

OSHA Issues Emergency Temporary Standard Requiring COVID-19 Tests or Vaccinations for Most Employers

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Less than two months after receiving direction from President Joe Biden, the Occupational Safety and Health Administration (OSHA) has issued an Emergency Temporary Standard (ETS) covering employers with at least 100 employees. Employers must comply with many of the requirements within 30 days and begin required testing within 60 days of the November 5, 2021, effective date.

The ETS places additional burdens on employers (and employees) already straining under workforce shortages, supply chain issues, and varying standards and guidance related to COVID-19. The ETS is expected to face multiple legal challenges.

Employers Covered

The OSHA ETS applies to employers with at least 100 employees company-wide.

It does not apply to:

- [Workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors](#); or
- Settings where any employee provides healthcare services or healthcare support services when subject to the Emergency Temporary Standard for healthcare employers (Subpart U – 29 CFR §1910.502).

The ETS also does not apply to the employees of covered employers:

- Who do not report to a workplace where other individuals, such as coworkers or customers, are present;
- While working from home; or
- Who work exclusively outdoors.

At any time during the duration of the ETS, if an employer employs at least 100 workers, the requirements of the ETS will apply regardless of fluctuations in the size of the employer's workforce.

Required Policy

OSHA's ETS requires employers who have at least 100 employees (company-wide, not just at one facility) to institute either a mandatory vaccine policy or a weekly testing and mask policy.

Employers must inform employees of their policies and procedures designed to comply with the ETS, the Centers for Disease Control and Prevention's "Key Things to Know About COVID-19 Vaccines," OSHA's prohibition against retaliation for reporting workplace illnesses or injuries and OSHA's whistleblower protections, and the criminal

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penalties associated with knowingly supplying false statements or documentation.

Vaccination Exceptions Allowed in a Mandatory Vaccination Policy

If an employer adopts a mandatory vaccination policy to comply with the OSHA ETS, it must require vaccination of all employees (and of all new employees as soon as practicable), other than those:

- For whom a vaccine is medically contraindicated;
- For whom medical necessity requires a delay in vaccination; or
- Who are legally entitled to a reasonable accommodation under federal civil rights laws, because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.

How is Vaccination Status Determined?

The employer must require each vaccinated employee to provide acceptable proof of vaccination status, including whether they are fully or partially vaccinated.

Acceptable proof of vaccination status is:

- The record of immunization from a healthcare provider or pharmacy;
- A copy of the 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; or
- 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).
- Where an employee is unable to produce acceptable proof of vaccination (as outlined above), a signed and dated statement by the employee:
 - Attesting to their vaccination status (fully vaccinated or partially vaccinated);
 - Attesting that they have lost and are otherwise unable to produce proof required by this section; and
 - Including the following language: "I declare (or certify, verify, or state) 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."
 - An employee who attests to their vaccination status, to the best of their recollection, should include the following information in their attestation: 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).

What Records Must Be Maintained?

According to the OSHA ETS, the employer must maintain a record of each employee's vaccination status. The employer must preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated, along with a roster of each employee's vaccination status. Significantly, employers that have already ascertained vaccination status *prior to the effective date of the ETS* through another form, attestation, or proof and retained records, are exempted from re-determining the vaccination status of individuals whose fully vaccinated status has been previously documented.

In addition, the employer must maintain a record of each test result provided by each employee.

These records and roster are considered employee medical records and must be maintained as such records. They must not be disclosed except as required or authorized by federal law. These records and roster must be maintained and preserved while this section remains in effect, but are *not* subject to OSHA's standard 30-year retention requirement.

Paid Time Off for Vaccine Time

According to the ETS (and similar to the earlier [ETS for Healthcare](#)), employers must provide paid time off for employees to get vaccinated (up to four hours) and to recover from any side effects. The ETS requires up to four hours of paid time to receive each dose of the vaccine, including travel time, at the employee's regular rate of pay. The ETS requires "reasonable time and paid sick leave" to recover from the side effects of each dose of the vaccine.

Who Pays for Testing?

OSHA permits employers to pass the expense for testing to employees, subject to the requirements of other laws.

Whether employers can require employees to pay for their own tests will depend on state law and whether testing is offered as a reasonable accommodation. Many states have laws requiring employers to pay the cost of any required medical exams or tests or expense reimbursement laws, which may be implicated.

The Fair Labor Standards Act (FLSA) and state law will govern whether employers have to pay for the time associated with getting testing and awaiting results.

It is also unclear at this time whether, under the FLSA, the cost of testing may drop an employee's effective rate of pay below the federal minimum wage.

Conflicting State Law?

Although some states have their own state OSHA plans, such plans generally must be "at least as effective as" the standard set by OSHA. In those states, the federal OSHA ETS will not apply immediately.

There are currently 22 states that have OSHA-approved State Plans regulating private sector employers. (Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Tennessee, South Carolina, Utah, Vermont, Virginia, Washington, Wyoming, and Puerto Rico.) Those states have 30 days to adopt the federal standard or inform OSHA of their plans to do something else. In addition to their own OSHA plans, some states have passed laws prohibiting or limiting employers' ability to require COVID-19 vaccines.

OSHA's ETS is intended to comprehensively address the occupational safety and health issues of vaccination, wearing face coverings, and testing for COVID-19. It, therefore, preempts any state or local requirements on these issues, except those from an OSHA-approved State Plan. Thus, the ETS preempts any state or local requirements banning or limiting an employer from requiring vaccines, face coverings, or testing.

What Type of Tests are Required?

According to the OSHA ETS, the COVID-19 test must be:

- Cleared, approved, or authorized, including in an Emergency Use Authorization, by the Food and Drug Administration to detect current infection with the SARS-CoV-2 virus (*e.g.*, a viral test);
- 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.

Examples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory (including home or on-site collected specimens that are processed individually or as pooled specimens), proctored over-the-counter tests, point-of-care tests, and tests where specimen collection and processing is done or observed by an employer.

When Must Testing Occur?

Employees who are not fully vaccinated must submit to testing at least weekly if present in the workplace at least once a week or within seven days before returning to work if away from the workplace for a week or longer.

For individuals who have received a positive COVID-19 test or who have been diagnosed with COVID-19, the ETS provides an exception from testing for the 90-day period following the positive diagnosis or test.

Employees who are not fully vaccinated and do not meet the testing requirements must be removed from the workplace pending a test result.

Removal for Positive Tests

Regardless of vaccination status, employees who test positive for COVID-19 or who are diagnosed with COVID-19 must be removed from the workplace until they meet certain return-to-work criteria. The ETS does not require paid leave for employees who are removed, but acknowledges that other laws may impose such obligations.

What Other Requirements Apply?

Masking: Subject to limited exceptions, employers are required to enforce the wearing of masks for those who are unvaccinated when indoors and when occupying a vehicle with another person for work purposes. Like testing costs, the ETS does not mandate employers to pay for face coverings required by the ETS.

Reporting: Employers are required to report work-related COVID-19 hospitalizations and fatalities to OSHA (within 24 hours of hospitalization and eight hours of a fatality). Under OSHA's normal reporting standards, work-related hospitalizations and fatalities must be reported only if they occur within a certain time period following the work-related incident (24 hours for hospitalization and 30 days for a fatality). Those time periods do *not* apply to work-related COVID-19 hospitalizations or fatalities, meaning, employers must still notify OSHA even if the hospitalization or fatality occurs *after* those time periods.

Notice: Employers must require employees to provide prompt notice when they receive a positive COVID-19 test or are diagnosed with COVID-19.

When Does the ETS Take Effect?

The OSHA ETS takes effect immediately, except in those states that have their own state plans. However, employers have 60 days to comply with the testing requirements of the ETS and 30 days to comply with the remaining provisions. State plan states have 30 days from the effective date to adopt the federal standard or inform OSHA of their plans to do something else.

If you have questions about your compliance obligations under applicable federal or state laws, or need assistance with OSHA inspections and citations, please reach out to the Jackson Lewis attorney with whom you often work, or any member of our Workplace Safety and Health Practice Group, our Disability, Leave and Health Management Practice Group, or our [COVID-19 team](#).

(Law clerk Nawal Chaudry contributed to this article.)

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