



## What Does the Recent Court Ruling Regarding the OSHA Vaccinate-or-Test Rule Mean For Your Organization in Washington?

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Employers are undoubtedly feeling whiplash from the effects of various legal rulings on the enforceability of the federal Occupational Safety and Health Administration’s Emergency Temporary Standard (“OSHA ETS”), requiring most employers with 100 or more employees to adopt mandatory COVID-19 vaccination or weekly testing programs. In November 2021, a federal appellate court issued a stay blocking implementation and enforcement of the OSHA ETS. But last Friday, December 17, 2021, the federal appellate court designated to address the consolidated legal challenges related to the ETS lifted the stay. That decision has been appealed to the U.S. Supreme Court, with oral argument scheduled for January 7, 2022. While the appeal process continues, OSHA plans to resume enforcement of its rule mandating vaccination or testing programs. This means, once again, the OSHA ETS rules are “live” and need to be followed by covered employers. However, OSHA has announced it will not issue citations for noncompliance with any aspects of the ETS before January 10, 2022 and will not issue citations for noncompliance with the testing portion of the rule before February 9, 2022.

Significantly, employers in Washington may have more time to achieve compliance. Washington is a “state plan” state, meaning workplace occupational safety and health standards are established by Washington law – the Washington Industrial Safety and Health Act, or “WISHA”) – rather than OSHA requirements. WISHA standards must meet or exceed OSHA requirements and state plan states like Washington have 30 days from the issuance of new OSHA standards to update their state laws to achieve compliance. Now that the stay on the OSHA ETS has been lifted, we expect the Department of Labor & Industries Division of Occupational Safety & Health to soon issue WISHA standards in alignment with the OSHA ETS. While Washington has the ability to adopt even more protective standards than OSHA, Governor Inslee has announced his intention to follow the OSHA ETS rules.

### ***So, what does this mean for Washington employers and what should your organization be doing now?***

While we do not yet know the details of the forthcoming WISHA requirements, we do know that they will likely be very similar to the requirements set forth in the OSHA ETS. Therefore, a general understanding of what the ETS requires will help you begin preparing your organization for compliance once the WISHA rules are issued. We anticipate Washington employers will be given 30 days to comply once the WISHA rules are announced but familiarizing yourself with the expected requirements should help streamline your compliance process. Below are some Frequently Asked Questions we hope will be helpful to you and your organization. If you have a question that is not addressed below, a very helpful FAQ resource is available on the OSHA website (<https://www.osha.gov/coronavirus/ets2/faqs>).

*Important Note: This guidance is provided as of December 23, 2021. Further court proceedings or regulatory activity may affect employer obligations, so employers are strongly encouraged to closely monitor developments in this area.*

## **Frequently Asked Questions**

### **Which employers will be covered by the WISHA vaccination/testing requirements?**

Assuming Washington's rule aligns with the OSHA ETS as to coverage, the requirements will apply to public and private sector workplaces with 100 or more employees. This number would be determined on an organization-wide basis, and the headcount would include part-time employees, temporary and seasonal workers, and remote employees. The WISHA rule may exclude workplaces and/or workers already subject to another vaccination mandate (e.g., workers already subject to the mandate applicable to workers in healthcare or educational settings). The WISHA rule also will not cover those workplaces within OSHA's jurisdiction such as federal workplaces and workplaces on tribal lands.

### **What will be the general requirements of the WISHA vaccination/testing rules?**

Again, assuming the forthcoming WISHA rules follow the OSHA ETS, covered employers will be required to take the following actions:

- Adopt a policy (i) requiring vaccination or (ii) requiring either vaccination or weekly testing and masks for those not vaccinated
- Determine the vaccination status of each employee
  - Maintain vaccination records that must be available for inspection
  - Create a roster of employees indicating vaccination status
- Require employees to promptly provide notice if they test positive for COVID-19
- Remove from the workplace any employee with a positive COVID-19 test or diagnosis
- Ensure unvaccinated employees wear face coverings indoors or in vehicles with others
- Provide each employee with information about WISHA rules, including:
  - A workplace policy
  - Information about vaccination efficacy, safety, and benefits
  - Protections against discrimination and retaliation
  - Criminal penalties for false documentation
- Report work-related COVID-19 fatalities to L&I within 8 hours, and work-related hospitalizations within 24 hours
- Ensure records are available for inspection
- Ensure employees who are not fully vaccinated are tested for COVID-19 at least weekly (if in workplace) or within 7 days before returning to workplace (if away from workplace)

### **When will these requirements take effect?**

This depends on when the WISHA rules are actually issued. We expect the State will require compliance with most of the requirements within 30 days of the date the rules are issued, with the testing requirement taking effect 30 days after that. Thus, an employer would have an initial 30 days to adopt and issue its policy, collect vaccination information, and process requests for reasonable accommodation (if applicable), then another 30 days to implement testing for any employees who are unvaccinated. However, we are still awaiting the exact timeline and deadlines from the State.

## Which employees will not be subject to the WISHA vaccination/testing requirements?

The WISHA requirements likely will not apply to:

- Employees who do not report to a workplace where other individuals, such as co-workers or customers, are present;
- Employees who work from home (provided that these employees must be tested within 7 days of any on-site presence);
- Employees who work exclusively outdoors on all workdays
  - These employees cannot routinely occupy vehicles with other employees as part of work duties; and
  - Must work outdoors for the entire workday except for *de minimis* time spent indoors where other individuals may be present (e.g., use of multi-stall bathroom, brief presence in an administrative office, etc.)

Notably, even if an employee is not subject to the vaccination or testing mandate, the employee will likely need to be included in the employer headcount for purposes of determining whether an employer has 100 or more employees and is thus covered by the WISHA rules.

## What are the policy options our organization has?

An employer has two options in adopting a written policy to achieve compliance:

### Option 1: Mandate Vaccination Against COVID-19

With this option, the employer would need to engage in the accommodation dialogue for those employees who are unable to get vaccinated due to medical/disability reasons or due to sincerely held religious beliefs. Any employee who is granted an accommodation and who works on-site, however, must be subject to weekly COVID-19 testing and must wear a face covering.

### Option 2: Require Either Vaccination or Weekly COVID-19 Testing and Masking

With this option, employers need not process requests for medical or religious accommodation from vaccination, as any employee who is unvaccinated would simply be required to undergo weekly testing and wear a mask if they work on-site. An employer can thus avoid the challenges of evaluating requests for accommodation at the outset but does assume the administrative burden arising from ongoing testing requirements for unvaccinated personnel. However, should an employee have a medical/disability reason preventing the employee from wearing a mask, then the employer must engage in the accommodation dialogue on that specific issue.

## What will be the requirements for our organization's written policy?

Again, if the WISHA rules align with the OSHA rules, an employer will be required to adopt a written policy addressing the following:

- Vaccination vs. Vaccination/Testing requirement
- Explanation of any potential exclusions from the vaccination mandate
  - Process for requesting and evaluating medical/disability and religious accommodation requests
  - Expectations for remote or outside workers

- Required disclosure of vaccination status and process for vaccination verification
- Paid time and sick leave for vaccination purposes (see minimum requirements below)
- Notification and removal requirements if testing positive for COVID-19
- Informational requirements
- Disciplinary action for employees who fail to comply
- Other: effective date, timelines for compliance, etc.

Thankfully, OSHA has provided policy templates for employers to use, which can be accessed here: <https://www.osha.gov/coronavirus/ets2>. There are two different templates based on whether an employer prefers a vaccination mandate or a vaccination/testing approach. The OSHA website also provides resources employers can use to comply with informational requirements (e.g., information about the efficacy and benefits of vaccination). Washington’s Department of Labor & Industries may provide similar resources but even if it doesn’t the OSHA resources should be a great starting point for employers.

### **What employee leave requirements will be imposed under the WISHA rules?**

If the WISHA rules closely follow the OSHA ETS as expected, employers will need to offer certain time-off benefits arising from vaccination and recovery. Specifically, employers will likely be required to provide at least the following:

- “Reasonable” paid time off to receive the vaccination, if during hours of work

Employees cannot be forced to use accrued leave for this purpose; therefore, employers may need to provide additional paid time off. OSHA indicated “reasonable” time off means up to four hours of paid time, including travel time, for receiving each primary dose (although WISHA could establish a more generous entitlement). No paid leave is required if an employee is vaccinated outside of work hours. OSHA indicated that this leave requirement is not retroactive for employees who are already vaccinated.

- “Reasonable” paid time off to recover from vaccination side effects

OSHA indicated that employees should be given up to two days of paid time per primary vaccine dose to recover from vaccination side effects. Under the OSHA rule, employers can require employees to first use their accrued sick leave or PTO (but not their vacation); however, if an employee has no paid sick leave or PTO available, the employer must provide up to two days of additional paid leave and cannot treat this as an advance of leave. WISHA rules could deviate from the OSHA rule on this issue, as L&I takes the position that employers cannot compel the use of Washington Paid Sick Leave.

### **If our organization allows testing as an alternative to vaccination, what requirements will apply to testing?**

#### When testing is required

- Unvaccinated employees who report to a workplace where others are present, at least weekly or more frequently, must be tested for COVID-19 at least once every 7 days;
- Unvaccinated employees who do not regularly report to a workplace where other people are present at least weekly must be tested for COVID-19 within 7 days of returning to the workplace;

- There is a limited exception for a worker who had COVID-19 within last 90 days; following isolation and recovery, such an employee may return to the workplace without testing but must wear a mask and resume testing after 90 days.

#### What kind of testing is required?

Tests must be FDA authorized, and may include laboratory tests, proctored over-the-counter tests, point-of-care tests, and tests where collection and processing is done or observed by the employer. Tests that are both self-administered and self-read are not permitted. Antibody tests are not sufficient. You may want to consider identifying the tests to be used and training personnel to administer the test.

#### Who pays for testing-related costs?

The OSHA ETS rules indicate they do not require employers to cover the cost of testing or pay employees for time spent testing (but notes that this may be required by other laws, labor agreements, etc.). Last week, the Biden Administration announced it will require private health insurers to cover the costs of at-home COVID-19 tests. More information should be available soon on this, but assuming this requirement is implemented, employers may be able to require employees obtain the tests themselves and seek reimbursement from their health insurance plan. That said, if an at-home test kit is permitted under the employer's policy, it must be administered or observed by the employer, as noted above.

While OSHA indicated its rules do not require employers to compensate employees for time spent testing, the WISHA rule may require this given Washington's expansive concept of "hours worked" under Washington's Minimum Wage Act. This is something to watch for in the WISHA rule. If testing time is compensable, employers may have a strong interest in procuring tests that can be done at the workplace to minimize travel and waiting time associated with testing at a laboratory or other off-site location.

#### Testing Records

Employers will likely be required to maintain a record of each test result for every employee subject to the testing requirements. These records should be treated as confidential medical records.

#### **What will the WISHA rule require with respect to face covering?**

Washington already has mask requirements in effect (see current L&I guidance: <https://lni.wa.gov/forms-publications/F414-164-000.pdf>), so it is unclear whether the existing requirements would be modified via new WISHA rules. If WISHA adopts the OSHA standard, employees who are not fully vaccinated will be required to wear face coverings indoors and in vehicles with others, except:

- When alone in a room with floor-to-ceiling walls and closed door
- For a limited time while eating or drinking, or for identification purposes to comply with safety/security requirements
- While wearing a respirator or face mask
- Where the employer can show wearing face coverings is infeasible or creates a greater hazard. *For example*:
  - Where it's important to see employee's mouth
  - Where the work requires use of employee's uncovered mouth
  - When wearing face covering presents risk or serious injury or death to employee

## **Are employers required to bargain with unions over the decision about whether to mandate vaccination or allow the option of vaccination or testing?**

This may depend on whether an employer is in the private or public sector. For private sector employers under the jurisdiction of the National Labor Relations Board (NLRB), the NLRB has communicated that employers are not required to bargain over matters that are clearly required by the OSHA ETS, but are required to bargain over matters where the employer has discretion under the rules. For example, because employers have discretion regarding whether to adopt a vaccination mandate policy or vaccination/testing policy, this decision is subject to bargaining.

For public sector employers subject to the jurisdiction of the Washington Public Employment Relations Commission (PERC), the answer has not been squarely addressed, but we believe that in light of existing PERC duty to bargain precedent and the strong public interest at issue, the decision about which policy approach to take is within management's discretion. As a result, the decision itself is not likely a mandatory subject of bargaining, but employers will be required to bargain the impacts of its chosen approach. We are still awaiting further legal guidance from PERC on this subject.

### **Employer Action Items**

The following checklist may be useful in ensuring your organization is informed and prepared:

- Determine whether you are a covered employer with 100+ employees.
  - If you are a covered employer, decide whether your organization will adopt a policy requiring vaccination or a policy allowing employees to either be vaccinated or subject to testing and masking requirements. Review OSHA's template policies, although it probably makes sense to hold off on finalizing a policy until the WISHA rules are issued, to ensure the WISHA requirements do not deviate from the OSHA ETS rules.
- Evaluate your duty to bargain; once your organization has determined how it wants to implement the WISHA rules, communicate with unions, clearly specify the upcoming implementation deadlines, and offer impact bargaining.
- If you will mandate vaccination, determine the process you will use to review and make determinations about requests for reasonable accommodation based upon medical/disability reasons and/or sincerely held religious beliefs. Begin developing forms to be used by employees requesting an exemption.
- If you will have some employees who are subject to testing, evaluate what testing protocols will be used. If your organization will provide testing, research options, including the expected cost and availability of testing supplies.
- Determine what process you will use to collect and maintain vaccination and testing records.
- Plan for employee communications.
- Monitor communications from L&I regarding the issuance of WISHA rules.

If you have specific questions about your organization's obligations once the WISHA rules are issued, please feel free to reach out to one of the attorneys in Summit Law Group's Labor & Employment group.

*This summary is intended to provide an overview of anticipated regulatory developments. This summary is not intended to be, and should not be interpreted as, legal advice. Employers are encouraged to contact a Summit Law Group attorney or other legal counsel for guidance regarding particular situations.*