



# CRISIS MANAGEMENT FOR COVID 19

## Phase 48: Kentucky Orders, 6<sup>th</sup> Circuit “Wins” the “Lottery” and OSHA POSTPONING ACTION!

*Presented by:  
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# INTRODUCTIONS



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# WHAT WE'LL COVER

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6<sup>th</sup> Circuit and OSHA TAKING ACTION!



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# Kentucky Executive Order and Updates



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# 1 Kentucky Statistics

## *Kentucky COVID-19 Stats/Red County Recommendations*

Total Positive  
**769,732**

Probable: 224,107- Confirmed: 545,625

Deaths  
**10,606**

Probable: 1,250- Confirmed: 9,356

Total Tested  
**10,327,823**

PCR: 7,617,973- Serology: 399,913- Antigen: 2,055,226

Positivity Rate\*  
**6.24%**

## RED ZONE REDUCTION RECOMMENDATIONS

- **Increase vaccination efforts** to reach unvaccinated persons
- **Require masking in government buildings**
- **Encourage masking in public indoor settings** for all persons  $\geq 2$  years of age
- **Encourage masking in crowded outdoor settings** for all persons  $\geq 2$  years of age
- Encourage **physical distancing** of at least 6 feet apart in public settings
- Maximize usage of **outdoor spaces for gatherings**
- **Consider limiting in-person community gatherings** and **postponing large events**
- **Encourage medically vulnerable persons to avoid large crowds**
- Engage **community partners and stakeholders to implement a strong communication plan**

[KYCOVID19.KY.GOV](https://KYCOVID19.KY.GOV)

TEAM  
KENTUCKY

# 1 Kentucky Booster Shot Executive Order Update

*On November 17, 2021, Governor Beshear Issued a new Executive Order 2021-864, which declared Booster Shots available to all Kentuckians over the age of 18.*

*The KyCovid19 Website provides the following guidance:*

## COVID-19 Vaccine **Booster Shots**

The CDC has expanded the eligibility for COVID-19 booster shots with recommendations for those who have received the Pfizer, Moderna or Johnson and Johnson COVID-19 vaccines. No matter what initial vaccine you received, you may choose which vaccine to receive as a booster.

### Who should get a **booster shot**?

**If you received a Pfizer or Moderna series:**

- 65 years and older
- Age 18 + who live in long-term settings
- Age 18+ who have underlying medical conditions
- Age 18 + who work or live in high-risk settings

**If you received a J&J vaccine:**

- Age 18 +

### When should you get a **booster shot**?

- At least 6 months after Pfizer or Moderna
- At least 2 months after J&J





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# 6th Circuit and OSHA POSTPONING ACTION!



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## OSHA ETS

### *The Fifth Circuit has Stayed Enforcement, already, of the OSHA ETS, pending final ruling*

- On November 12, 2021, the Fifth Circuit issued a sweeping order continuing its initial November 6, 2021, stay of the ETS issued by OSHA on November 4, 2021
  - ETS “imposes a financial burden upon [private employers] by deputizing their participation in OSHA’s regulatory scheme, exposes them to severe financial risk if they refuse or fail to comply, and threatens to decimate their workforces (and business prospects) by forcing unwilling employees to take their shots, take their tests, or hit the road.”
  - OSHA was not intended to allow sweeping pronouncements on public health.
  - Criticized ETS for not making an attempt to “account for differences in workplaces (and workers) that have more than a little bearing on workers’ varying degrees of susceptibility to the supposedly ‘grave danger’ the [ETS] purports to address.”
  - Questions whether OSHA has shown a “grave danger” and that the ETS is “necessary.”
- It is silent as to whether it applies only in the Fifth Circuit or nationwide
- Requires OSHA to “take no steps to implement or enforce the [ETS] until further court

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## OSHA ETS

### *The Sixth Circuit Will Decide the Fate of OSHA's Enforcement of Mask/Vaccine Mandates*

- 11 of the 12 United States circuit courts of appeals had cases pending challenging the ETS
  - When petitions for review of federal action are filed in multiple circuit courts, our law mandates that one jurisdiction be selected “by means of random selection”
- On November 16, 2021, the U.S. Judicial Panel on Multidistrict Litigation conducted a statutorily required random selection
- The Panel randomly selected the Sixth Circuit Court of Appeals – which handles matters from Kentucky, Michigan, Ohio, and Tennessee.
- The Sixth Circuit Court of Appeals sits in Cincinnati, Ohio
- There are 16 full-time judges, 11 of whom were appointed by Republican presidents
- Initially, a three-judge panel from the Sixth Circuit should be randomly assigned to the case
- No timetable has been established for the Sixth Circuit to hear the matter, but multiple cases from multiple jurisdictions will be consolidated for review
- Ultimately, the issue will likely end up being heard by the United States Supreme Court

*According to OSHA's webpage, as of Thursday afternoon, November 16, 2021:*

*On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard, published on November 5, 2021 (86 Fed. Reg. 61402) ("ETS"). The court ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order." While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.*

What does this mean?

- The future of the ETS remains uncertain
- It is reasonable to assume that the Sixth Circuit will issue a decision as to whether it will take immediate action to reconsider the Fifth Circuit's stay that is currently in place, or keep it in effect pending determination of the legal challenges.
- The OSHA Website ominously still indicates that there is a Vaccine and Mask ETS, but it is not being "implemented" or "enforced"
- However, businesses will need to keep track of the status of the Sixth Circuit for any further developments

Shortly after OSHA's ETS was suspended, several larger companies immediately undertook actions to withdraw prior directives and guidance:

- The future of the ETS remains uncertain
- It is reasonable to assume that the Sixth Circuit will issue a decision as to whether it will take immediate action to reconsider the Fifth Circuit's stay that is currently in place, or keep it in effect pending determination of the legal challenges.
- The OSHA Website ominously still indicates that there is a Vaccine and Mask ETS, but it is not being "implemented" or "enforced"
- However, businesses will need to keep track of the status of the Sixth Circuit for any further developments
- Certain large corporations have suspended enforcement of mandatory vaccinations

Not coincidentally, shortly thereafter, the Safer Federal Workplace Task Force pushed back the Federal Contractor Compliance Date previously required by the President to January 18, 2022

**Federal Workers are still mandated to comply by today, November 22, 2021**

- What about State Laws?

- Florida: On November 18, 2021, Florida signed into law measures that immediately prohibit workplace COVID-19 vaccine mandates for private and public employers and begins Florida's own OSHA, and requires exemptions from mandates for medical, religious, COVID-19 immunity, regular testing, and PPE.
- Tennessee: Don't Ask, Don't Tell
- West Virginia: Exemption from Vaccine Mandate
- Alabama: Exemption from Vaccine Mandate
- Arkansas: Exemption from Vaccine Mandate
- Iowa: Waive Vaccine Mandate
- Montana: Full blown anti-discrimination laws implemented in May, 2021
- Texas: Expanded Exemptions under state laws
- Illinois: Attempting to undo previous Conscience Objector law, but not effective until June, 2022

With Kentucky's Legislature, there is a distinct possibility that OSHA will be challenged in Kentucky

- What about Kentucky?
  - Last year, we advised of Senate Bill 8, which
    - Amended KRS 214.036 to provide exemptions from mandatory immunization for any child, emancipated minor, or adult, who personally or by a parent or guardian, submits a written sworn statement objecting to the immunization based on conscientiously held beliefs
    - Prohibited any administrative regulation, administrative order, or executive order from requiring during an epidemic the immunization of persons who submit either a written sworn statement objecting to the immunization based on conscientiously held beliefs or the written opinion of the person's physician that such immunization would be injurious to the person's health
    - Required the Cabinet for Health and Family Services to develop and make available on its Web site a standardized form relating to the exemptions from mandatory immunization and to accept the form after it is submitted

Not yet impacting employer mandates, but this is probably a precursor to future legislative action

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## OSHA ETS Dangers

### *Employer Mandates/Questions*

Many employers are moving ahead with efforts to comply with the OSHA ETS, causing many questions:

Q. Does a medical plan have to cover all testing for unvaccinated employees?

A. No. CARES Act requires medical plans to pay for COVID-19 testing only when a medical professional has made an individualized determination that testing is medically appropriate

Q. If a plan does not currently cover employment-based testing, may it be amended to do so?

A. Yes. However, covering all COVID-19 testing could significantly and unnecessarily raise costs

Q. The ETS does not require employers to pay for testing. Are there factors employers may want to consider if they want unvaccinated employees to pay for their own testing?

A. Although the ETS itself does not require employers to pay for testing for unvaccinated employees, there could be other state laws, union contracts, and other issues that make it difficult to pass cost of testing on.

Q. What if an employer decides to pay for employment-based testing outside of the medical plan?

A. A COVID-19 test would most likely be considered medical care under ERISA, which could cause issues. Free testing at the workplace could cause privacy issues under HIPAA. Recommendation is 3<sup>rd</sup> party EAP

Q. If an employer pays for testing, are employees subject to a tax on the cost of the testing?

A. COVID-19 testing would most likely be considered medical care under the tax code and could be tax-



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