

November 2021

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OSHA Releases Emergency Temporary Standard Implementing Vaccine Mandate for Large Employers

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As we previously [reported](#), President Biden announced a comprehensive national strategy to combat the ongoing COVID-19 pandemic on September 9, 2021. As part of that plan, the Department of Labor's Occupational Safety and Health Administration ("OSHA") was directed to issue an Emergency Temporary Standard ("ETS") to implement a comprehensive "vaccinate-or-test" requirement for employers with 100 or more employees.

On November 4, 2021, OSHA released the ETS (available [here](#)), which is effective immediately upon its publication in the November 5, 2021 Federal Register. See 86 Fed. Reg. 61402. OSHA has published [a number of resources](#) regarding the ETS, including a [30-minute webinar](#) to help employers and workers understand the requirements.

Employers must comply with all of the ETS requirements within 30 days after the effective date (December 5, 2021), except for the requirements related to COVID-19 testing and completion of employee vaccinations, which employers must comply with no later than 60 days after the effective date (January 4, 2022). Failure to comply with the ETS could result in on-site inspections by OSHA and penalties of up to \$13,653 per violation or up to \$136,532 per willful or repeated violation.

Who is covered by the ETS?

The ETS applies to all employers having a total of 100 or more full-time and part-time employees across the company at any time the ETS is in effect (regardless of their work location, and including employees working remotely or from home). Independent contractors are not included in the count. The ETS does not apply to workplaces covered under the Safer Federal Workforce Task Force Guidance for Federal Contractors and Subcontractors (which we discussed in a [prior client alert](#)) or to healthcare providers covered under the previously issued Healthcare ETS.

While the ETS provides some guidance on multi-employer situations and franchisor/franchisee arrangements, it does not specifically address whether affiliates and subsidiaries must be included under a "one employer" theory, or whether subsidiaries and affiliates organized as separate entities should each be treated separately.¹ As a result, employers should recognize there is risk in treating subsidiaries as separate entities, and should document an appropriate record, showing that subsidiaries have

separate locations, separate management and their own HR/Health & Safety programs if they choose to treat subsidiaries separately.

Do the ETS requirements apply to all employees of a covered employer?

No. Although all employees are considered for purposes of the 100-employee threshold, the requirements of the ETS do not apply to workers who do not report to a workplace where other individuals (e.g., co-workers or customers) are present, those who work exclusively outdoors, or workers while working from home.

What kind of policy must an employer implement?

Covered employers must either (1) have a written mandatory vaccination policy or (2) have a written policy allowing employees to choose either to get vaccinated or to undergo regular COVID-19 testing and wear a face covering at work. That said, OSHA “strongly prefers that employers adopt a mandatory vaccination policy, as vaccination is singularly effective at protecting workers from the severe consequences that can result from a COVID-19 infection.”

A mandatory vaccination policy must have exemptions/accommodations for medical necessity, a disability, or a sincerely held religious belief.

OSHA has published policy templates for both a [mandatory vaccination policy](#) and a [vaccinate-or-test and face covering policy](#).

What does “regular testing” mean?

For an employee who reports to work regularly where other individuals are present, the employee must be tested at least once every 7 days and must provide documentation of her/his most recent COVID-19 test result to the employer no later than 7 days after the last result was provided. If an employee does not report to work where other individuals are present during a period of 7 or more days, then the employee must be tested within 7 days prior to returning to the workplace and must provide documentation of that test result upon returning to the workplace.

Employees must complete a vaccination series (i.e., receive their second Moderna or Pfizer dose, or one Johnson & Johnson dose)² by January 5, 2022 in order to avoid the testing requirement. Any employees who have not yet completed a vaccination series by that date must be tested at least weekly until they are fully vaccinated.

If an employee fails to timely provide documentation of a COVID-19 test result, the employer must exclude the employee from the workplace until the employee provides a result.

What kind of COVID-19 tests are acceptable?

Tests must be cleared, approved, or authorized by the FDA to detect current infection (e.g., a viral test) and administered in accordance with the authorized instructions. Note that self-administered, self-read, and over-the-counter tests are not sufficient unless observed by the employer or an authorized healthcare provider.

Independent confirmation of self-administered and self-read tests can be accomplished in multiple ways, including through the involvement of a licensed healthcare provider or a point-of-care test provider. If an OTC test is being used, the employer can validate the test through the use of a proctored test that

is supervised by an authorized telehealth provider. Alternatively, the employer could proctor the OTC test itself.

Who pays for the COVID-19 testing?

The ETS explicitly does *not* require employers to pay for any costs associated with testing. That said, employers may wish to pay for testing in order to retain talent in a tight labor market, or may want unvaccinated workers to bear the cost of testing as an inducement to become fully vaccinated.

Is an employer required to pay for time spent being vaccinated?

Yes. The ETS requires employers to “support COVID-19 vaccination” by providing a reasonable amount of time for employees to receive each primary (i.e., non-booster) vaccination dose, providing up to 4 hours of paid time (including travel time) at the employee’s regular rate of pay for each primary vaccination dose, and providing reasonable time and paid sick leave to recover from any side effects following any primary vaccination dose. If an employee does not have any accrued sick leave to use for these purposes, the employer must provide additional leave.

How should an employer determine and document employee vaccination status?

Acceptable proof of vaccination status is:

1. The record of immunization from a health care provider or pharmacy;
2. A copy of the COVID-19 Vaccination Record Card;
3. A copy of medical records documenting the vaccination;
4. A copy of immunization records from a public health, state, or tribal immunization information system; or
5. A 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).

If an employee is unable to produce acceptable proof of vaccination, then the employer may accept a signed and dated attestation by the employee stating the employee’s vaccination status and that the employee has lost or is otherwise unable to produce acceptable proof. The attestation must also include a statement certifying that the information provided about vaccination status is “true and accurate” and that the employee understands that “knowingly providing false information regarding my vaccination status” could result in criminal penalties.

How should an employer keep records of employee vaccination status?

Employers must:

- Maintain a record (physically or electronically) of each employee’s vaccination status;
- Preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated; and
- Maintain a roster of each employee’s vaccination status.

Such records or rosters are considered employee medical records and must be maintained confidentially and separate from an employee's personnel file.

What about records of employee testing?

The employer must maintain a record of each test result required to be provided by each employee pursuant to this ETS or obtained during tests conducted by the employer. These records must be maintained in accordance with 29 CFR 1910.1020 as employee medical records and must not be disclosed except as required by this ETS or other federal law. Although these records are not subject to the retention requirements of 29 CFR 1910.1020(d)(1)(i) (Employee medical records), they must be maintained and preserved while this ETS remains in effect.

What about face coverings?

Employers must ensure that each employee who is *not* fully vaccinated properly wears a face covering when indoors and when occupying a vehicle with another person for work purposes. Exceptions are made for when:

- An employee is alone in a room with floor to ceiling walls and a closed door;
- The employee is eating or drinking, or for identification purposes in compliance with security;
- An employee is wearing a respirator or facemask, as defined by OSHA standards;
- The use of face coverings is infeasible or creates a greater hazard.

What happens if an employee tests positive for COVID-19?

Employers must require that each employee promptly provide notice of a positive COVID-19 test. The employer must then remove any positive employee (regardless of vaccination status) from the workplace until the employee: (1) receives a negative nucleic acid amplification test following a positive antigen test; (2) meets the [CDC's Isolation Guidance](#) for returning; or (3) receives a recommendation to return to work from a licensed healthcare provider.

Employees that have had a positive test or were diagnosed with COVID-19 by a licensed healthcare provider are not subject to the weekly testing requirement for 90 days after the positive test or diagnosis due to the likelihood of false positive results that do not indicate active infection but instead are a reflection of past infection. After the 90-day period is complete, if an employee is not fully vaccinated, weekly testing must resume.

Are there any required postings or other notices to employees?

Yes. The ETS requires employers to provide to each employee, in a language and at a literacy level the employee understands, the following information:

- The requirements of the ETS;
- Employer policies and procedures established to implement the ETS;
- The CDC's "[Key Things to Know About COVID-19 Vaccines](#)";
- The anti-discrimination and anti-retaliation requirements of the OSH Act and its implementing regulations; and

- The legal prohibitions that provide for criminal penalties associated with knowingly supplying false statements or documentation.

Do COVID-19 fatalities and hospitalizations need to be reported?

Yes. Employers must report to OSHA each work-related COVID-19 fatality within 8 hours of learning about the fatality and each work-related COVID-19 in-patient hospitalization within 24 hours of learning about the hospitalization.

What about conflicting state or local law?

The ETS is intended to preempt “all State or local requirements . . . that ban or limit the authority of employers to require vaccination, face covering, or testing.” This is especially important for employers in jurisdictions such as Texas, Arkansas, and Montana that have prohibited private employers from implementing mandatory vaccination policies. The ETS explicitly states that such state laws are fully preempted by the ETS, even where the employer could potentially comply with both the ETS and the state laws. However, numerous states already have filed, or have announced they intend to file, challenges to block enforcement of the ETS.

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¹ The FAQs do state: “The count should be done at the employer level (firm- or corporate-wide), not the individual location level. Therefore, for a single corporate entity with multiple locations, all employees at all locations are counted. For example, if a single corporation has 50 small locations (e.g., kiosks, concession stands) with at least 100 total employees in its combined locations, that employer would be covered even if some of the locations have no more than one or two employees assigned to work there.” FAQ 2.A.2.

² Booster shots and additional doses beyond the primary vaccination series (i.e., the first dose for Johnson & Johnson’s vaccine, and the second dose for both Pfizer and Moderna) are not necessary for an employee to be considered “fully vaccinated” under the ETS.

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