

Human Resources **BULLETIN**



OSHA's COVID-19 Vaccination Emergency Temporary Standard

● **November 9, 2021** ●

The Occupational Safety and Health Administration (OSHA) has released the long-awaited emergency temporary standard (ETS) addressing mandatory vaccinations in the workplace. The issuance of the ETS resulted from President Biden's Path Out of the Pandemic Covid Action Plan which directed OSHA to develop the ETS.

The COVID Action Plan was designed and intended to cover an extensive segment of the American workforce to reduce the spread of COVID-19 and the negative impact of the disease on the American workforce and economy. In carrying out this goal, the presidential administration determined that employers employing 100 or more workers would have the administrative ability and resources to comply with the requirements of the ETS.

This bulletin will highlight key provisions and the timelines that covered employers of 100 or more employees need to know to comply with the requirements of the ETS.

The effective date of the ETS is **November 5, 2021** and employers must comply with most of the requirements of the ETS by December 5, 2021. Employers have until **January 4, 2022** to comply with the testing requirements for any unvaccinated workers, but workplace masking requirements for unvaccinated workers are effective on **December 5, 2021**.

OSHA has provided resource documents to help employers understand and meet their obligations under the ETS. These documents include sample policies, sample communications and answers to frequently asked questions. Links to these materials are included at the end of this bulletin. Even with the extensive materials provided, there are questions that remain and nuances that employers will need to navigate.

Determining Whether an Employer is Covered Under the ETS

OSHA's ETS applies to employers with 100 or more employees. In determining the employee headcount for the 100 employee threshold requirement:

- The employee counts are based on the company's total number of employees, across all sites and locations. All employees are counted. This **includes full-time, part-time, temporary and seasonal employees**. Even employees who are otherwise not required to be vaccinated or tested because they work completely remotely or exclusively outdoors are to be counted for determining the employee threshold for employer coverage purposes.
- The date the employee count is to be made is the effective date of the ETS, November 5, 2021.
- OSHA did not provide specific guidance on how employees of **related and affiliated companies** are to be counted in determining the 100 employee threshold. It is likely the classic single-employer analysis would be important in the determination. Factors such as common management, common ownership, and the interrelation of the human resources/labor relations functions of the businesses would be important under this analysis.
- If an employer **increases its employee count** from below 100 to 100 or more while the ETS is in effect, the employer will need to comply with the ETS immediately upon reaching the 100 employee threshold. If an employer falls below the 100 employee threshold while the ETS is in effect, it will still need to comply through the entire period the ETS remains in effect.
- The ETS **does not apply** to workplaces covered by the vaccination executive orders for government contractors or the specific ETS that applies to healthcare employers. These workplaces are already held to higher standards.

Employer Requirements Under the ETS

OSHA's ETS requires covered employers to:

- **Develop, implement and enforce a mandatory COVID-19 vaccination policy.** Alternatively, employers can comply with the ETS if they establish, implement and enforce a policy allowing employees to elect whether to get vaccinated **or** to undergo weekly COVID-19 Testing and wear a face covering at the workplace.
- 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.
- Support vaccination by providing employees reasonable time, including up to **four hours of paid time off**, to receive each primary vaccination dose, and reasonable time and paid sick leave to recover from any side effects following vaccination. The ETS indicates that up to two days of paid leave would generally be reasonable based

on the commonly reported side effects from the vaccination.

- Ensure that each employee who is not fully vaccinated is tested for COVID-19 **at least weekly** and **provide proof of a negative test**. Employers also must ensure that unvaccinated employees wear acceptable masks while working indoors.
- Make records relating to vaccinations and testing available to employees and their representatives within 24 hours of a request.
- Employers **must inform employees** that they (the employees) are required to immediately report a positive COVID-19 test or diagnosis. Employers are required to **immediately remove employees from the workplace with a positive test or diagnosis**, regardless of vaccination status.
- Employers are required to **provide employees** information about the **requirements of the ETS**, the **policies and procedures the employer is enacting** to implement the ETS, and information about the safety and benefits of being vaccinated by providing each employee with a copy of the CDC publication "Key Things to Know About the COVID-19 Vaccine" (link included in the resource materials below). This information should be included in the employer's required written policy.

Employees Not Covered by the ETS

The OSHA ETS allows for employees working under some limited specific conditions to avoid the mandatory vaccination or testing and masking requirements.

This exclusion is limited to the following categories of employees:

- Employees that work completely remotely.
- Employees that do not report to a workplace where other employees are present.
- Employees that work exclusively outdoors.

It is important for employers to make sure to continually monitor the working circumstances of employees and their locations since these conditions can change and impact whether the exclusion would continue to apply.

Effect of Conflicting State and Local Laws and Orders

The ETS clearly states that it preempts all state and local laws or orders that are inconsistent with the requirements of the ETS. This will likely be tested in the courts.

What Does the ETS Mean for Employers Under 100 Employees?

Employers under the threshold of 100 employees are not subject to the OSHA ETS. Employers under 100 employees may continue to choose to mandate vaccinations unless state or local laws specify otherwise.

Definition of Fully Vaccinated

An employee is deemed fully vaccinated for purposes of the ETS' requirements two weeks after a second dose in a two-dose vaccination series or two weeks after a single-dose vaccine. Vaccines must be approved by the U.S. Food and Drug Administration (FDA) or the World Health Organization (WHO). Booster shots are not currently considered in the definition of fully vaccinated for purposes of the ETS.

Who is Responsible for the Cost of Required Testing?

The ETS does not require employers to pay the costs of the FDA approved COVID testing.

Employers need to be aware that payment for testing may be required by **other** laws, regulations and collective bargaining agreements where applicable. This includes state specific laws.

Employee Accommodations

The OSHA ETS does not alter the requirement of employers to accommodate employees with a medical condition, disability or a sincerely held religious belief that prevents them from being vaccinated. Employees that are accommodated for these protected reasons **will** still be subject to the **weekly testing** requirement **and masking** requirement as unvaccinated employees.

Proof of Vaccination Status

OSHA's ETS requires employers to maintain records of each employee's vaccination status and a roster of all employees with their respective vaccination status.

Proof of vaccination can include the following per OSHA:

- 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;
- A copy of any other official documentation that includes 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). This information should also be part of the above-listed forms of proof.

Employer Responsibilities Related to Employee Vaccine Documentation

Employers must keep a physical or digital copy of the vaccine documentation employees provide to them. Employers also must notify employees that there are criminal penalties under the OSHA Act for knowingly providing false statements or documentation.

It is important that employers understand that the ***proof of vaccination*** and the ***roster*** required by the ETS are ***confidential medical records*** and must be maintained as such. This would include maintaining these records in a secure file, separate from the employee personnel files, and accessible only to those authorized employees with a legitimate need to know the information.

OSHA ETS' Impact on States with OSHA Approved State Run Plans

States with OSHA approved state plans are required to enact rules at least as effective as those included in the ETS within 30 days. There are currently more than 20 states that run separate state plans covering private sector and state and local government employees. These states will have 30 days to adopt the OSHA ETS or implement a regulation that is at least as effective as the ETS.

OSHA Penalties for Non-Compliance

OSHA has enforcement authority and can assess penalties for non-compliance with the requirements of the ETS. This can include citing employers for each instance of non-compliance and each affected employee. The current penalty for serious and other-than-serious violations is ***\$13,653 per violation***. Willful or repeated violations can result in significantly higher fines.

Legal Challenges to ETS Requirements

The U.S. Federal Fifth Circuit Court of Appeals has issued an order that prevents enforcement of the OSHA COVID-19 ETS until a final decision regarding its legality is determined. It is important to note that the ETS has not been officially delayed nor vacated and employers should continue to prepare for compliance with its provisions.

Next Steps

Now that the details and specific requirements of the ETS have been established and communicated employers can and should immediately begin planning for and taking specific actions to meet the compliance requirements of the ETS.

Employers will need to make sure the required policies they develop and implement include paid time off for employees to get vaccinated and, if needed, reasonable time to recover from side effects experienced that keep them from working. Employers also need to make sure they are monitoring and enforcing the requirement that unvaccinated employees wear appropriate masks in the workplace beginning December 5th.

Employers must make sure to follow all of the communication, recordkeeping, and accommodation policies and practices. Some third party service offerings are available to ease the burden of the ongoing vaccine tracking, testing, and recordkeeping required of employees. Employers concerned about their ability to comply with the recordkeeping requirements may want to consider these services.

Employers will have decisions to make including determining which of the two methods of compliance, mandatory vaccination or allowing employees the option to undergo weekly testing and ongoing mask use, is best for their businesses. There are certainly added costs, administrative commitments and greater risks of non-compliance with the weekly testing option. Employers do, however, have the choice under the ETS.

ADDITIONAL RESOURCES

[OSHA COVID-19 Vaccination and Testing; ETS](#)

[CDC - Key Things to Know About the COVID-19 Vaccine](#)

[DOL ETS FAQs](#)

[DOL ETS Social Media Toolkit](#)