

## OSHA's New Emergency Temporary Standard: Vaccinate or Test

**November 08, 2021**

The Occupational Safety and Health Administration (OSHA) issued a new emergency temporary standard (the "ETS") effective November 5, 2021 requiring covered employers to develop, implement and enforce a mandatory COVID-19 vaccination policy or a policy requiring unvaccinated employees to wear a face covering in the workplace and undergo regular testing.

### Covered Employers and Employees

The ETS applies to employers with 100 or more employees. The number of employees is determined at the company-wide level, so a business that has four separate offices with 25 employees in each office would meet the 100-employee threshold. Employees who work remotely (whether at home or elsewhere) count toward the 100-employee threshold. Part-time employees also count toward the 100-employee threshold, but independent contractors do not.

The ETS applies to employers who have 100 employees at any time that the ETS is in effect.(1) If an employer has 100 or more employees on the November 5, 2021 effective date, then the ETS applies to that employer for the duration of the ETS, even if the number of employees drops below 100. If an employer has fewer than 100 employees on November 5, 2021 and subsequently crosses the 100-employee threshold while the ETS is in effect, then the ETS applies to that employer beginning on the date on which the employer reaches 100 employees and for the duration of the ETS (even if the employer subsequently drops below the 100-employee threshold).

The ETS does not apply to workplaces that are already covered by similar regulations imposed on federal contractors and subcontractors or to health care workers at hospitals, nursing homes and other facilities that participate in Medicare and Medicaid who are covered by similar regulations issued by the Centers for Medicare & Medicaid Services.(2)

The ETS preempts contradictory state or local laws, including those that restrict an employer's ability to impose vaccination, testing or mask requirements. In states with OSHA-approved State Plans, private employers and state and local government employers with 100 or more employees will be covered by state occupational safety and health requirements, as long as those requirements are at least as effective as the ETS.

### Policies Required by the ETS

By December 5, 2021, covered employers must implement either (1) a mandatory COVID-19 vaccination policy or (2) a policy requiring employees who are not fully vaccinated to (a) wear a face covering in the workplace and (b) undergo COVID-19 testing at least weekly (if the employee is in the workplace at least once per week) or within seven days before returning to work (if the employee is away from the workplace for a week or longer).(3)

If an employer opts to implement a "mandatory COVID-19 vaccination policy," then it must require each employee to be fully vaccinated by January 4, 2022 unless the employee falls into one of three categories: (i) those for whom a vaccine is medically contraindicated; (ii) those for whom medical necessity requires a delay in vaccination; or (iii) those legally entitled to a reasonable accommodation under federal civil rights

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laws because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement. A mandatory vaccination policy must require employees who are not vaccinated because they fall into one of these categories to wear a face covering in the workplace and undergo weekly COVID-19 testing.

If an employer opts to implement a policy requiring unvaccinated workers to wear masks and undergo weekly testing, the testing requirement becomes effective on January 4, 2022.

The ETS does not require employers to pay for any costs associated with testing, but employers should be aware that state or local laws may require employers to pay for costs associated with testing. The ETS does not prohibit employers from voluntarily assuming the costs of testing.

Employees do not need to be vaccinated or undergo weekly testing if they: (i) do not physically report to a workplace where other individuals are present (i.e., co-workers or customers); (ii) work full time from home; or (iii) work exclusively outdoors.

### **Additional ETS Requirements**

Effective December 5, 2021, covered employers must:

- Determine the vaccination status of each employee, obtain acceptable proof of vaccination from vaccinated employees, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status.
- Provide employees reasonable time, including up to four hours of paid time, to receive each vaccination dose, and reasonable time and paid sick leave to recover from any side effects experienced following each vaccination dose.
- Require all employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19.
- Immediately remove from the workplace any employee, regardless of vaccination status, who received a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider, and keep the employee out of the workplace until return to work criteria are met.<sup>(4)</sup>
- In addition to implementing policies, employers must provide each employee with information, in a language and at a literacy level the employee understands, about: (i) the requirements of the ETS and workplace policies and procedures established to implement the ETS; (ii) vaccine efficacy, safety, and the benefits of being vaccinated by providing the CDC document "Key Things to Know About COVID-19 Vaccines";<sup>(5)</sup> (iii) protections against retaliation and discrimination; and (iv) the prohibitions of 18 U.S.C. § 1001 and of Section 17(g) of the OSH Act, which provide for criminal penalties for knowingly supplying false statements or documentation.<sup>(6)</sup>
- Report work-related COVID-19 fatalities to OSHA within 8 hours of learning about them, and work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization.
- Make available for examination and copying to an employee (and to anyone having written authorized consent of that employee) the employee's COVID-19 vaccine documentation and any COVID-19 test results and to an employee or an employee representative the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

OSHA has published a sample mandatory vaccination policy template and a sample vaccination or testing and face covering policy template.<sup>(7)</sup> Covered employers should ensure that their policies are readily accessible to all employees through the employer's normal methods of distributing information to employees. Employers are not required to submit their written policies to OSHA, unless requested.

### Legal Challenges

OSHA is authorized to issue emergency temporary standards to address grave dangers to workers. In announcing this ETS, which is expected to apply to more than 84 million private workers, OSHA stated that "[t]he nation's unvaccinated workers face grave danger from workplace exposure to coronavirus, and immediate action is necessary to protect them."<sup>(8)</sup>

Not surprisingly, challenges to the ETS have already begun. On November 6, 2021, the U.S. Court of Appeals for the Fifth Circuit issued an emergency stay of the ETS pending further briefing and expedited judicial review. Thus, the ETS is not currently enforceable in workplaces located in the Fifth Circuit (Louisiana, Mississippi and Texas), pending further action by the Court. Several other lawsuits have been filed in other areas of the country and employers should monitor those challenges in locations where they have employees reporting to workplaces to determine if they will impact the scope or effectiveness of the ETS.

### Conclusion

The ETS is effective November 5, 2021 and covered employers are required to comply with many elements no later than December 5, 2021. Employers should consult with counsel to determine their obligations under the ETS and ensure timely compliance.

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(1) As of November 4, 2021, OSHA expects the ETS to be in place for at least six months. [COVID-19 Vaccination and Testing ETS – Frequently Asked Questions | Occupational Safety and Health Administration \(osha.gov\)](#).

(2) The Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors; Healthcare ETS (29 CFR § 1910.502). These employees, however, still count toward the 100-employee threshold.

(3) The ETS allows employers to implement hybrid policies in which some categories of employees must be vaccinated, and other categories of employees may be unvaccinated and subject to masking and weekly testing requirements.

(4) The ETS requires that an employee who receives a positive COVID-19 test or is diagnosed with COVID-19 be removed from the workplace until the employee: (i) receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if the employee chooses to seek a NAAT test for confirmatory testing; (ii) meets the return to work criteria in CDC's "Isolation Guidance"; or (iii) receives a recommendation to return to work from a licensed healthcare provider.

(5) Available here: [Key Things to Know About COVID-19 Vaccines \(cdc.gov\)](#).

(6) OSHA fact sheets regarding the penalties for knowingly supplying false information are available in English and Spanish here: [COVID-19 Vaccination and Testing ETS – Frequently Asked Questions | Occupational Safety and Health Administration \(osha.gov\)](#).

(7) The OSHA sample policies are available here: [COVID-19 Vaccination and Testing ETS | Occupational Safety and Health Administration \(osha.gov\)](#).

(8) OSHA National News Release: [US Department of Labor issues emergency temporary standard to protect workers from coronavirus | Occupational Safety and Health Administration \(osha.gov\)](#).

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