

OSHA RELEASES EMERGENCY TEMPORARY STANDARD FOR COVID-19 VACCINE AND TESTING

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On September 9, 2021, President Biden announced that he ordered OSHA to develop an emergency temporary standard (ETS) that would require private employers with 100 or more employees to mandate that employees either receive one of the three available COVID-19 vaccines or submit to weekly COVID-19 testing. On November 4, 2021, OSHA released an unpublished version of the [COVID-19 Vaccination and Testing Emergency Temporary Standard](#). The published version is set to be released on November 5, 2021. A [summary](#), [fact sheet](#), and [FAQs](#) are also available.

Background

On August 23, 2021, the U.S. Food and Drug Administration (FDA) approved the Pfizer-BioNTech COVID-19 vaccine, one of the three COVID-19 vaccines approved for emergency use in the United States. Due to this approval and the rampant spread of the COVID-19 Delta variant, on September 9, 2021, President Biden announced that OSHA will issue an ETS mandating employers with 100 or more employees to either be vaccinated or submit to weekly testing. At that time, there were many unanswered questions about how the ETS would apply – how the headcount is determined, who pays for the testing, what type of documentation would be permitted to show proof of the vaccine, etc.

On November 4, 2021, OSHA released its COVID-19 Vaccination and Testing ETS which is described more fully below. We expect the ETS will be challenged, particularly in states where state law prohibits employers from mandating vaccines; however, the ETS is intended to preempt inconsistent state and local requirements relating to these issues, including requirements that ban or limit employers' authority to require vaccination, face covering, or testing, regardless of the number of employees. In the meantime, employers should familiarize themselves with the ETS, begin developing their written policies, and communicate the requirements and expectations to employees.

Below summarizes the specific requirements of the ETS.

COVID-19 Vaccination and Testing ETS

With certain limited exceptions, the ETS requires employers with 100 or more employees to develop, implement, and enforce a mandatory, written COVID-19 vaccination policy, or a written policy requiring employees to either be vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination.

If employers have employees who request a reasonable accommodation because they cannot be vaccinated and/or wear a face covering due to a disability, as defined by the ADA, or if vaccination, and/or testing for COVID-19, and/or wearing a face covering conflicts with an employee's sincerely held religious belief, practice, or observance the employee may be entitled to a reasonable accommodation.

Employers must begin complying with the requirements of the ETS within 30 days from the date of publication, which means employers will need to, among other things, develop their written policies by that time. The deadline for employers to begin testing employees who are not vaccinated is 60 days from the date the ETS is posted in the Federal Register, which is January 4, 2022.

Essentially, this means employees must be fully vaccinated by January 4, 2022. Fully vaccinated means the individual received the second dose (of a two-dose vaccine or combination of two-doses of a vaccine) or the first dose (of a single-dose vaccine) 2 weeks prior to January 4, 2022. For two-dose vaccines (Moderna or Pfizer), the doses must have been provided within at least the minimum recommended interval between doses, in accordance with the approval, authorization, or listing by the FDA or WHO, or administered as part of a clinical trial at a U.S. site (if the recipient is documented to have primary vaccination with the "active" (not placebo) COVID-19 vaccine).

The ETS requires employers to provide employees with time off for obtaining their vaccinations. Specifically, the ETS requires employers to provide employees with a reasonable amount of paid time (up to 4 hours at their regular rate of pay) to travel to and receive their COVID-19 vaccine doses (first and second doses, as applicable). To be clear, it is four (4) hours total that must be paid for a two-dose shot. Further, employers are required to provide reasonable time and paid sick leave to employees who need the time to recover from the side effects of the either dose, as applicable, of the vaccine. The ETS sets minimum standards within the workplace, though employers are permitted to implement additional measures (subject to collective bargaining for union employees).

Note the ETS does not apply to federal contractors (who must comply with the President's Executive Order and the Safer Federal Workforce Task Force COVID19 Workplace Safety: Guidance for Federal Contractors and Subcontractors) or employees providing healthcare services or healthcare support services who are subject to the Healthcare ETS while the Healthcare ETS is in effect.

Exemptions from Vaccinations

Employers are not required to mandate employees receive the vaccine if:

- It is medically contraindicated;
- Medical necessity requires a delay in vaccination; or
- They 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.

Covered Employers

The ETS applies to employers who have a total of 100 or more employees at "any time the ETS is in effect" regardless of where the employees report to work and applies for the duration of the ETS even if the employer's headcount subsequently falls below 100 employees. For purposes of reaching the headcount, employees include part-time employees, remote employees, employees who do not report to the worksite, and employees working exclusively outdoors.

Even if an employer does not have 100 employees as of the effective date of the ETS, if the employer reaches the 100-employee threshold while the ETS is in effect, it must comply for the remainder of the ETS even if the count later drops below 100. Further, the count applies to different corporate structures and settings as follows:

- For a single corporate entity with multiple locations, all employees at all locations are counted.
- In a traditional franchisor-franchisee relationship in which each franchise location is independently owned and operated, the franchisor and franchisees would be separate entities. In such case, the franchisor would only count "corporate" employees, and each franchisee would only count employees of that individual franchise. Therefore, if the franchisor has 100 employees, but none of the franchisees do, then only the franchisor must comply.
- Two or more related entities that handle safety matters as one company may be regarded as a single employer, in which case the employees of all entities making up the integrated single employer must be counted.

- Where employees of a staffing agency are placed at a host employer location, only the staffing agency would count these jointly employed workers.
- For a typical multi-employer worksite such as a construction site, each company represented – the host employer, the general contractor, and each subcontractor – would only need to count its own employees; however, each employer must count the total number of workers it employs regardless of where they report for work on a particular day. The ETS provides the following example:
 - If a general contractor has more than 100 employees spread out over multiple construction sites, that employer is covered under this ETS even if it does not have 100 or more employees present at any one worksite.

Workplace Definition

A workplace is defined as a physical location (fixed or mobile) where the employer's work or operations are performed. It does not include an employee's own home.

State or Local Government Employers

The ETS does not apply to state and local government employers in states without State Plans, because state or local government employers and employees are exempt from OSHA coverage under the OSH Act. In states with OSHA-approved State Plans, however, the State Plans must adopt requirements that are at least as effective as the requirements in OSHA's ETS. Therefore, state and local government employers with 100 or more employees in states with State Plans will be required to comply with those state occupational safety and health requirements.

Exclusion for Remote Employees and Employees Working Outdoors

While remote employees, employees working exclusively outdoors, and employees who do not report to a workplace where other coworkers or customers are present must be counted for determining the employer's headcount, such employees are not required to be vaccinated. This is different from the standards applicable to federal contractors and many employers with remote employees may find relief with this decision. A list of occupations with workers who work outdoors is included in Table IV.B.1 of the ETS.

Obtaining Proof of Vaccination

Employers are required to determine the vaccination status of all employees. Accordingly, the ETS provides that employers must require each vaccinated employee to provide acceptable proof of

vaccination status, including whether they are fully or partially vaccinated. Acceptable proof of vaccination status include:

- 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)

Note, employers should be cautious about using the approach in the third and final bullets, as this could result in the employer having access to medical diagnoses or genetic information protected by the ADA or GINA. If employers allow these approaches, at the very least, they should ask employees to redact any additional medical information included in the record before providing it to the employer.

If an employee is unable to provide acceptable proof of vaccination, then they must be required to submit a signed statement that includes an attestation:

- Of their vaccination status (fully vaccinated or partially vaccinated); and
- That they have lost and are otherwise unable to produce proof required by this section.

The signed statement must include this statement: “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.”

Further, the employee should, to the best of their recollection, include the following 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).

If an employee does not provide acceptable proof of receipt of the vaccine (or the signed statement meeting the above requirements), then they must be treated as not fully vaccinated.

How Does Paid Time Off Work

The ETS provides that the four hours of paid time off to receive the COVID-19 vaccine must be paid at the employees' regular rate of pay and cannot be offset by any other leave the employee has accrued (i.e., other PTO, sick leave, or vacation time offered by the employer). If more than four hours are needed, then the time is not required to be paid, but is protected leave.

On the other hand, if an employee needs time off to recover from the COVID-19 vaccine side effects, then they may be required to use their accrued and unused sick leave (or PTO if the employer does not distinguish between sick leave and vacation time). If they do not have sick leave or PTO time available, then the employer must provide the time and pay for it. Employers cannot require employees to accrue negative paid sick leave or borrow against future paid sick leave to recover from vaccination side effects. The ETS does not provide a specific amount of time that must be provided to recover from the effects of the COVID-19 vaccine, though the employer must provide a "reasonable" amount of time. OSHA suggests two (2) days of paid sick time is "reasonable."

Paid time off is not required for employees who must be removed from the workplace for failure to be vaccinated or failure to submit to the required testing. Paid time off is also not required by the ETS if an employee is removed from the workplace due to a positive COVID-19 diagnosis or test result, though employers would have to comply with any other applicable law, ordinance, regulation, or collective bargaining agreement that requires such time be paid.

Employers are not, however, required to retroactively provide PTO for time used to receive the vaccine or recover from the side effects of the vaccine to employees who received the vaccine prior to the ETS. Moreover, employers are not required to reimburse employees for transportation costs (e.g., gas money, train/bus fare, etc.) incurred to receive the vaccination, including the costs of travel to an off-site vaccination location (e.g., a pharmacy) or travel from an alternate work location (e.g., telework) to the workplace to receive a vaccination dose.

If an employee chooses to receive the vaccine outside of work hours, employers are not required to grant paid time to the employee for the time spent receiving the vaccine during non-work hours; however, the employee must still be provided reasonable time and paid sick leave to recover from side effects that they experience during scheduled work time.

How Must Testing be Administered

If an employer opts to allow employees to be tested in lieu of vaccination, then the testing applies to any employee who reports at least once every 7 days to a workplace where other individuals such as coworkers or customers are present. In such cases, the employee:

- Must be tested for COVID-19 at least once every 7 days; and
- Must provide documentation of the most recent COVID-19 test result to the employer no later than the 7th day following the date on which the employee last provided a test result.

The following applies for employees who do not report during a period of 7 or more days to a workplace where other individuals such as coworkers or customers are present (e.g., teleworking for two weeks prior to reporting to a workplace with others):

- The employee must be tested for COVID-19 within 7 days prior to returning to the workplace; and
- The employee must provide documentation of that test result to the employer upon return to the workplace.

If an employee does not provide documentation of a COVID-19 test result, the employer must keep that employee removed from the workplace until the employee provides a test result. The employer is not required to pay employees for this time.

If an employee is diagnosed with COVID-19 or receives a positive COVID-19 test, then they are not required to submit to weekly testing for 90 days following the positive test result of diagnosis.

What Tests Can be Used

If the employer will allow employees to be tested in lieu of vaccination, the employer's written policies must specify how testing will be conducted (e.g., testing provided by the employer at the workplace, employees independently scheduling tests at point-of-care locations, etc.), how employees should provide their COVID-19 test results to the employer, and what tests are permitted.

Tests authorized by the employer must be, (1) cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the FDA to detect current infection with the SARS-CoV-2 virus (e.g., a viral test, (2) administered in accordance with the authorized instructions; and (3) not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

Examples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens), proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer. Therefore, the employer cannot accept an at home test administered by the employee or his or her family member.

Who Pays for the Testing

The ETS provides that the employer is not required to cover any costs associated with the testing, though employers may have to comply with other laws, ordinances, regulations, or collective bargaining agreements that mandate the employer pay for testing. Thus, depending on the facts, the employer may require employees to pay for their testing. Note, testing that is not due to an employee having recent, known exposure to COVID-19, ordered by a health care provider, or due to an employee experiencing symptoms of COVID-19 would not be covered by the employer's health plan. If an employer chooses to pay for the testing, it would be at the employer's own expense and not paid through the health plan.

Records Retention

Employers are required to maintain a roster of vaccinated employees, maintain a record of each employee's vaccination status, and preserve the acceptable proof of vaccination for each fully or partially vaccinated employee. Further, employers who offer a testing in lieu of vaccination option must maintain a record of each test result provided by each employee or obtained by the employer's own testing. All of these records are considered medical records and, therefore, would need to be maintained separately from an employee's personnel file and are not subject to further disclosure by the employer except as otherwise required under the ETS or other applicable federal law. Records are only required to be preserved while the ETS is in effect.

Face Coverings/Face Masks

If the employer chooses to allow testing in lieu of vaccination, they must ensure that all non-fully vaccinated employees wear a face covering when indoors and when occupying a vehicle with another person for work purposes, unless the following apply:

- The employee is alone in a room with floor to ceiling walls and a closed door.
- The employee is eating or drinking (for a limited period of time) at the workplace or for identification purposes in compliance with safety and security requirements.
- The employee is wearing a respirator or facemask.

- The employer can show that the use of face coverings is infeasible or creates a greater hazard that would excuse compliance with this paragraph (e.g., when it is important to see the employee's mouth for reasons related to their job duties, when the work requires the use of the employee's uncovered mouth, or when the use of a face covering presents a risk of serious injury or death to the employee).

Face coverings must completely cover an employee's nose and mouth and must be:

- Made with two or more layers of a breathable fabric that is tightly woven (i.e., fabrics that do not let light pass through when held up to a light source);
- Secured to the head with ties, ear loops, or elastic bands that go behind the head. If gaiters are worn, they should have two layers of fabric or be folded to make two layers;
- Fitted snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and
- A solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings.

Per the ETS, face coverings also include clear face coverings or cloth face coverings with a clear plastic panel that, despite the non-cloth material allowing light to pass through, and which may be used to facilitate communication with people who are deaf or hard-of-hearing or others who need to see a speaker's mouth or facial expressions to understand speech or sign language respectively.

Face coverings must be worn by the employee to fully cover the employee's nose and mouth and must be replaced when wet, soiled, or damaged (e.g., is ripped, has holes, or has broken ear loops). Face shields may be worn in addition to face coverings.

Employers are prohibited from preventing any employee from voluntarily wearing a face covering or facemask unless the employer can demonstrate that doing so would create a hazard of serious injury or death, such as interfering with the safe operation of equipment. Further, employers must permit employees to wear a respirator instead of a face covering whether required or not. In addition, the employer may provide respirators to the employee, even if not required. In such circumstances, the employer must also comply with applicable law. Finally, employers cannot prohibit customers or visitors from wearing face coverings.

Employers are not required to pay for the face coverings unless required by other applicable laws or regulations or collective bargaining agreements.

Written Policy Requirements

Employers' written policies should address all of the applicable requirements in the ETS, including: (1) whether the employer will require the vaccine or whether there will be a testing/face covering option and any applicable exclusions that may apply for an employee due to a medical contraindications, medical necessity requiring delay in vaccination, or applicable reasonable accommodations; (2) information on how the employer will determine an employee's vaccination status and how this information will be collected; (3) paid time off and sick leave for vaccination purposes; (4) notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace; (5) how the employer will make required information available to as described in the next section, and (6) disciplinary action for employees who do not abide by the policy.

The written policy should also include all relevant information regarding the policy's effective date, which employees are required to comply, deadlines for being vaccinated or submitting vaccination information, testing requirements and deadlines (if applicable), and procedures for compliance and enforcement.

Informing Employees

Employers must inform each employee, in a language and at a literacy level the employee understands, about (1) the requirements of the ETS as well as any employer policies and procedures established to implement this section, (2) COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated, (3) protections against retaliation and discrimination, and (4) laws that provide for criminal penalties for knowingly supplying false statements or documentation. The following document must be provided with their policy: "Key Things to Know About COVID-19 Vaccines," available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>.

Records Disclosure

Employers must provide a copy of its written policy to OSHA as well as the aggregate number of fully vaccinated employees at the workplace and the total number of employees at the workplace within 4 hours of a request and must provide OSHA all other records required to be maintained by the end of the next business day.

Further, they must make available for inspection and copying any individual COVID-19 documentation and test results by the end of the next business day after receiving a request. The employee or anyone having written authorized consent may request this information. Additionally, an employee or employee

representative may request the aggregate number of fully vaccinated employees at the workplace and the total number of employees at the workplace, which the employer must provide by the end of the next business day after the request is made.

Conclusion

In conclusion, employers subject to the ETS must determine whether they will take a vaccine-only or combined vaccine and testing/face covering approach to compliance and must develop the required written policies and communicate those policies to employees, so they have ample time to receive their COVID-19 vaccines. Employers should work with legal counsel to develop their written policies and to address any reasonable accommodation requests received by employees.

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