OSHA jurisdiction state or a state with its own OSHA-approved State Plan ("State Plan" states). A list of State Plans states can be found below.

[Does the ETS apply to state and local governments in Federal OSHA jurisdiction states? \(e.g., Ohio, Texas, Pennsylvania, West Virginia\)](#)

As a general matter, no. State and local governments are outside of Federal OSHA's jurisdiction and, therefore, are not subject to the requirements of the ETS. Public sector entities in these states likely do not have to comply with the mandates of the ETS even if they have more than 100 employees. However, even if OSHA does not have jurisdiction over state and local governments in Federal jurisdiction states, there may be other agencies within the state that are responsible for public employees' safety and could adopt similar requirements. Ohio's Public Employment Risk Reduction Program is one such example of a state agency focused on public employer safety standards. A state and local government could also be subject to other federal vaccine mandates (e.g. the federal contractor mandate).

Does the ETS apply to state and local governments in State Plan states? (e.g., Indiana, Kentucky, Michigan, Tennessee, Virginia)

It depends. Unlike Federal jurisdiction states, State Plans are generally responsible for the safety of public employees in their states, and state and local governments in those states must follow the standards promulgated by the State Plan. Here is a list of State Plan jurisdictions:

Alaska	Maryland	
Arizona	Michigan	South Carolina
California	Minnesota	Tennessee
Connecticut	Nevada	Utah
Hawaii	New Jersey	Vermont
Illinois	New Mexico	Virginia
Indiana	New York	Washington
Iowa	North Carolina	Wyoming
Kentucky	Oregon	US Virginia Islands
Maine	Puerto Rico	

Source: OSHA, September 25, 2021

Further, the ETS requires State Plans to adopt the ETS, or a similar standard that is at least as effective as the ETS, within 30 days of the ETS's publication date (November 5). If a State Plan adopts OSHA's ETS, its requirements will generally apply to employees of its state and local governments. Whether each State Plan will adopt OSHA's ETS, adopt an equivalent state standard, or outright refuse to do either, however, will depend on each individual State Plan.

Therefore, whether the requirements of the ETS will apply to state and local government employees in states with a State Plan will depend on the actions of each State Plan in adopting, or refusing to adopt, the ETS.

What should employers in State Plan jurisdictions do?

For those State Plans that adopt the OSHA ETS, both public and private employers should review the ETS's coverage and requirements with counsel, and then determine their obligations.

Meanwhile, the ETS will not become effective with respect to employers in State Plan jurisdictions until the ETS is adopted by the state. Therefore, it is important for both private and public employers in State Plan jurisdictions to monitor whether the ETS is adopted by their state.

Finally, while we anticipate that the ETS will face many legal challenges in the days and weeks to come, covered employers should promptly comply with the ETS's requirements. Because the ETS leaves many questions unanswered, it is particularly important for employers to seek guidance from experienced counsel when developing, implementing, and enforcing the policies required by the ETS.

For questions or additional information, please contact [Kyle D. Johnson](#), [Catherine F. Burgett](#), [Jeffrey S. Shoskin](#), [Souhila EL Moussaoui](#), [Steve M. Tolbert](#) or any attorney in Frost Brown Todd's [Labor and Employment](#) practice group.

Read more of our analysis as it relates to COVID-19 and vaccine mandates.

- [OSHA Suspends Implementation and Enforcement of Vaccine-or-Test Mandate in Response to Fifth Circuit Order](#)
- [OSHA Releases COVID-19 Vaccination and Testing Emergency Temporary Standard](#)
- [Nursing Homes: Spread of COVID and Vaccine Mandates](#)
- [Conflicting Orders: Can State Laws Thwart Federal Vaccine Mandates?](#)
- [EEOC COVID-19 Vaccine Mandate FAQ Updates Address Religious Objections](#)
- [Mandatory Vaccines Update: OSHA Sends Draft ETS to White House](#)
- [Thinking About Implementing a Mandatory COVID 19 Vaccine Policy? Here Is What to Consider](#)
- [Maintaining Employee Medical Information and COVID-19](#)

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