

ALERTS

OSHA Issues COVID-19 Vaccination and Testing Emergency Temporary Standard

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On Nov. 4, 2021, the Occupational Safety and Health Administration (“OSHA”) issued the COVID-19 Vaccination and Testing Emergency Temporary Standard (“ETS”). OSHA relied on its determination that COVID-19 presents a “grave danger” to unvaccinated employees in the workplace, and that an ETS is “necessary” to protect workers from the risk of contracting COVID-19 at work as the legal basis for issuing the ETS. The ETS establishes mandatory requirements for private employers with 100 or more employees to minimize the spread of COVID-19 in the workplace.

Employers Covered by the ETS

The ETS applies to employers that have a total of 100 or more employees. Full-time and part-time employees, remote employees, employees who work outdoors and temporary and seasonal workers hired directly by the employer^[1] all count toward the 100-employee threshold.^[2] In determining if an employer meets this threshold, the employer must aggregate the total number of employees in all of its U.S. workplaces and locations.

Employers who have 100 or more employees on Nov. 5, 2021 are bound by the ETS for the duration of the time the ETS is in effect (even if their employee-count shrinks below 100).^[3] An employer that initially has less than 100 employees will be bound by the ETS once it employs 100 or more employees. Federal contractors covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal

Contractors and Subcontractors Executive Order, and healthcare employees in settings covered by OSHA's previously issued, June 2021 COVID-19 Healthcare ETS[4] are not subject to the ETS.[5]

While an employer with 100 or more employees must comply with the ETS, not all of its employees may be subject to its requirements. The ETS generally only applies to employees who report to a workplace where other individuals are present, such as coworkers or customers. The ETS applies to employees who work at certain offsite locations, including in company vehicles, but does not apply to employees who work exclusively at home or outdoors. For example, if an employer has 100 employees who work exclusively at home and 50 employees who work in the office, the employer would be bound by the ETS because it has more than 100 employees, but the ETS requirements would only apply to those 50 employees who work in the office.

Compliance With the ETS

Pursuant to the ETS, covered employers must develop, implement and enforce a written mandatory COVID-19 vaccination policy or a policy that permits employees to choose either full vaccination or proof of weekly COVID-19 testing. Those employees choosing the testing option must also wear a face covering while in the workplace. Mandatory vaccination policies must require all employees to be fully vaccinated,[6] with exceptions for those employees who are legally entitled to a reasonable accommodation to the vaccination requirement due to a medical disability or a sincerely held religious belief, practice or observance.[7] Employers are not required to submit their written policies to OSHA, unless OSHA requests them to do so. The ETS does not displace collective bargaining agreements with unions that have requirements that meet or exceed the ETS' requirements.

Compliance with the ETS requires covered employers to:

- Determine the vaccination status of each employee, obtain acceptable proof of vaccination[8] and maintain records and a roster of each employee's vaccination status (fully vaccinated, partially vaccinated, not fully vaccinated because of a religious or medical accommodation or not fully vaccinated because they have not provided acceptable proof of vaccination status). OSHA considers these vaccination records to be employee medical records and requires such personally

identifiable medical information to be maintained in a confidential manner, including by storing such information separately from employees' personnel files and limiting access to such information.

- Support vaccination by providing employees reasonable time, including up to four hours of paid time off, to receive each vaccination dose and “reasonable time” and paid sick leave to recover from any side effects experienced following each dose.
- Require employees to provide prompt notice to the employer when an employee receives a positive COVID-19 test or is diagnosed with COVID-19. Such employees must be removed from the workplace, regardless of vaccination status, and must not be allowed to return to work until the employee meets certain return-to-work criteria.
- Ensure that employees who are not fully vaccinated are tested for COVID-19 at least weekly (if 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). Employers are required to maintain a record of each employee's required test results while the ETS is in effect.^[9] These records must be treated as employee medical records and remain confidential.
- Require each employee who is not fully vaccinated to wear an ETS-compliant face covering^[10] when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances. Examples of such circumstances include when an employee is alone in a room with floor to ceiling walls and a closed door, for a limited time while an employee is eating or drinking, for security identification purposes or where the employer can show that the use of face coverings is not feasible or creates a greater hazard that would excuse compliance.
- Report work-related COVID-19 fatalities and in-patient hospitalizations to OSHA.
- Make available an employee's COVID-19 vaccine documentation and any COVID-19 test results to that employee and to anyone with written authorized consent of the employee in question.
- Employers must also make available to an employee the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.^[11]

- Provide each employee with information, in a language and at a literacy level the employee understands, about the workplace policies and procedures the employer establishes to implement this ETS, as well as the CDC document “Key Things to Know About COVID-19 Vaccines.” Employers must also provide additional information to unvaccinated employees, including information about the employer’s policies and procedures for COVID-19 testing and face coverings.

Employers that previously implemented mandatory vaccination policies must evaluate and modify their policies to ensure they meet or exceed the requirements of this ETS.

Effective Dates

The ETS was effective immediately upon its publication in the Federal Register on Nov. 5, 2021. Employers must comply with all of the ETS’ requirements by Dec. 6, 2021, except that employers that offer COVID-19 testing as an option must begin testing unvaccinated employees by Jan. 4, 2022. Legal challenges to the ETS already have been filed in response to OSHA’s publication of the ETS, including challenges by twenty-five states in federal court to block the ETS. On Nov. 6, 2021, a federal court of appeals temporarily halted the enforcement of ETS due to apparent “grave statutory and constitutional issues” raised by the ETS. Action by the Supreme Court of the United States to either overrule or affirm the lower court’s order halting the enforcement of the ETS is likely forthcoming. Employers should be prepared to comply with the ETS by its original deadlines in the event the injunction against the ETS is removed.

When employers change their policies or procedures related to implementing the ETS, they must provide such updated or additional information to all employees.

Costs

The ETS does not require employers to pay for the COVID-19 testing of its employees or to pay for face coverings. Employer payment for testing, however, may be required by other laws, regulations or collective bargaining agreements or other agreements.

State Plans

Employers in certain states and territories that contain their own OSHA-approved State Plans are not required to follow this ETS. Under the terms of such state plans, however, each state plan must contain standards that are “at least as effective” as the corresponding federal OSHA standard. States with such state plans must update their state plans to add a standard that is “at least as effective” as the ETS by Dec. 5, 2021. Although Connecticut, New Jersey and New York have state OSHA plans, their state plans are limited to public employers. Accordingly, private employers in the Tri-State area are bound by the federal OSHA ETS.

Enforcement

Employers who violate the ETS are subject to fines. OSHA fines for a single violation range from \$1,000 to \$13,653 dependent on the severity of the violation; willful or repeated violations result in penalties of up to \$136,532. Similarly, OSHA is authorized to impose a penalty of up to \$13,653 for each day that an employer fails to resolve an OSHA violation past a date specified in an OSHA notice to the employer. Employers should be aware that a bill is pending in Congress that would raise the maximum fines for single violations and failures to abate from \$13,653 to \$70,000, and fines for willful or repeated violations from \$136,532 to \$700,000.

Next Steps

Employers need to take action now to comply with the ETS, including by:

1. Determining whether they meet the 100-employee threshold for coverage;
2. Developing a written COVID-19 policy in compliance with the ETS;
3. Developing a procedure to handle requests for medical and religious exemptions;
4. Preparing the necessary notices and documents to employees as required by the ETS;
5. Training supervisors on compliance with the ETS; and
6. Communicating with employees regarding these requirements

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] Employers do not need to include a staffing agency's employees placed in the employer's workplace.

[2] Independent contractors do not count as employees.

[3] OSHA anticipates that the ETS will be in effect for six months.

[4] OSHA's Healthcare ETS covers most health care workplaces, but does not cover employees in non-healthcare settings. These employees in non-healthcare settings are subject to this new ETS, even if their employer is a healthcare employer.

[5] The U.S. Center for Medicare & Medicaid Services also released a regulation that requires healthcare organizations covered by Medicare and Medicaid to have their healthcare workers vaccinated.

[6] Employees are "fully vaccinated" two weeks after their second dose in a two-dose series, such as the Pfizer or Moderna vaccines, or two weeks after a single-dose vaccine, such as Johnson & Johnson's vaccine. At this time, booster shots and additional doses are not included in the ETS' definition of fully vaccinated.

[7] In October 2021, the EEOC updated its guidance on reasonable accommodations to employers' mandatory vaccination policies, and published its internal Religious Accommodation Request Form as an example for employers to model their own religious accommodation request forms.

[8] Pursuant to the ETS, an acceptable proof of vaccination status is: "(i) the record of immunization from a health care provider or pharmacy; (ii) a copy of the COVID-19 Vaccination Record Card; (iii) a copy of medical records documenting the vaccination; (iv) 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). A signed and

dated employee attestation is acceptable in instances when an employee is unable to produce proof of vaccination.”

[9] Following an employee’s positive COVID-19 test result or diagnosis, the testing requirements for this employee are temporarily suspended for 90 days.

[10] OSHA broadly defines “face covering” to include both cloth and non-cloth masks, including homemade masks, provided such masks fit snugly and cover the individual’s nose and mouth.

[11] Upon request for this information, employers must make these records available by the end of the next business day. Employees are entitled to only one free copy of each requested record: after receiving an initial, free copy of the record, an employee may be charged a reasonable fee for copying duplicative records.

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