

NOVEMBER 4, 2021

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## OSHA RELEASES EMERGENCY TEMPORARY STANDARD REQUIRING EMPLOYEE VACCINATION OR WEEKLY TESTING

Since President Biden's announcement in early September that employers with more than 100 employees would be subject to an employee vaccine mandate, employers have been anxiously awaiting information about what will be required and by when the requirements must be implemented. OSHA released the Emergency Temporary Standard ("ETS") implementing those requirements today. Here is what you need to know:

**100-Employee Threshold.** The ETS applies to employers with 100 or more employees at any time while the ETS is in effect. It does not apply to those employers covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors or in settings where employees provide health-care services or healthcare support services when subject to the requirements of the Healthcare ETS. According to OSHA, as reported during a stakeholder presentation today, the ETS will impact over 84 million employees.

The ETS does not apply to individual workplace locations. Instead, companies must look firm- or corporate-wide at all their U.S. workplaces to determine whether

the ETS applies. Part-time employees and offsite or remote employees count towards the 100-employee threshold, though fully remote employees are not required to be vaccinated or submit to weekly testing.

**Effective Date.** Employers are required to be in compliance with the bulk of the ETS by December 5, 2021. Employers must begin testing for employees who have not received all doses required for primary vaccination no later than January 4, 2022.

**Employer Policy on Vaccination.** The ETS requires covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy, and has provided a **template policy** for this purpose. To meet this requirement, the policy must require vaccination of all employees, other than those for whom a vaccine is medically contraindicated, for whom a medical necessity requires a delay in vaccination, or who are otherwise entitled to a reasonable accommodation under the Americans with Disabilities Act or Title VII of the Civil Rights Act because they have a disability or sincerely held religious beliefs that conflict with the vaccination requirement.

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**Testing Alternative.** Consistent with President Biden's initial announcement, there is an exception from the vaccine mandate for employers that instead establish, implement, and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace. OSHA has also provided a **template policy** for employers who choose this method of compliance with the ETS.

The ETS requires employers to ensure that each employee who is not fully vaccinated (including those entitled to reasonable accommodations for religious or medical reasons) is tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer). Employees who fail to provide documentation of a COVID test result must be excluded from the workplace until they provide such test result. Employees who test positive or are diagnosed with COVID-19 are excused from testing requirements for 90 days following their positive test or diagnosis. Employers must maintain a record of each test result.

The ETS does not require employers to pay for any costs associated with testing, nor does it prohibit employers from doing so. The ETS notes, however, that employers may be required to pay for testing in accordance with other laws or collective bargaining agreements.

**Employee Vaccination Status.** The ETS requires employers to determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status. Employers must remain cognizant of their obligations to maintain the confidentiality of employee medical information. Vaccine information, like all employee medical information, must be kept confidential and stored separately from the employee's personnel files under the Americans with Disabilities Act.

**Leave Requirements.** The ETS requires employers to provide employees reasonable time, including up to four hours of paid time, to receive each vaccination dose, including travel time. Employers may not require their employees to use their accrued sick or personal time for these purposes.

Employers must also provide reasonable time and paid sick leave to recover from side effects experienced following each dose. If employees have accrued paid sick leave, they may be required to use that leave when recovering from vaccination side effects. The ETS does not specify the amount of paid sick leave an employer must provide for this purpose, and permits an employer to set a reasonable cap on the amount of time that may be used. These leave requirements apply to all covered employers, including those

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who opt to provide the testing/masking alternative to vaccination and those who facilitate vaccination on-site.

**Face coverings.** The ETS requires employers to ensure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances:

- 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 that would excuse compliance with this paragraph (e.g., when it is important to see the employee's mouth for reasons related to their job duties, when the work requires the use of the employee's uncovered mouth, or when the use of a face covering presents a risk of serious injury or death to the employee).

Employers must not prevent any employee, regardless of vaccination status, from voluntarily wearing a face covering unless it creates a serious

workplace hazard (e.g., interfering with the safe operation of equipment). Employers should also note that the ETS does not preempt state or local governments from mandating face coverings in indoor public spaces regardless of vaccination status, and should continue to comply with applicable mandates that exceed the ETS's requirements on face coverings.

**Employee notification to employer of a positive COVID-19 test and removal.** The ETS requires employers to:

- require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19, regardless of vaccination status;
- immediately remove any employee from the workplace, regardless of vaccination status, who received a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider; and
- keep removed employees out of the workplace until they meet criteria for returning to work.

The ETS does not require that employers provide paid leave to employees who are removed from the workplace because of COVID-19 positive result or diagnosis, though paid time may be required by other laws, or by a collective bargaining agreement.

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*This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.*

### **Providing information to employees.**

The ETS requires employers to provide employees the following in a language and at a literacy level the employees understand:

1. information about the requirements of the ETS and workplace policies and procedures established to implement the ETS;
2. the CDC document “Key Things to Know About COVID-19 Vaccines”;
3. information about protections against retaliation and discrimination; and
4. information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.

### **Reporting COVID-19 fatalities and hospitalizations to OSHA.**

The ETS requires employers to 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.

**Availability of records.** Upon OSHA’s request, an employer will have four business hours to provide its policy on vaccination/testing, and until the end of the next business day to provide all other records that must be maintained (i.e. proof of each employee’s vaccination status or test results as required by the ETS). Employees also have the ability to request their own vaccination or testing records, and may submit requests for the aggregate number of fully vaccinated employees in the workplace along with the total number of employees at that workplace.

This requires immediate attention to ensure compliance by the deadline, and employers should consult the extensive **FAQs** OSHA has published. Employers that fail to comply with rule may be subject to fines. Employers who have already implemented policies requiring that their employees be vaccinated, or mandating testing, should review those policies to ensure they comply with requirements of the ETS. Employers should also stay tuned for updates, as multiple legal challenges to the ETS are expected.