

OSHA Issues ETS Requiring Employee COVID-19 Vaccinations

Insights for Employers Alert | 10+ min read

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On November 5, 2021, the U.S. Occupational Safety and Health Administration (OSHA) published its long-awaited emergency temporary standard (ETS) addressing COVID-19 vaccination and testing requirements for employers. The ETS became effective immediately upon publication and below, we address specific dates for compliance. OSHA incorporated the ETS in its General Industry Standards under Part 1910 Subpart U (29 CFR 1910.501).

November 8, 2021 Update: Multiple legal challenges were filed shortly after the ETS was published in the Federal Register on Friday, November 5. The United States Court of Appeals for the Fifth Circuit granted a temporary injunction on Saturday, November 6, enjoining the ETS from becoming effective. The Fifth Circuit ordered OSHA to file briefs by close of business on Monday, November 8, 2021, on whether the court should grant a permanent injunction. At this time, it is premature to determine how the Fifth Circuit or any other court will ultimately decide this issue.

November 10, 2021 Update: legal challenges to the ETS have been filed in the Fifth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits. Because the various challenges are largely identical and pending in multiple circuit courts, a multi-circuit lottery will be conducted to determine which circuit court will hear and decide the consolidated actions. To make this determination, an entry for each circuit court will be placed into a drum, and one circuit court will be selected. Circuit courts will not receive additional entries based on the number of legal challenges to the ETS it receives. In the meantime, the Fifth Circuit's stay remains in place. If the Fifth Circuit were to rule before the outcome of the lottery, the selected circuit court has the power to modify, revoke, or extend the stay.

December 1, 2021 Update: On November 30, 2021, OSHA extended the comment period for the ETS. The comment period was extended from December 6, 2021 for an additional 45 days: **the new deadline is through January 19, 2022.**

This Alert highlights the key provisions of the ETS, most notably, that employers with 100 or more employees must develop, implement, and enforce a mandatory COVID-19 vaccination policy, as well as require unvaccinated workers to wear face masks when working indoors and be tested for COVID-19 at least weekly. The ETS establishes minimum requirements for employers and does not prohibit employers from establishing

requirements that exceed those of the ETS. Further, state and local laws and collective bargaining agreements may impose requirements that exceed those of the ETS.

In complying with the ETS, employers must also be aware of other laws that become intertwined with the ETS, such as anti-discrimination laws (e.g., Title VII, the ADA, and state and local anti-discrimination laws) and wage and hour laws (e.g., the FLSA and state and local wage and hour laws). The ETS explicitly provides that an employee may be exempted from vaccine and/or mask mandates where the employee requires a reasonable accommodation for a disability or sincerely-held religious belief. In these situations, employers will be required to conduct an individualized assessment of the request for accommodation. Additionally, time spent by employees obtaining a vaccination or COVID-19 test during work hours may be compensable and count toward the employees' weekly hours for overtime purposes.

Employers should consult their labor and employment attorney to develop, implement, and enforce a policy as required by the ETS, as well as complying with other laws that may be intertwined with the ETS.

OSHA's Justification for the ETS.

OSHA repeatedly states in the ETS that vaccination is the single most effective means of protecting workers from the "grave danger" posed by COVID-19, citing multiple studies extolling the effectiveness of vaccinations and the significant costs associated with a lack of vaccinations, including high mortality rates for workplaces with close contacts with other workers. Consistent with its legal duties under the Occupational Safety and Health Act ("OSH Act") (see 29 U.S.C. 655(c)(1)), OSHA is issuing this ETS to address the grave danger posed by occupational exposure to COVID-19.

Covered Status and Counting Employees to Determine Covered Status.

Employers with 100 or more employees are covered under the ETS. To determine whether an employer has at least 100 employees for purposes of the ETS, OSHA states that employers should count all employees across all U.S. locations, on a corporate-wide basis, as of the effective date of the ETS. Part-time employees count towards a company's total, but independent contractors do not. Franchisees do not count towards a franchisor's total. In situations where the employees of a staffing agency are placed at a host employer location, only the staffing agency would count those jointly employed workers for purposes of the 100-employee threshold.

If an employer does not have 100 employees as of the effective date of the ETS but subsequently hires additional employees and surpasses the 100-employee threshold, the employer must then comply with the requirements of the ETS. If an employer has 100 employees as of the effective date but subsequently falls below the 100-employee threshold, the employer will still be required to comply with the requirements of the ETS.

Mandatory Vaccination Policies.

Covered employers are required to establish and implement a written mandatory vaccination policy that requires that all employees get vaccinated, including new employees, as soon as practicable. Per Section 1910.501(c), certain employees may be exempt from the vaccine mandate under the following conditions: (1) those for whom a vaccine is medically contraindicated; (2) those for whom a medical necessity requires a delay in vaccination; or (3) those are legally entitled to reasonable accommodations under federal civil rights laws because of a disability or sincerely-held religious beliefs. Employers have the option to implement a written policy allowing employees to choose to be either fully vaccinated or provide proof of weekly testing for COVID-19 and wear a face covering.

Employee Proof of Vaccination.

Under Section 1910.501(e), covered employers are required to determine the vaccination status of each employee, including whether an employee is fully or only partially vaccinated. To satisfy this requirement, employers must require vaccinated employees to provide acceptable proof of vaccination status, including whether they are fully or partially vaccinated.

Employers must keep a roster of all employees and preserve acceptable records regarding the vaccination status of each employee, subject to applicable confidentiality requirements. Such records contain personally identifiable medical information and are to be maintained in a confidential manner consistent with Section 1910.1020(d). These employee vaccination records must be maintained and preserved only so long as the ETS remains in effect and are not subject to the retention requirements of Section 1910.1020(d)(1)(i). Any employee who does not provide one of the acceptable forms of proof of vaccination status must be treated as not fully vaccinated. If an employee is unable to provide proof of vaccination after reasonable attempts to obtain such proof, the ETS allows that a signed and dated attestation by the employee may be acceptable, but the ETS warns employers to be on the lookout for fraud. The employee roster must be made available to OSHA upon request.

Employer Support For Vaccination.

Employers are required under Section 1910.501(f) to provide reasonable time for administration of the vaccine and for recovery post-vaccination. For administration of the vaccine dose(s), employers must provide a reasonable amount of time, including travel, for up to 4 paid hours at the employee's regular pay rate for this purpose, if done during normal work hours. This paid time cannot be offset by any other leave that the employee has accrued, such as sick or vacation leave. Employers may be required to pay for overtime rate of pay depending on circumstances. If an employee chooses to get the vaccine outside of normal working hours, the employer would not be required to pay the employee for that out-of-work time under OSHA's ETS. However, other laws may dictate that this time is compensable under wage and hour requirements. Employers may choose to coordinate on-site vaccination programs in order to reduce the time that employees require to obtain their vaccine. For recovery time, employers must provide reasonable time and paid sick leave for employees to recover from side effects experienced following each dose, even if they received the vaccine outside of normal work hours.

Testing Unvaccinated Employees.

OSHA emphasizes that asymptomatic carriers of COVID-19 present a significant risk of exposure to others, particularly in the workplace. In order to remove infected persons from the workplace to limit transmission, the ETS requires that all unvaccinated workers be regularly tested for COVID-19, even if they are not symptomatic. As discussed in more detail below, to encourage vaccination as the most effective means of limiting COVID-19 transmissions, employers are not required by the ETS to bear the costs of administering these tests; rather, employees would bear these costs.

Under Section 1910.501(g)(1), employers must ensure that each employee who is not fully vaccinated is tested for COVID-19 at least weekly (if the worker is in the workplace at least once a week) or within seven days before returning to work (if the worker is away from the workplace for a week or longer), and provide documentation of the test results to the employer. For example, an unvaccinated part-time employee scheduled to work only two days per week must still be tested at least once every seven calendar days. Similarly, unvaccinated new hires would need to be tested for COVID-19 within seven days prior to reporting to a workplace where others will be present and provide documentation of their test results no later than arrival on their first day of work.

If the employee does not provide documentation of a COVID-19 test, the employer must remove the employee from the workplace until they provide a test result. Additionally, when an employee has received a positive COVID-19 test or has been diagnosed by a licensed healthcare provider, the employer cannot require that employee to undergo COVID-19 testing for 90 days after their diagnosis/positive test. Finally, the employer must maintain a record of each employee-provided test result and maintain such records per Section 1910.1020 as employee medical records.

Positive COVID-19 Cases.

Under Section 1910.501(h), employers must require that each employee, regardless of vaccination status, who is COVID-19 positive notify the employer of their test result or diagnosis “promptly.” Employers must then remove the employee from the workplace and must not allow that employee to return to the workplace until they meet the required criteria. The employee may return to work by one of three means: (1) receiving a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test; (2) meeting the return to work criteria in CDC’s “Isolation Guidance” (incorporated by reference into the ETS); or (3) receiving a recommendation to return to work from a licensed healthcare provider.

Employee Removal.

Under Section 501(h), the term “removal” means an employee’s temporary removal from the workplace while that employee is infectious. This term does not mean the permanent removal of an employee from their position. Any time an employee is required to be removed from the workplace under Section 1910.501(h)(2), the employer can require the employee to work remotely or in isolation when suitable. If, however, the employee is too sick to work, remote work should not be required, and sick leave or other leave should be made available consistent with the employer’s policies and applicable laws. The ETS does not require or prohibit employers from providing paid time to any employee for removal due to a positive COVID-19 test. OSHA also notes that paid time off may be

required by other laws, regulations, or collective bargaining agreements, and clarifies that this provision is not meant to deprive employees of the benefits they are normally entitled to as part of their employment.

Face Coverings Required for Unvaccinated Employees.

Under Section 1910.501(i), employers must require employees who are not fully vaccinated to wear a face covering when indoors or when occupying a vehicle with another person for work purposes. Workers who are fully vaccinated are not required to wear face coverings under the ETS because vaccination is considered sufficient to reduce the grave danger to themselves or others in the workplace. Employers cannot prohibit any employee from choosing to wear a face covering, unless there is a risk to that employee's safety.

The ETS provides several exceptions to the face covering requirement for unvaccinated employees. For example, an employee who is alone in a room with floor to ceilings windows and a closed door is not required to wear a face covering. However, if that employee exits the room or another individual enters the room, they are required to wear a face covering. Other exceptions include: while an employee is eating or drinking at the workplace; for identification purposes in compliance with safety and security requirements; when an employee is wearing a respirator; and where the employer can show that a face covering would cause a greater hazard or is infeasible.

Employees Paying for Less Protective Options.

OSHA has determined it would not be appropriate to require that employers bear any costs associated with COVID-19 testing for employees who have individually chosen not to be vaccinated. Similarly, OSHA determined that it is not appropriate to require employers to pay for face coverings for employees who choose not to be vaccinated. OSHA finds that the materials for acceptable face coverings are easily available to employees. Accordingly, OSHA only requires employers to bear the costs of employee compliance with the preferred and more protective method of protection: vaccination. OSHA acknowledges, however, that employers may be required to pay for employee COVID-19 tests by other state or local laws, regulations, or collective bargaining agreements. The ETS does not prohibit employers from paying such costs.

Employers Reporting to OSHA.

Section 1910.501(j) outlines employers' reporting obligations. Employers must report to OSHA each work-related COVID-19 fatality within 8 hours of the employer learning about the fatality. Employers must also report each work-related COVID-19 in-patient hospitalization within 24 hours of the employer learning about the An employer "learns" of a COVID-19 fatality or in-patient hospitalization when a supervisor, receptionist, or another employee at the company receives information from a family member or medical professional about an employee fatality or in-patient hospitalization.

This reporting requirement in the ETS updates OSHA's prior guidance. Rather than requiring employers to report based on the time of the workplace exposure, the requirement is now based on when the employer learns that a fatality or hospitalization from COVID-19 is work-related. Employers must make reasonable efforts to acquire the

necessary information to make good-faith work-relatedness determinations, keeping in mind the following factors:

- Physical distancing and other controls in the workplace;
- The extent and duration of time spent in a shared indoor space with limited ventilation; and
- The type, extent, and duration of contact the employee had with other people at the workplace, particularly the general public or anyone who exhibited signs and symptoms of COVID-19.

Employers must also follow the recordkeeping criteria set forth in Section 1904.5 for determining work-relatedness. Should an employer determine that a reported case of COVID-19 is work-related, that employer must record that information on the OSHA Forms 300, 300A, and 301 or on equivalent forms.

Required Information To Be Provided to Employees.

Employers must provide their employees with the information specified in Section 1910.501(j), in a format and language and at a literacy level that can be understood by the employees. Employers must inform employees of the employers' policies and procedures related to the ETS. The ETS also specifically instructs employers to share the document "Key Things to Know About COVID-19 Vaccines." Employers must also explain to employees their protections against retaliation under Section 11(c) of the OSH Act. Finally, employers must remind employees of the prohibition and criminal penalties associated with knowingly supplying false statements or false documentation.

Exemptions.

The ETS identifies the two types of exempted workplaces: 1) workplaces covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, and 2) workplaces where employees provide healthcare services subject to Section 1910.502. The ETS also identifies certain employees of covered employers who are exempt, as the risk of transmission is low, including: (a) employees who do not report to a workplace where other individuals (e.g., coworkers or customers) are present, (b) employees telecommuting from home, and (c) employees who work *exclusively* outdoors. Employees who work part-time from home and part-time in the workplace are subject to the ETS for the days they are working on-site.

Preemption.

OSHA states explicitly that the ETS preempts any conflicting State and local laws that ban or limit employers from mandating COVID-19 vaccinations, COVID-19 testing, and mask-wearing.

Compliance Dates.

The ETS became effective immediately upon publication in the Federal Register on November 5, 2021. Employers have 30 days, on or before December 6, 2021, to comply with all requirements under the ETS, except for testing

unvaccinated employees pursuant to Section 1910.501(g). Employers have 60 days, on or before January 4, 2022, to comply with the testing requirements under Section 1910.501(g). Note, however, that employees who have received their vaccinations by the January 4, 2022 deadline do not need to be tested, even if the employees have not completed their two-week waiting period.

Public Comments.

OSHA invites public comments on the contents of the ETS and whether the ETS should be adopted as a permanent standard. OSHA specifically seeks comments on the following topics: whether COVID-19 is a “significant risk” under Section 6(b) of the OSH Act; whether employees who have previously contracted COVID-19 should be required to get vaccinated; employers’ previous experience with implementing COVID-19 vaccine policies; employee testing and removal policies; face coverings policies; other workplace controls to prevent the spread of COVID-19; employer educational materials; the ETS’ feasibility; and input from employers with fewer than 100 employees. **The deadline to submit comments is December 6, 2021.**

Links.

The full ETS can be found on the [Federal Register’s website](#). Read [OSHA’s FAQ page on the ETS](#), or [OSHA’s three-page summary of the ETS](#). For more information on the ETS, [visit OSHA’s dedicated webpage](#).

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