



OSHA Releases COVID-19 Vaccination and Testing Emergency Temporary Standard

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On September 9, President Joe Biden announced that employers with 100 or more employees will be required to mandate that all employees be vaccinated against COVID-19 or undergo weekly testing. On November 4, the Occupational Safety and Health Administration (OSHA) released an Emergency Temporary Standard (ETS) supplementing the healthcare industry ETS it adopted in June to implement this requirement. The ETS becomes effective on the date it is published in the Federal Register. We anticipate that will occur on November 5, 2021.

The entire ETS is 490 pages. This article highlights only certain key requirements.

Coverage

Who must comply?

- The ETS applies to all employers with 100 or more employees at any point on or after the effective date of the ETS. The ETS attempts to eliminate potential employer efforts to exempt themselves by reducing the number of employees after the effective date.
- This includes not only employers subject to OSHA's General Industry and Construction standards but also to employers subject to OSHA's Shipyards, Marine Terminals, and Longshoring standards.
- Employers subject to the Agricultural standards need only comply if 11 or more employees are engaged on any given day in hand-labor operations in the field or if they maintain a temporary labor camp.
- State and local governments that are outside of Federal OSHA's jurisdiction are not subject to the requirements of the

ETS.

Are there any exempt worksites?

- Yes. Workplaces covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for federal contractors and subcontractors and settings where employees provide healthcare support services when subject to the requirements of § 1910.502 are exempt.

Are there any exempt employees?

- Yes. Employees who do not report to a workplace where other individuals such as coworkers or customers are present, employees working from home, and employees working exclusively outdoors are exempted from the requirements of the ETS.

What are the relevant effective dates?

- The ETS is effective immediately upon publication in the Federal Register; the ETS is scheduled to be published on **Friday, November 5, 2021**. Employers will then be required to implement all requirements of the ETS, except the weekly testing requirement, **30 days after publication (December 5, 2021)**. Employers must come into compliance with the weekly testing requirement within **60 days after publication (January 4, 2022)**.

Vaccination Requirement

Must covered employers implement a written policy requiring employees to be vaccinated against COVID-19?

- Yes, unless employers implement a written policy that allows employees to choose between vaccination or regular testing (see more information on testing below).
- Employees must be fully vaccinated against COVID-19 unless: (i) vaccination is medically contraindicated, (ii) medical

necessity requires a delay in vaccination, or (iii) the employee is entitled to a reasonable accommodation because of a disability or sincerely held religious belief.

- Employers must require new employees to be vaccinated as soon as practicable.

Did OSHA release a model vaccination policy?

- Yes. A copy of the Mandatory Vaccination Sample policy can be found here: [COVID-19 Vaccination and Testing ETS | Occupational Safety and Health Administration \(osha.gov\)](https://www.osha-slc.gov/COVID-19/Vaccination-and-Testing-ETS/)

When are employees considered fully vaccinated for purposes of this ETS?

- Two weeks after completing primary vaccination with a COVID-19 vaccine that is: (i) approved or authorized for emergency use by the FDA, (ii) listed for emergency use by the World Health Organization (WHO), or (iii) administered as part of a clinical trial at a U.S. site, subject to certain requirements.

How must covered employers verify an employee's vaccination status?

- Employers are required to verify an employee's vaccination status. Examples of acceptable proof of vaccination include official immunization records, a copy of the employee's vaccination card, a copy of medical records, or a copy of another official document that contains that information.

Is a statement from an employee acceptable as proof of vaccination status?

- Yes. A signed and dated statement from the employee is acceptable, provided that it attests to their vaccination status (either partial or full), attests that they have lost and are unable to produce proof of their vaccination status, and includes language certifying the truth of their statement subject to criminal penalties.

What if a covered employer ascertained an employee's vaccination status prior to the issuance of this ETS?

- Employers who, prior to the effective date of this ETS, already determined and documented an employee's vaccination status are exempt from the determination of vaccination requirements under the ETS.

Is there an exemption to the mandatory vaccination policy?

- Yes. The ETS provides a limited exemption from the mandatory vaccination policy requirement for employers who establish, implement, and enforce a written policy permitting employees to: (i) choose to be fully vaccinated against COVID-19, or (ii) provide proof of regular testing for COVID-19 in accordance with the ETS, and wear a face covering.

Paid Time Off

When must covered employers provide employees with paid time off under the ETS?

- Employers must provide employees with reasonable time for each of their primary vaccination doses and provide up to four hours paid time, including travel time, at the employee's regular rate of pay for this purpose.
- Employers must also provide employees with reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination dose to each employee for each dose. The ETS does not provide any "cap" on what is considered reasonable recovery time that must be paid.
- Employers are not required to provide paid time to any employee who is required to be removed from the workplace as a result of a positive COVID-19 test or diagnosis of COVID-19. Note: Paid time off may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements.

Testing/Cost of Testing

Who must bear the cost of COVID-19 testing?

- Employees who choose not to be vaccinated may bear the costs of the required COVID-19 testing, as well as costs related to the purchase of face coverings – subject to the requirements of other laws, regulations, or collective bargaining agreements. The DOL's wage and hour division has not yet addressed this issue.
- OSHA only requires employers to bear the costs of employee compliance with the vaccination provision.

How often must employees who choose not to be vaccinated undergo COVID-19 testing?

- Employees who report at least once every seven days to their workplace must be tested for COVID-19 at least once every seven days and provide documentation of the most recent COVID-19 test result to the employer no later than the seventh day following the date the employee last provided a test result.

How often must employees who do not report to work at least once every seven days undergo COVID-19 testing?

- Those employees must be tested for COVID-19 within seven days prior to returning to the workplace and provide documentation of that test result upon their return to work.

Which COVID-19 tests are acceptable for purposes of this ETS?

- Acceptable COVID-19 tests are those approved by the Food and Drug Administration (FDA) in an Emergency Use Authorization that are administered in accordance with the authorized instructions and not self-administered and self-read unless observed by the employer or an authorized telehealth proctor.
- Examples include tests with specimens processed by a laboratory, proctored over-the-counter tests, point of care tests, and tests where specimen collection is either done or observed by an employer.

Is there an exemption for COVID-19 testing?

- Yes. A covered employer must not require an employee who received a positive COVID-19 test or was diagnosed with COVID-19 by a licensed healthcare provider, to undergo COVID-19 testing for 90 days following the date of their positive test or diagnosis.

Record Keeping

Must covered employers keep a record of test results provided by employees?

- Yes.

Are records of test results considered medical records?

- Yes. These records must be maintained in accordance with 29 CFR 1910.1020 (Access to Records Standard) and must not be disclosed except as required or authorized by the ETS and other federal law.

What are Employers' Other Recordkeeping Requirements?

- Employers must maintain a record of each employee's vaccination status and must preserve proof of vaccination for each employee who is fully or partially vaccinated. In addition, employers must also maintain a roster of each employee's vaccination status.
- Employers do not need to re-collect vaccination status and proof for those employees who provided such records prior to the ETS.
- These records and rosters must be maintained confidentially and in accordance with OSHA's employee medical records requirements under 29 CFR 1910.1020 (Access to Records Standard).
- Employers are currently only required to preserve these records while the ETS remains in effect.

- If requested by authorized personnel, employers must make available by the end of the next business day the following records: (1) individual COVID-19 vaccine documentation and any COVID-19 test results for a particular employee; and (2) the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

Impact on Healthcare Settings

What is the impact of the ETS on healthcare workers?

- Healthcare workers covered by OSHA's Healthcare ETS aren't covered by this ETS. There is no data to demonstrate that unvaccinated workers in settings covered by the Healthcare ETS face a "grave danger" from COVID-19 when the requirements of that ETS are followed.
- However, OSHA's new finding of a "grave danger" applies to unvaccinated workers in healthcare settings that are not covered by the Healthcare ETS to the same extent it applies to unvaccinated workers in all other industry sectors.
- [Click here](#) for the latest healthcare impacts from our [Healthcare Innovation](#) industry team.

Workplace Removal

What must employers do if an employee who chooses not to be vaccinated does not provide documentation of a COVID-19 test result as required by the ETS?

- In this situation, the employer must remove the employee from the workplace until the employee provides a test result.

Must employees who test positive for COVID-19 be removed from the workplace regardless of vaccination status?

- Yes. Regardless of COVID-19 vaccination status, employers must: (i) require that each employee promptly notify the employer when they receive a positive COVID-19 test or are

diagnosed with COVID-19 by a licensed healthcare provider; and (ii) immediately remove any employee from the workplace who receives a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider.

How long must employees be removed from the workplace after testing positive for COVID-19?

- Removal must occur until the employee: (i) receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if the employee initially chooses to seek a NAAT test; (ii) meets the return-to-work criteria outlined in the Center for Diseases Control's "Isolation Guidance;" or (iii) receives a recommendation to return to work from a licensed healthcare provider.

Communications to Employees

What information must covered employers provide to employees?

- Employers must provide employees with information regarding:
 - the requirements of the ETS and any policies and procedures established in response to the ETS;
 - the COVID-19 vaccine by providing the document, "Key Things to Know About COVID-19 Vaccines."
 - the requirements of 29 CFR 1904.35(b)(1)(iv) which precludes the employer from discharging or in any manner discriminating against an employee for reporting a work-related injury or illness, and section 11(c) of the OSH Act, which prohibits the employer from discriminating against an employee for exercising rights under this section; and
 - the prohibitions of 18 U.S.C. 1001 and of section 17(g) of the OSH Act, which provide for criminal penalties associated with knowingly supplying false statements or

documentation.

Reasonable Accommodations

Are Employers Required to Provide Reasonable Accommodations?

- Yes. The ETS also accounts for the fact that some employees may be entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs that conflict with the vaccination or face covering requirements.
- Employers must provide accommodations under the Americans with Disabilities Act (for qualifying disabled employees) and Title VII of the Civil Rights Act of 1964 (for qualifying employees with conflicting sincerely held religious beliefs), provided the accommodation does not pose an undue hardship to the employer.
- Employees who qualify for a reasonable accommodation from vaccinations are still subject to the weekly testing and face-covering requirements (unless an exemption to face-covering applies).

Face Coverings

Are Face Coverings Required at Work?

- In most instances, yes, for those who are not fully vaccinated.
- Employees who are not fully vaccinated (or receiving a qualifying accommodation) must wear a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances (e.g. while eating and drinking).
- Employees who are already required by OSHA's existing standards to wear a facemask or respirator do not need to also wear a face covering.

- Employers are prohibited from preventing any employees from voluntarily wearing a face covering, and OSHA continues to encourage, but not require, all employees to wear face coverings in areas of high transmission.

Reporting Requirements

What are the Reporting Requirements for COVID-19 Deaths and Hospitalizations?

- Employers' reporting requirements for deaths and hospitalizations from work-related COVID-19 exposure remain unchanged:
 - Employers must report work-related COVID-19 fatalities to OSHA within 8 hours of learning about them, and;
 - Employers must report work-related COVID-19 in-patient hospitalizations within 24 hours of learning of the hospitalization.

Penalties

What happens if a covered employer willfully disregards the requirements of this ETS?

- OSHA indicated that this ETS will enable it to issue more meaningful penalties for willful and egregious violations. Therefore, it is likely that OSHA will issue willful citations to employers who intentionally disregard their obligations under the ETS, allowing it to impose higher penalties.
- Serious violations carry a maximum penalty of up to \$13,653.
- Willful violations carry a maximum penalty of up to \$136,652.

State Plan Jurisdictions

What should covered employers in state plan jurisdictions do?

- Employers in state plan jurisdictions should monitor the requirements of their own jurisdiction and monitor when the ETS will be adopted in their jurisdiction.
- OSHA will require State Plan jurisdictions to adopt the ETS within 30 days.

While we anticipate that the ETS will face many legal challenges in the days and weeks to come, covered employers should promptly comply with the ETS' requirements. Because the ETS leaves many questions unanswered, it is particularly important for employers to seek guidance from experienced counsel when developing, implementing, and enforcing the policies required by the ETS.

For questions or additional information, please contact [Kyle D. Johnson](#), [Catherine F. Burgett](#), [Jeffrey S. Shoskin](#), [Souhila EL Moussaoui](#), [Steve M. Tolbert](#) or any attorney in Frost Brown Todd's [Labor and Employment](#) practice group.

Read more of our analysis as it relates to COVID-19 and vaccine mandates.

- [CMS Issues Interim Final Rule on Vaccine Mandate for Health Care Workers](#)
- [Nursing Homes: Spread of COVID and Vaccine Mandates](#)
- [Conflicting Orders: Can State Laws Thwart Federal Vaccine Mandates?](#)
- [EEOC COVID-19 Vaccine Mandate FAQ Updates Address Religious Objections](#)
- [Mandatory Vaccines Update: OSHA Sends Draft ETS to White House](#)
- [Thinking About Implementing a Mandatory COVID 19 Vaccine Policy? Here Is What to Consider](#)
- [Maintaining Employee Medical Information and COVID-19](#)

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