



BUSINESS IN 2021
WEEKLY WEBINAR SERIES

BOND SCHOENECK
& KING ATTORNEYS

This webinar series will continue in 2022

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Introduction



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Update: OSHA'S Vax or Test ETS



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OSHA's ETS

- Access blog posts at this link

<https://www.bsk.com/news-events-videos/osha-rsquo-s-vax-or-test-emergency-temporary-standard-ets-is-here>

<https://www.bsk.com/new-york-labor-and-employment-law-report/is-osha-rsquo-s-vax-or-test-mandate-here-to-stay>

<https://www.bsk.com/new-york-labor-and-employment-law-report/supreme-court-to-expedite-hearing-on-oshas-vax-or-test-mandate>

- Access related presentations at this link

<https://www.youtube.com/watch?v=BbuXI5zx1PU>

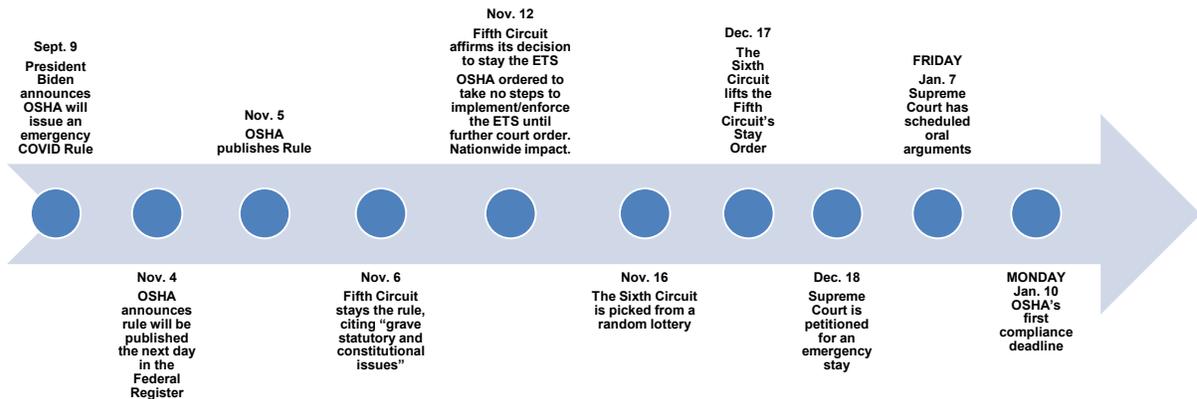
https://www.youtube.com/watch?v=hQU2_mdkCrw&t=2319s



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The Lifecycle of OSHA's ETS Standard



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OSHA SAYS...

- *OSHA is gratified the U.S. Court of Appeals for the Sixth Circuit dissolved the Fifth Circuit's stay of the Vaccination and Testing Emergency Temporary Standard. OSHA can now once again implement this vital workplace health standard, which will protect the health of workers by mitigating the spread of the unprecedented virus in the workplace.*
- *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 requirements 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.*

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What Now?

- Employers must make reasonable, good faith efforts to comply with the requirements

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Complete by Jan. 10, 2022

- Establish compliant policy
- Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status
- Provide paid time off for vaccination and for recovery from vaccination
- Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis and remove these employees from the workplace until they can return to work as per the ETS
- Ensure employees who are not fully vaccinated wear face coverings as per the ETS
- Provide employees with information about the ETS
- Comply with the ETS' reporting requirements and make certain records available

Complete by Feb. 9, 2022

- Ensure employees who are not fully vaccinated (due to exceptions as per the ETS) are tested for COVID-19 at least weekly (if in the workplace at least once a week) or within seven days before returning to work (if away from the workplace for a week or longer)

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Prepare a Written Policy

- OSHA has provided templates
 - [template for a mandatory vaccination policy](#)
 - [template for a vaccination or testing and face covering policy](#)

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Determine and Track Vaccination Status

- Employers must maintain a roster of employee vaccination status
- Acceptable documentation:
- The following list includes the acceptable documentation for proof of vaccination:
 - the record of immunization from a health care provider or pharmacy;
 - a copy of the U.S. COVID-19 Vaccination Record Card;
 - a copy of medical records documenting the vaccination;
 - a copy of immunization records from a public health, state, or tribal immunization information system; or
 - a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).
- To be acceptable as proof of vaccination, any documentation should generally include the employee's name, type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

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- Employee may provide signed and dated attestation:
 - Attesting to their vaccination status (fully vaccinated or partially vaccinated);
 - Attesting that they have lost and are otherwise unable to produce proof required by this section; and
 - Including the following language: “I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.”
- From the preamble to the rule: “While employers may not invite or facilitate fraud, the ETS does not require employers to monitor or detect fraud.”

<i>Vaccination Status</i>	<i>Instructions</i>	<i>Deadline</i>
<i>Employees who are fully vaccinated.</i>	<i>Submit proof of vaccination that indicates full vaccination.</i>	
<i>Employees who are partially vaccinated (i.e., one dose of a two dose vaccine series).</i>	<i>Submit proof of vaccination that indicates when the first dose of vaccination was received, followed by proof of the second dose when it is obtained.</i>	
<i>Employees who have not yet been vaccinated.</i>	<i>Submit statement that you are unvaccinated.</i>	

[Employers can set their own internal deadlines to allow for processing. OSHA requires employers to collect all information about employee vaccination status by January 10, 2022.]

Provide Paid Time Off

- FOR VACCINATION
 - 4 hours of paid time (includes travel time) to receive each primary vaccination dose
 - Separate from regular leave benefits
 - If the employer offers time during workday and employee does not accept, and gets vaccinated on own time, employer does not have to pay the vaccination time.
- FOR RECOVERY
 - Reasonable time and paid sick leave to recover from any side effects experienced following each primary vaccination dose.
 - What's reasonable? OSHA doesn't define this but says that if at least two days of paid sick leave per primary vaccination dose is provided, it will not enforce
 - If sick leave and vacation time are tracked separately and is available, may allow employees to use only sick leave benefits while recovering from vaccination side effects
 - Cannot require employees to accrue negative sick leave or borrow against paid sick leave to recover from vaccination side effects

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Require Prompt Notice of Positive Covid-19 Test

Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis and remove these employees from the workplace until they can return to work as per the ETS.

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Notice to Employees

- Key Things to Know About COVID-19 Vaccines,” available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
- That they can't be retaliated against. See [fact sheet](#) and
- The criminal penalties for false statements. See [fact sheet](#)

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Documentation

- By the end of the next business day after a request by an employee or an employee representative, the employer must make available to the requester the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.
- If OSHA asks for the written policy and the number of vaccinated employees and total employees during an inspection, that must be produced within four hours of the request.

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Report

Employers must also report work-related COVID-19 fatalities to OSHA within eight hours of learning about them and report work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization.

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Test the Unvaccinated – Feb. 9

- Every seven days
 - Employers must ensure that each employee who is not fully vaccinated is tested at least weekly (if in the workplace once per week) or within seven days before returning to work (if away from the workplace for a week or longer).
- Does not have to be PCR – rapid OTC tests acceptable.
- Self-administered is okay, and self-read is okay, but
- BOTH self-administered and self-read is NOT okay.
- If employee is in the vaccination process, must test until fully vaccinated UNLESS employee gets last dose on or before Feb. 9

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☑ Other Considerations

- Face coverings for unvaccinated
 - Exceptions:
 - When an employee is alone in a room with floor to ceiling walls and a closed door.
 - For a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements.
 - When an employee is wearing a respirator or facemask.
 - Where the employer can show that the use of face coverings is infeasible or creates a greater hazard

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Other Developing COVID-Related Matters

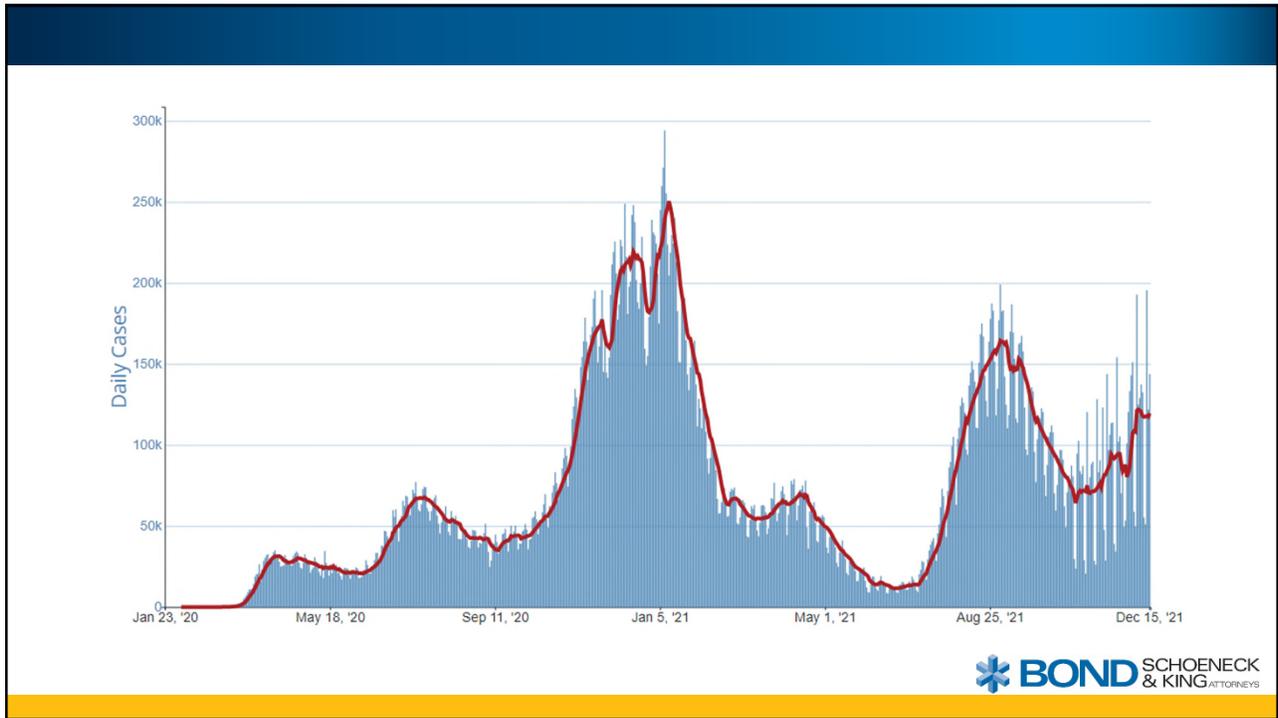


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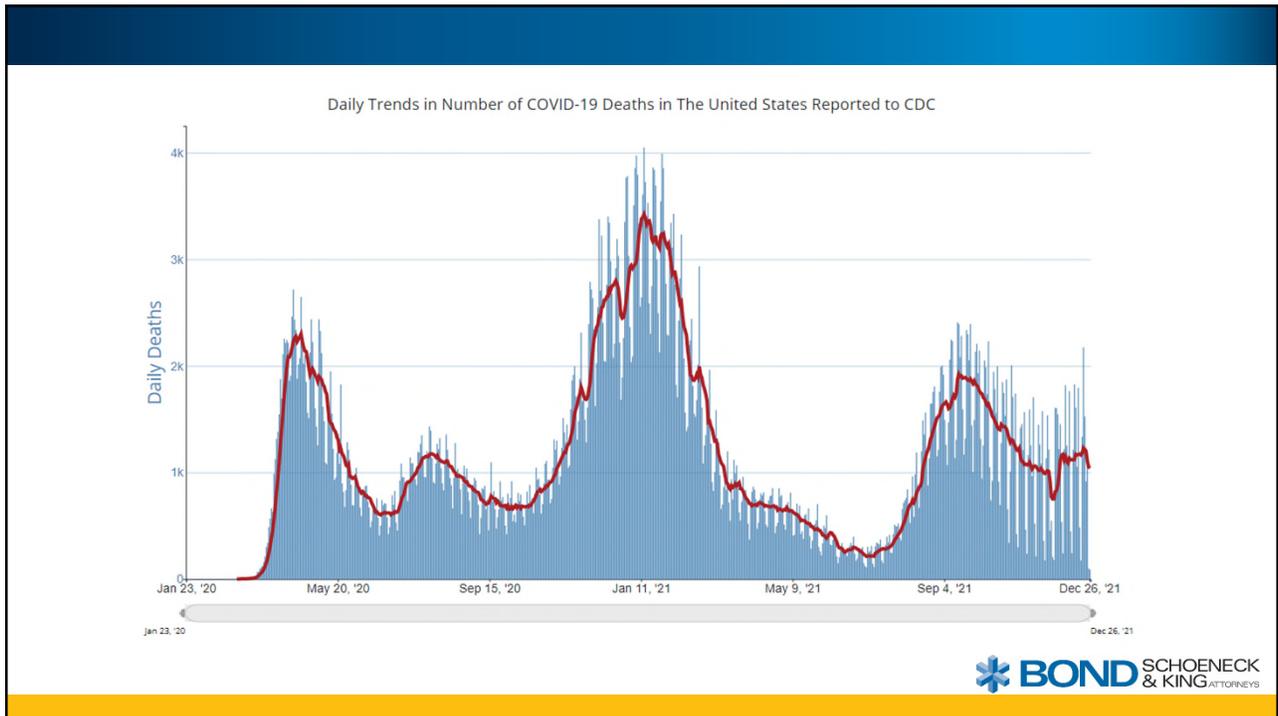
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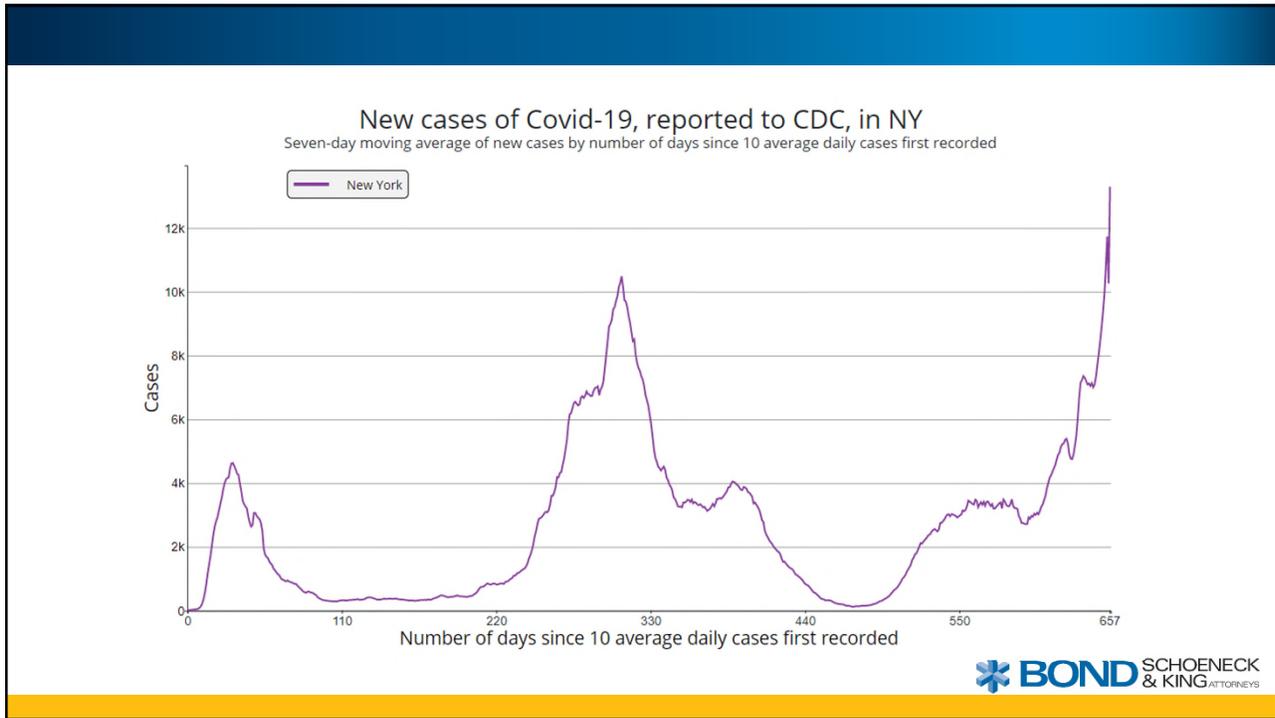
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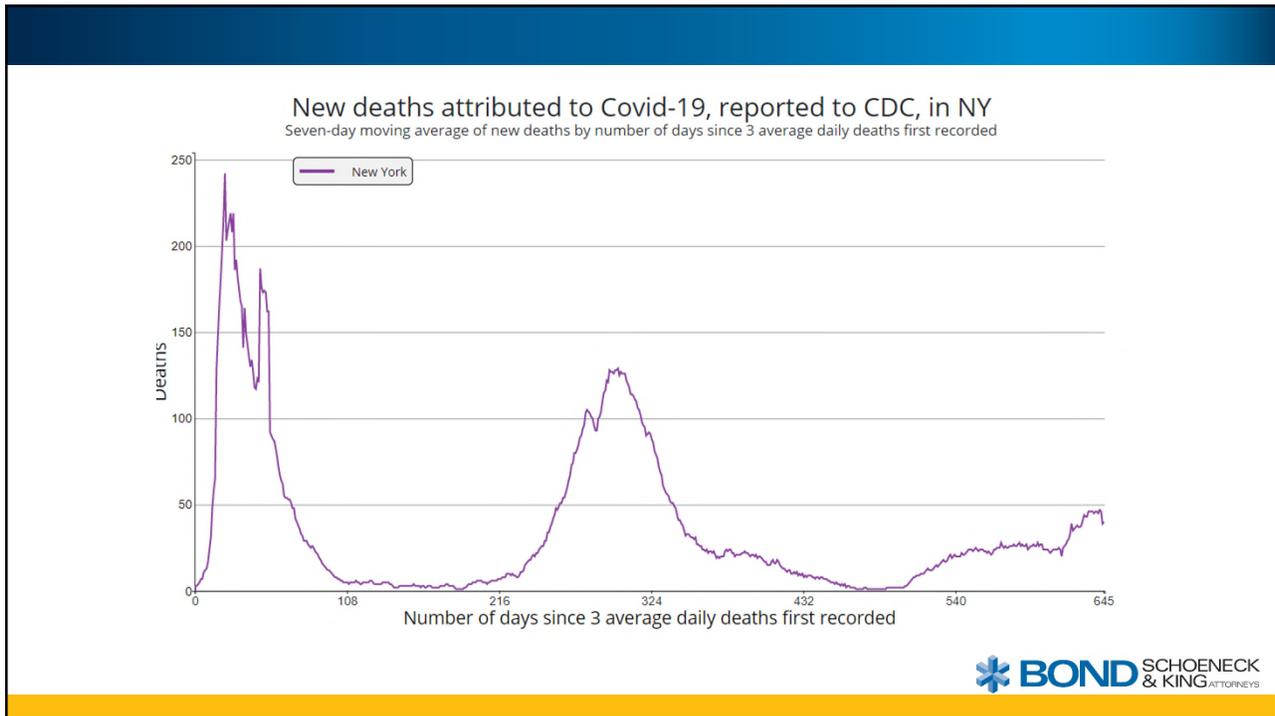
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Omicron Variant: CDC Guidance

- Continuing surge expected (Delta remains)
- Likely will spread more easily than original virus (but “don’t yet know how easily it spreads”)
- “More data are needed” to assess infection and illness risks
- Current vaccines expected to protect against severe illness, hospitalizations, and deaths due to Omicron infections

Additional CDC Guidance

- Data suggests transmission occurs a majority of times early in the illness (1-2 days prior to onset of symptoms until 2-3 days after)
- Recommended isolation time now 5 days (from 10) if asymptomatic, followed by 5 days of wearing a mask around others
 - If 5 days “not feasible” then it is “imperative” that to wear a “well-fitting mask” when around others for 10 days
- Individuals who received boosters do not need to quarantine following an exposure, but should wear masks for 10 days
- For all exposed, “best practice” is to test after 5 days
- If symptomatic, then stay home and get tested

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