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OVERVIEW OF REQUIREMENTS UNDER THE FEDERAL OSHA EMERGENCY TEMPORARY STANDARD

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Landmark OSHA Emergency Temporary Standard (ETS) Requires COVID-19 Vaccination or Testing

- Covered employers with 100+ employees must by **December 6, 2021** establish a vaccine policy that requires by **January 4, 2022**:
 - Mandatory vaccination; or
 - Weekly testing for unvaccinated employees.



Preamble Focuses on Grave Danger

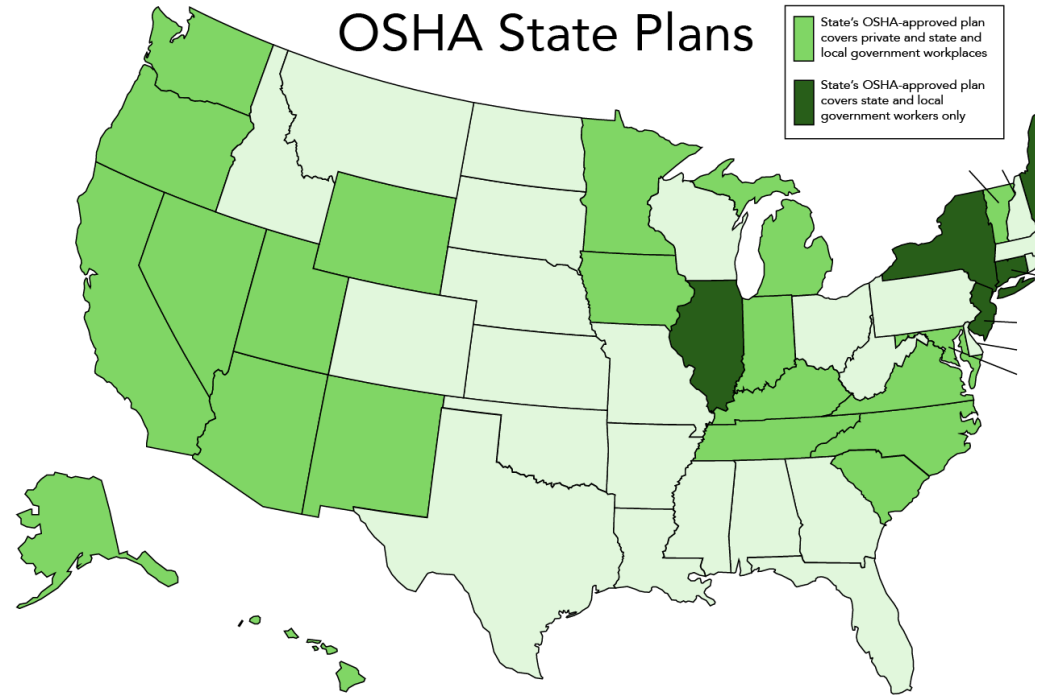
- 490 Pages with Preamble
- “Grave danger” used 191 times
 - *However, a “grave danger” represents a risk greater than the “significant risk” that OSHA must show in order to promulgate a permanent standard under section 6(b) of the OSH Act, 29 U.S.C. 655(b).*
 - *In determining the type of health effects that may constitute a “grave danger” under the OSH Act, the Fifth Circuit emphasized “**the danger of incurable, permanent, or fatal consequences to workers, as opposed to easily curable and fleeting effects on their health.**” Fla. Peach Growers Ass’n, Inc. v. U. S. Dep’t of Labor, 489 F.2d 120, 132 (5th Cir. 1974). Although the findings of grave danger and necessity must be based on evidence of “actual, prevailing industrial conditions,” see Int’l Union, 590 F. Supp. at 751, when OSHA determines that exposure to a particular hazard would pose a grave danger to workers, OSHA can assume an exposure to a grave danger wherever that hazard is present in a workplace. Dry Color Mfrs. Ass’n, Inc. v. Dep’t of Labor, 486 F.2d 98, 102 n.3 (3d Cir. 1973).*
- Lengthy FAQs go beyond text of ETS

Challenges In Federal Court

- 5th Circuit granted an emergency motion to stay enforcement pending further action.
"The petitions give cause to believe there are grave statutory and constitutional issues with [the ETS]."
- The Order applies nationwide and enjoins federal agencies from enforcing the ETS.
- Briefing completed by Tuesday, November 9 → 5th Circuit ruling on stay is imminent.
- Challenges pending in 11 circuits (as of 11/11).
 - Judicial Panel on Multidistrict Litigation will randomly select a circuit sometime next week.
 - Stay could be upheld, lifted, deadlines tolled, etc.
- OSHA may also ask for the U.S. Supreme Court to dissolve this temporary stay.
- Likely appeal to the U.S. Supreme Court.

OSHA State Plans

- There are 22 OSHA-approved State Plans covering private and public workers.
- Each must either adopt (1) the federal OSHA ETS or (2) an ETS that is **at least as effective as** the federal OSHA ETS.
- State Plans must notify OSHA of their intended action by November 20, 2021.
- Adoption must be complete by December 6, 2021.



State Laws Passed to Limit Employer COVID-19 Vaccine Mandates

- Alabama, Arkansas, Tennessee, West Virginia, and Iowa legislatures passed bills aiming to limit an employer's ability to mandate vaccination.
- These states follow Montana's passage of a COVID-19 vaccine discrimination law in May and the Texas governor's issuance of an executive order in early October purporting to expand exemptions to vaccine mandates under state law.
- Florida will consider similar measures in a special session starting November 15.
- Other states will likely consider similar legislation when their legislatures reconvene in the new year.

Effective Dates for Key Requirements

- **By December 6, 2021:**

- Establish a written vaccine policy.
- Determine the vaccination status of each employee.
- Follow new recordkeeping and reporting requirements.
- Offer PTO benefits for vaccination and recovery from side effects.
- Implement face covering requirement for unvaccinated employees.
- Communicate with employees & complete required disclosures.
- Be prepared to make available certain records if requested by employees or OSHA.

- **By January 4, 2022:**

- Begin weekly testing for employees who are not fully vaccinated.

Applicability – The 100 Employee Threshold

- OSHA ETS applies to all employers with 100+ US-based employees
 - Employers **must** count:
 - All employees (not just those at a single location)
 - All employees (regardless of vaccination status)
 - Any employee employed while the ETS is in effect (ie, seasonal workers)
 - Part-time workers
 - Minors
 - Employers should **not** count
 - Independent contractors
 - Workers employed by staffing agencies.

Proof of Vaccination

- Covered employers must determine employee vaccination status by 12/6
- The OSHA ETS only allows the following as proof of vaccination:
 - Record of immunization from a healthcare provider or pharmacy
 - Copy of US COVID-19 Vaccination Record Card
 - Copy of medical records documenting vaccination
 - Copy of immunization records from a public health, state, or tribal immunization info system,
or
 - 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).

Two Exceptions – (1) Lost Card

- If an employee is **unable to produce acceptable proof of vaccination** (for example, because their card was lost or stolen), they can submit a signed and dated statement confirming vaccination
 - The signed and dated statement must:
 - Attest to their vaccination status
 - Attest that they have lost or are otherwise unable to produce proof required by the ETS, **and**
 - Include the following statement: “I declare 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.**”
 - FAQ says the statement also should include, to the best of the employee’s recollection:
 - The type of vaccine administered,
 - Date(s) of administration,
 - The name of the health care professional(s) or clinic site(s) administering the vaccine(s).

Two Exceptions – (2) Prior Proof

- The ETS provides a limited exemption for employers who previously collected employee vaccine information using forms of proof not accepted under the ETS.
 - Employer must have ascertained vaccination status prior to the issuance of the ETS; and
 - Must have retained records of that ascertainment

Other Recordkeeping Requirements

- Employers must maintain a roster of the vaccination status of all employees.
- FAQs say roster should show if they are:
 - Fully vaccinated,
 - Partially (not fully) vaccinated,
 - Not fully vaccinated because of a medical or religious accommodation, or
 - Not fully vaccinated because they have not provided acceptable proof of their vaccination status
- Upon request, employers must make the following available (1) to employees and “and to anyone having written authorized consent of that employee” by the end of the next business day, and (2) to OSHA within 4 hours:
 - An employee’s personal vaccine and testing documentation
 - The aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace

Other Recordkeeping Requirements

- While the ETS remains in effect, employers must preserve:
 - The records of **each** COVID-19 test result for **each** unvaccinated employee
 - Vaccine records
- Vaccine and testing records are confidential employee medical records.
 - Per relevant legal requirements, these records must be maintained in a confidential manner, stored separately from employee personnel files, and not disclosed to others unless required or authorized by the ETS or other federal law

→ *What should employers do if a test does not yield any records?*

What Type of COVID-19 Tests Are Allowed?

- COVID-19 tests must be:
 - Cleared, approved, or authorized, including in an Emergency Use Authorization, by the FDA to detect current infection of COVID-19;
 - Administered in accordance with the authorized instructions; and
 - **Not** both self-administered and self-read **unless** observed by the employer or an authorized telehealth proctor.
- This means that self-administered tests must be processed by a laboratory, administered by or in the presence of a healthcare provider, or administered in the presence of the employer.
- Rapid antigen tests with FDA-approval are permitted.
- Antibody tests are **not** permitted.



Cost of Testing

- The ETS does **not** require employers to pay for any costs associated with testing.
- However, ***employers may be required to pay such costs by other federal and/or state laws.***
- You should consult with counsel to determine whether you are required to pay costs associated with testing. Morgan Lewis has 50 state surveys available on testing cost and time.

Hospitalization and Fatality Reporting Rules



- Employers must report each **work-related** COVID-19 fatality to OSHA **within 8 hours of *learning* about the fatality.**
- Employers must report each **work-related** COVID-19 in-patient hospitalization to OSHA **within 24 hours of *learning* about the in-patient hospitalization.**
- An employer is considered to “learn” of such a situation when **any employee** receives such information from a family member or medical professional of the affected employee.

Enforcement and Penalties

- **Employer** failure to comply with the provisions of the ETS:
 - Penalties of up to \$13,653 per Serious or OSHA violations
 - Penalties of up to \$136,653 per Willful or Repeat violations
 - OSHA has adopted its “egregious violation” policy for deterrence purposes when aggravating circumstances may be present
 - OSHA has noted that the ETS was intentionally drafted to give OSHA authority to separately cite employers for “each instance of the employer’s failure to protect employees and for each affected employee, where appropriate”
- **Employer** knowingly accepting false documentation of vaccine status:
 - Section 17(g) of the OSH Act provides for fines up to \$10,000 and imprisonment for not more than six months, or both
 - 18 U.S.C. 1001 allows for fines and imprisonment of no more than five years
- Potential criminal penalties for **employees** who submit fake vaccine information.



Required PTO Benefits

- Employers must provide “reasonable time” during work hours, up to four hours of paid time off, for employees to receive **each** of their primary vaccine dose(s).
 - Employers **cannot** offset this benefit with other PTO employee has accrued.
- Employers must also provide “reasonable time and paid sick leave” to **recover from side effects** associated with each primary vaccine dose.
 - Employers **can** offset with an employee’s already accrued sick leave (unless state/local law provides otherwise).
 - However, if the employee does not have available sick leave, additional leave must be provided for this purpose – the employee cannot be forced to use other kinds of accrued PTO (such as vacation) and cannot be forced to go into a negative PTO balance or be advanced future sick leave.
 - Employers may set a “reasonable” cap on the amount of paid sick leave available. OSHA has indicated that two days per dose would be considered reasonable.

Face Covering Requirement

- Employers must ensure that unvaccinated employees are wearing face coverings when indoors or in a car with another person for work purposes.
- Face coverings must:
 - Completely cover the nose and mouth;
 - Be made with two or more layers of fabric that is tightly woven;
 - Be secured to the head with ties, ear loops, or elastic bands that go behind the head;
 - Fit snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and
 - Be a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings.
- Exceptions apply in limited situations:
 - Alone in a room with floor-to-ceiling walls and a closed door;
 - While actively eating or drinking;
 - For identification purposes;
 - When wearing a respirator or facemask (i.e., medical procedure mask); or
 - When the employer can demonstrate that use of face coverings is infeasible or creates a greater hazard that would excuse compliance.



Removal and Return to Work Requirements

- Regardless of vaccination status, employers must require each employee to promptly notify them when they receive a positive COVID-19 test or are diagnosed by a licensed healthcare provider.
- Employees with COVID-19 must be immediately removed from the workplace.
- Removed employees may only return to work after they:
 - Meet the return-to-work criteria published in the CDC's Isolation Guidance (i.e., *for symptomatic cases, at least 10 days since symptoms first appear, no fever for 24 hours without fever-reducing medication, and other symptoms have improved or for asymptomatic cases, at least 10 days since test specimen was provided*);
 - Receive a recommendation to return to work from a licensed healthcare provider; or
 - Obtain a negative test result on an NAAT test after having received a positive antigen test result.
- Note that the ETS does **not** require contact tracing or removal of close contacts. OSHA recommends that employers follow CDC guidance.

Required Employee Disclosures

- Employees must be informed (in a language and at a literacy level the employee understands) of:
 - The requirements of the ETS;
 - The employer's related policies and procedures;
 - The safety, efficacy, and benefits of COVID-19 vaccination;
 - Must provide the document "Key Things to Know About COVID-19 Vaccines," *available at* <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
 - Paid time off entitlements for vaccination and recovery from side effects;
 - Anti-retaliation protections;
 - The prohibitions and criminal penalties for knowingly supplying false statements or documentation; and
 - The types of records employees are entitled to and procedures for requesting such records.
 - Employers must make an employee's personal vaccine and testing documentation available to that employee.
 - Employers must also make available the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace, if requested.

OSHA Resources

- **Sample Policy Templates** <https://www.osha.gov/coronavirus/ets2>
- COVID-19 Vaccination and Testing ETS FAQs
<https://www.osha.gov/coronavirus/ets2/faqs>
- Fact Sheet on Workers' Rights Under the ETS
<https://www.osha.gov/sites/default/files/publications/OSHA4159.pdf>
- Fact Sheet on Penalties for False Statements and Records
<https://www.osha.gov/sites/default/files/publications/OSHA4157.pdf>
- Fact Sheet on Reporting COVID-19 Fatalities and In-Patient Hospitalization
<https://www.osha.gov/sites/default/files/publications/OSHA4129.pdf>
- CDC Fact Sheet on Key Things to Know About COVID-19 Vaccines
https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html?s_cid=10493:covid%2019%20vaccination:sem.ga:p:RG:GM:gen:PTN:FY21

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.

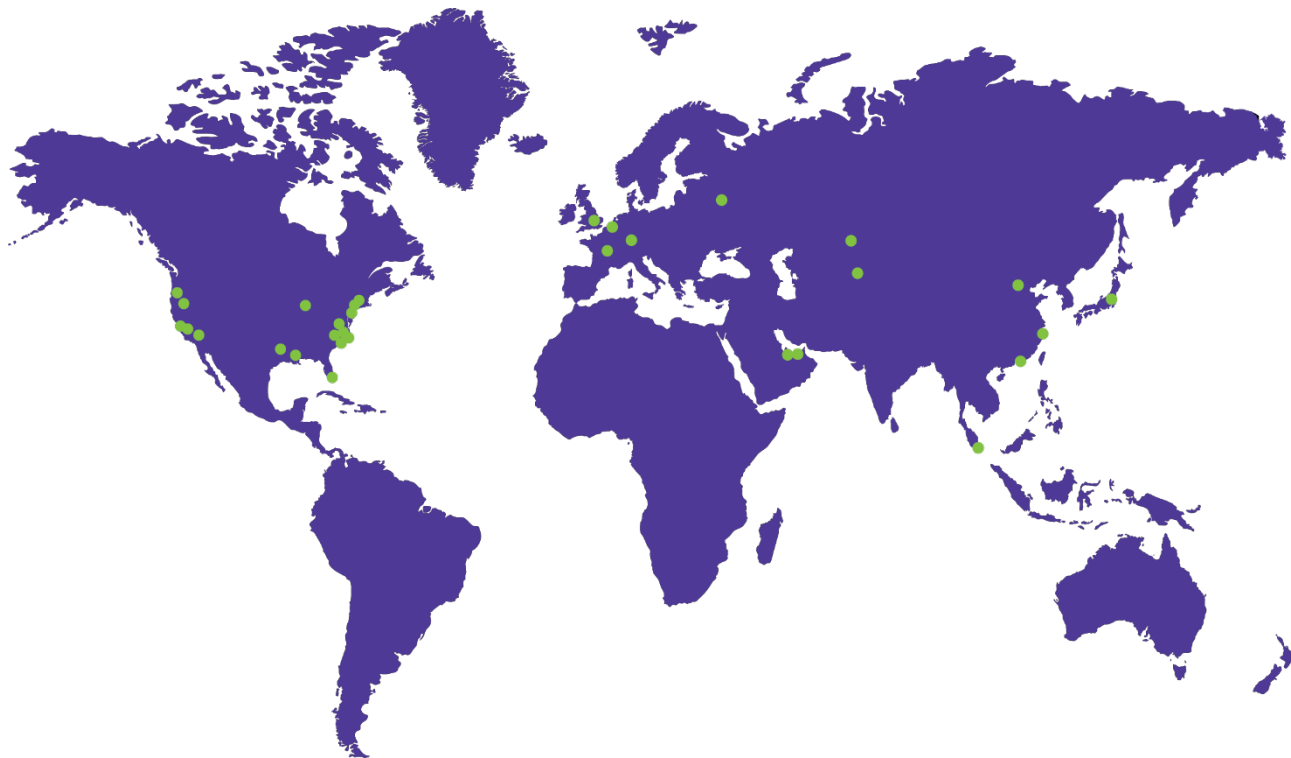


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