

PUBLICATION

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

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On November 4, 2021, the Occupational Safety and Health Agency (OSHA) released the highly anticipated COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS) covering employers with at least 100 employees. This ETS is expected to be published on November 5, 2021, and will be effective upon publication. 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 was part of President's Biden's "Path Out of the Pandemic Plan" that has the unapologetic and stated purpose of vaccinating as many Americans as possible. Although the ETS and related published materials generally assert that this ETS preempts states, and political subdivisions of states, from banning or limiting the published mandates set forth in the guidance, we anticipate a full onslaught of litigation on a myriad of issues associated with this ETS. The future trajectory of this ETS may be uncertain as a result of potential legal challenges.

Covered Employers

Generally, the ETS applies whenever an employer has 100 or more employees. The ETS includes a series of FAQs that specifically address the 100 or more employee threshold. The count should be done at the corporate-wide level and not an individual location level. The example OSHA provided is as follows: "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." Beyond that, all employees – whether working remotely, full-time, part-time, or seasonal, or whether working at a customer site – must be counted.

The ETS does not cover employers already subject to the [Health Care ETS](#) published earlier this year or by employers covered under [Executive Order 14042](#) and the implementing Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, the deadline of which has been extended from December 8, 2021 to January 4, 2022.

Further, employees who do not report to a workplace where other individuals, such as coworkers or customers, are present, employees who work from home, and employees who exclusively work outdoors are exempted under the ETS.

Below is a brief summary of the ETS requirements for covered employers:

Required Policy. Employers are required to 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 penalties associated with knowingly supplying false statements or documentation.

Mandatory Vaccination or Vaccine and Test Approach. In general, the ETS requires that covered employers roll out *either* a mandatory vaccination policy *or* a policy that requires full vaccination or regular COVID-19 testing coupled with a face covering policy. The policy must be written and must be provided to OSHA within four business hours if formally requested. The OSHA website provides employers with a sample Mandatory Vaccination Policy Template as well as a COVID-19 Vaccination, Testing, and Face Covering Policy Template.

Under a mandatory vaccination approach, absent undue hardship, employees may be entitled to a reasonable accommodation under the Americans with Disabilities Act because they have a disability or Title VII of the Civil Rights Act because of a sincerely held religious belief or practice if the employee cannot be vaccinated or wear a face covering.

Determination of Vaccination Status. Every covered employer is required to determine the vaccination status of each employee. The ETS outlines the types of acceptable proof of vaccination status that an employer may accept as follows:

- The record of immunization from a health care 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).

Any employee who does not provide one of the acceptable forms of proof of vaccination status outlined in the ETS should be treated as not fully vaccinated.

Recordkeeping Requirements. It is the employer's responsibility to maintain a record of each employee's vaccination status and to preserve acceptable proof of vaccination status. Covered employers must also maintain a roster of each employee's vaccination status. All employees, regardless of vaccination status, should be included on the roster. These records and roster are considered medical records and should be maintained accordingly. Any employer who ascertained employee vaccination status prior to November 5 through another form of attestation or proof and retained records of that may be exempt from duplicative efforts.

Paid Time Off for Vaccination and Recovery. Covered employers are required to support COVID-19 vaccination by providing reasonable paid time off for each employee to obtain their vaccination dose(s). Actual working time spent obtaining the vaccination up to four hours, including travel time, must be paid by the employer for each dose of the vaccine. The four hours of paid working time that employers must provide for the administration of each primary vaccination dose *cannot* be offset by any other leave that the employee has accrued, such as sick leave or vacation leave. Employers are not required to pay employees who obtain their vaccination doses outside of working hours.

Employers may require employees to use paid sick time or other forms of paid leave for reasonable time to recover from side effects experienced in connection with each vaccination dose, however, employers cannot require employees "to go into the negative" if the employee does not have paid time off available.

COVID-19 Testing Requirements. Employees who are not fully vaccinated must be tested for COVID-19 at least once every seven days if they report at least once every seven days to a workplace where other individuals are present. Employees who telework or do not regularly report to a workplace at least every seven days must be tested within seven days prior to returning to the workplace.

Although the ETS does not require employers to pay for any costs associated with testing, employers may be required to pay for it under other federal, state, or local laws, regulations, or collective bargaining agreements.

The ETS directs an employer to keep an employee who fails to provide test results out of the workplace. An exception does exist for employees who have received a positive COVID-19 test or have been diagnosed with COVID-19 by a licensed health care provider. In those situations, an employee may be relieved of testing requirements for up to 90 days after the date of the positive test or diagnosis. Testing records are considered employee medical records and must be maintained accordingly. Under the ETS, the COVID-19 test must be:

- cleared, approved, or authorized, including Emergency Use Authorization, by the FDA to detect current infection;
- administered in accordance with the authorized instructions; and
- not both self-administered and self-read, unless observed by the employer or an authorized telehealth provider.

Workplace Removal. Employees are required to promptly notify employers whenever they receive a positive COVID-19 test result or are diagnosed with COVID-19 by a licensed health care provider. Once notified, the employer must immediately remove the employee from the workplace until the employee receives a negative result from a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test, meets the return-to-work criteria outlined in the CDC's Isolation Guidance, or received a recommendation to return to work from a licensed health care provider. In contrast to the previously issued Healthcare ETS, employers are not required to provide employees with paid leave for workplace removal as a result of a positive COVID-19 test or diagnosis, but OSHA acknowledges that other laws may impose such obligations on employers.

Face Coverings. Any employee who is not fully vaccinated should wear a face covering indoors unless they are alone in a room with floor to ceiling walls and a closed door or for a limited time while eating or drinking or for identification purposes in compliance with safety and security requirements. Nothing in the ETS prohibits employers from requiring customers and workplace visitors from wearing face coverings.

Employee Information. The ETS requires the employer to provide any policies and procedures related to the ETS in a language and at a literacy level the employee understands. Additionally, employers must provide each employee with a copy of the "Key Things to Know About COVID-19 Vaccines" document available on the

CDC website. The employer should also provide employees with information regarding an employer's inability to discharge or discriminate against an employee for reporting a workplace injury or illness or from filing a complaint with OSHA. Further, the employee must be informed that criminal penalties are associated with knowingly supplying false statements or documentation.

OSHA Reporting. Employers must report each work-related COVID-19 fatality within eight hours of the employer learning about it. Each work-related COVID-19 in-patient hospitalization should be reported within 24 hours of the employer learning about the hospitalization.

Record Availability. Individual COVID-19 vaccine documentation and any COVID-19 test results maintained by the employer must be made available to an employee for examination and copying by the end of the next business day after a request. Additionally, employees may request information regarding the total number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

Effect on State OSHA Plans. State OSHA plans generally must be "at least as effective as" the standard set by OSHA. Some state plans cover private employers as well as state government workers. In those [states](#), the federal OSHA ETS will not apply immediately. States will have 30 days to adopt the federal ETS or inform OSHA of their plans for compliance.

Enforcement and Possible Penalties. Enforcement will largely fall to employers themselves. It is anticipated that OSHA inspectors will respond to employee complaints of non-compliance and will add COVID-related inspection protocols when they are already on-site for inspections. Fines for OSHA violations can range from \$13,653 per violation to up to ten times that for willful or repeated violations.

Effective Date. The effective compliance date for providing time off for vaccination and face coverings for employees who are not fully vaccinated is December 5, 2021. Compliance with any vaccination portion of the ETS (or testing in lieu of vaccination portion) must occur on or before January 5, 2021.

This ETS is already facing the threat of lawsuits from several states. Baker Donelson will continue to provide alerts as to any notable developments. For now, covered employers should begin assessing their compliance obligations now to meet the pending effective dates of the ETS. If you have any questions about this ETS or need assistance putting your compliance plan into place, please contact one of the authors or any member of Baker Donelson's [Labor & Employment Team](#).