

OSHA Issues COVID-19 Emergency Temporary Standard for Large Employers

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Introduction

On November 4, 2021, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) announced an Emergency Temporary Standard (ETS) applicable to large employers of 100 or more employees aimed at encouraging vaccinations and protecting employees from the grave danger of employees contracting COVID-19 in the workplace. Employers have the duty under the OSH Act to provide safe workplaces to their employees, including protecting employees from known hazards by complying with occupational safety and health standards.

This ETS applies to employers in all industries covered by the OSH Act and targets unvaccinated workers in any indoor work setting where more than one person is present. This ETS will apply to workplaces that are as diverse as schools, restaurants, retail settings, offices, prisons, and factories. However, this ETS does not apply in settings where any employee provides healthcare services or healthcare support services while they are covered by the requirements of OSHA's prior COVID-19 rule pertaining to healthcare workers. Moreover, this ETS does not apply to workplaces covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidelines for Federal Contractors and Subcontractors.

The ETS will be published in the Federal Register and become effective on November 5, 2021. To comply, employers must ensure that provisions are addressed in the workplace by the following dates: (1) 30 days after publication: all requirements other than testing for employees who have not completed their entire primary vaccination doses; and (2) 60 days after publication: testing for employees who have not received all doses required for a primary vaccination.

While the ETS takes effect immediately, it also serves as a proposal under the OSH Act for a final standard. OSHA is seeking comment on all aspects of this ETS and how it would be adopted as a final standard. OSHA is continuing to assess the impact of this standard on employers with fewer than 100 employees. Stakeholders are invited to submit comments at www.regulations.gov. Moreover, resources, such as Questions and Answers and compliance guidance related to this ETS are available at www.osha.gov/coronavirus.

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Set forth below are the highlights of the ETS.

Compliance Options for Employers Under the ETS

A. Mandatory Vaccination Policy

- OSHA has identified vaccination as the single most efficient and effective means for removing an unvaccinated worker from the grave danger of contacting COVID-19. Although this ETS does not impose a strict vaccination mandate, OSHA has determined that, to adequately address the grave danger that COVID-19 poses to unvaccinated workers, a more proactive approach is necessary than simply requiring employers to make vaccination available to employees.
- The ETS requires employers to develop, implement and enforce a mandatory COVID-19 vaccination policy but provides an exemption for an alternative policy that allows employees to choose either to be fully vaccinated or to be regularly tested and wear a face covering in most situations when they work near other individuals.
- A mandatory vaccination policy is defined as an employer policy requiring each employee to be fully vaccinated. The policy must require vaccination of all employees, including vaccination of all new employees as practicable, other than those employees (1) for whom a vaccine is medically contraindicated; (2) for whom a medical necessity requires a delay in vaccination; or (3) 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.
- Fully vaccinated means a person's status two weeks after completing primary vaccination with a COVID-19 vaccine with, if applicable, at least the minimum recommended interval between doses in accordance with the approval, authorization, or listing that is (1) approved or authorized for emergency use by the FDA; (2) listed for emergency use by the World Health Organization; or (3) administered as part of a clinical trial at U.S. site under specified conditions.
- Employers may implement vaccination policies that differ by location or type of business operation. An example might be a retail corporation employer that has a mixture of staff working at the corporate headquarters, performing intermittent telework from home, and working in stores to serve customers.

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- Employers are required to know each employee's vaccination status to ensure that the vaccination, testing, and face covering requirements of the standard are met. The standard also requires employers to maintain records 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.

B. Employer Requirements for Alternative Testing/Face Covering Policy

- Only employers who decline to implement a mandatory vaccination program are required by the rule to assume the administrative burden necessary to ensure that unvaccinated workers are regularly tested for COVID-19 and wear face coverings when they work near others.
- A face covering means a covering that: (1) completely covers the nose and mouth; (2) is made with two or more layers of a breathable fabric that is tightly woven (light does not pass through); (3) is secured to the head with ties, ear loops, or elastic bands that go behind the head; (4) fits snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and (5) is a solid piece of material without slits, exhalation valves, visible holes, punctures or other openings.
- The ETS requires employers to ensure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances. Employers must not prevent any employee, regardless of vaccination status, from voluntarily wearing a face covering unless it creates a serious workplace hazard.
- To reduce the risk that unvaccinated workers will spread COVID-19 at the workplace, this rule requires employers that do not implement a mandatory vaccination policy to ensure that unvaccinated workers who report to a workplace where others are present are tested at least once a week for COVID-19.
- A COVID-19 test means a test that is (1) cleared, approved, or authorized, including in an Emergency Use Authorization, by the U.S. Food and Drug Administration; (2) administered in accordance with authorized instructions;

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and (3) not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

- Only diagnostic tests comply with this ETS; antibody tests do not meet the definition of COVID-19 test for the purposes of this ETS. 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 processing is either done or observed by the employer.
- Employers have the flexibility to select the testing scenario that is most appropriate for their workplaces.

C. Employer Policy Requirements

- After determining the policy, an employer must ensure that it is following the policy, as laid out in its written plan. Employers must ensure that they enforce the requirements of their policies with respect to their workforce, through training and the use of mechanisms, such as work rules and the workplace disciplinary system, if necessary.
- The policies must be comprehensive and effective and should address all requirements, including requirements for COVID-19 vaccinations; applicable exclusions from the written policy, such as medical contraindications, medical necessity delay, or reasonable accommodations for workers with disabilities or with sincerely held religious beliefs;; information on determining an employee's vaccination status and how this information will be collected; paid time and sick leave for vaccination purposes; notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace; and disciplinary action for employees who do not abide by the policy. The policy should also include the policy's effective date, to whom the policy applies, deadlines for submitting vaccination information and for becoming vaccinated; and procedures for compliance and enforcement.
- An employer who has both vaccinated and unvaccinated employees will need to develop and include in the written policy the relevant procedures for the two sets of employees.

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- An employer must address how the policy will apply to new employees. All new hires should be treated similarly to any employee who has not entered the workplace in the last seven days and will need to be fully vaccinated or provide proof of a negative COVID-19 test within the last seven days prior to entering the workplace for the first time.
- Each employer with a current policy must evaluate the policy to ensure it satisfies all requirements of this rule. Employers with existing policies must modify and/or update their current policies to incorporate any missing required elements and must provide information on these new updates or modifications to all employees.
- Employers must provide the information to employees in a language and at a literacy level the employees understand, including (1) information about the requirements of the ETS and workplace policies and procedures established to implement the ETS; (2) the CDC document, “Key Things to Know About COVID-19 Vaccines”; (3) information about protections against retaliation and discrimination; and (4) information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.

Employer Pay and Leave Obligations

- Where there is a mandatory vaccination policy, ETS requires all covered employers to provide employees with reasonable time, including up to four hours of paid time, to receive each vaccination dose, and reasonable time and paid sick leave to recover from vaccination side effects following each dose.
- Where the employer opts out of implementing a mandatory vaccination policy, and the employee opts out of vaccination, this ETS places no obligation on the employer to pay for costs associated with the regular testing of unvaccinated workers for COVID-19 or their use of face coverings.
- In some cases, employers may be required to pay testing and/or face covering costs under other federal or state laws or collective bargaining obligations, and some may choose to do so even without such a mandate, but otherwise employees will be required to bear the costs if they choose to be regularly tested and wear a face covering in lieu of vaccination.

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- Nothing prohibits the employer from voluntarily assuming the costs associated with testing.

Determining Whether Employer Has 100 Employees

- For the threshold coverage applicable to 100 employees, employers must include all employees across their U.S. locations, regardless of employees' vaccination status or where they perform their work. Part-time employees count towards the employer total, but independent contractors do not.
- The determination of whether an employer falls within the scope of this ETS based on number of employees should initially be made as of the effective date of the standard. If the employer has 100 or more employees on the effective date of the standard, this standard applies for the duration of the standard.
- If the same employer subsequently hires more workers and reaches the 100-employee threshold for coverage, the employer would then be expected to come into compliance with the standard's requirements. Once an employer has come within the scope of the ETS, the standard continues to apply for the remainder of the time the standard is in effect, regardless of fluctuations in the size of the employer's workforce.
- In a traditional franchisor-franchisee relationship in which each franchise location is independently owned and operated, the franchisor and franchisees would be separate entities for coverage purposes, such that the franchisor would only count "corporate" employees, and each franchisee would only count employees of that individual franchise.
- In other situations, two or more related entities may be regarded as a single employer for OSH Act purposes if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted.
- In situations in which employees of a staffing agency are placed at a host employer location, only the staffing agency would count these jointly employed workers for purposes of the 100-employee threshold for coverage under this ETS. The host employer would be covered by the ETS if it has 100 or more employees in addition to the employees of the staffing agency.

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- On a typical multi-employer worksite, such as a construction site, each company represented – the host employer, general contractor, and each subcontractor - only need to count its own employees, and the host and employer and general contractor would not need to count the total number of workers at each site.

Exemptions for Certain Employees of Covered Employers

- Even where the standard applies to a particular employer, its requirements do not apply to employees who (1) do not report to a workplace where other individuals, such as co-workers or customers are present; (2) while working from home; or (3) who work exclusively outdoors.
- A workplace includes the entirety of any space associated with the site, such as workstations, hallways, stairwells, breakrooms, elevators and any other space that an employee might occupy in arriving, working, or leaving.
- Workplaces that are truly outdoors typically do not include any of the characteristics that normally enable transmission of COVID, such as poor ventilation, enclosed spaces and crowding.
- This exemption only applies to employees while they are working from home. An employee who switches back and forth from teleworking to working in a setting where other people are present, such as an office, is covered by this ETS and must be vaccinated if required by the employer. If not required, the teleworking employee must either be vaccinated or complete testing and wear a face covering in accordance with the employer's policy.
- Employees whose indoor time is interrupted by the indoor periods are subject to the requirements of this ETS.
- If an employee work primarily outdoors but routinely occupies vehicles with other employees as part of work duties, that employee is not covered by the exemption.

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Reporting Obligations

- The ETS requires employers to (1) require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19; (2) immediately remove any employee from the workplace, regardless of vaccination status, who received a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider; (3) keep removed employees out of the workplace until they meet criteria for returning to work.
- Employers are required to report work-related COVID-19 fatalities to OSHA within eight hours of learning about them, and work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization.

Record-Keeping Obligations

- The ETS requires employers to make available for examination and copying an employee's COVID-19 vaccine documentation and any COVID-19 test results to that employee and to anyone having written authorized consent of that employee. Employers are required to make available to an employee, or an employee representative, the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.
- Acceptable forms of proof of vaccinations include: (1) the record of immunization from a healthcare provider or pharmacy; (2) a copy of the U.S. CDC COVID-19 Vaccination Record Card; (3) 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).
- In instances where an employee is unable to produce acceptable proof of vaccination, a signed and dated statement by the employee will be acceptable and must include the employee's statement (1) attesting to their vaccination status; (2) attesting that they have lost or are otherwise unable to produce proof required by the standard; (3) and include language that "I declare (or certify, verify, or state) that this statement about my vaccination

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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.”

- Maintenance of records regarding vaccination status are subject to applicable legal requirements for confidentiality of medical information.
- Vaccination records must be maintained and preserved while the ETS remains in effect.

Preemption of State and Local Laws

- OSHA intends the ETS to address comprehensively the occupational safety and health issues of vaccination, wearing face coverings, and testing for COVID-19. This ETS is intended to preempt States and political subdivisions of States, from adopting and enforcing workplace requirements relating to these issues, except under the authority of a Federally-approved State Plan. OSHA intends to preempt any State or local requirements that ban or limit an employer from requiring vaccination, face covering, or testing.

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A labor and employment attorney with more than 35 years of experience, including as in-house counsel, Ms. Holtzman is a trusted advisor to employers, including Fortune 100 companies seeking to manage risk with their human capital. She has led investigations and been a national speaker on a myriad of employment topics, including discrimination, harassment, and board governance following the emergence of the #MeToo movement. Ms. Holtzman also recently led the American Bar Association’s 20,000-member Labor and Employment Law Section. Certified by the Supreme Court of Florida as a Circuit Civil Mediator and a Fellow of the College of Labor and Employment Lawyers, Ms. Holtzman is a member of the Florida Bar and District of Columbia Bar.