

OSHA ISSUES EMERGENCY TEMPORARY STANDARD MANDATING COVID-19 VACCINES OR WEEKLY TESTING

Hodgson Russ OSHA Alert
November 5, 2021

UPDATE AS OF 11/6/21: The United States Circuit Court of Appeals for the Fifth Circuit entered an Order temporarily staying enforcement of the ETS pending further review, as discussed. [Click here for new alert.](#)

On November 4, 2021, the U.S. Occupational Safety and Health Administration (“OSHA”) issued a new Emergency Temporary Standard (“ETS”) “intended to establish minimum vaccination, vaccination verification, face covering, and testing requirements to address the grave danger of COVID-19 in the workplace.” Importantly, the ETS also expressly preempts state and local laws that limit employers’ authority to require vaccinations, face coverings, or testing. Employers may implement additional safety measures that go beyond the minimum standards set forth in the ETS, but the ETS will serve as a floor for covered employers. OSHA’s ETS is available on its website, along with certain interpretive guidance material, including a set of Frequently Asked Questions (“FAQs”).

What Employers are Covered?

All employers with at least 100 employees at any point while the ETS is in effect. Per OSHA’s FAQs, all employees, including part-time, temporary, seasonal, and remote workers, count towards the 100-employee threshold. However, bona fide independent contractors do not count. Employees placed by a staffing agency also do not count towards the threshold for the business at which they are placed, but do count towards the staffing agency’s headcount.

Note that the Centers for Medicare and Medicaid Services (CMS) also issued a new Interim Final Rule on November 4, 2021 to revise and update vaccination requirements applicable to health care facilities that participate in Medicare or Medicaid. You can read about those requirements in our companion Alert [here](#).

By when must the requirements of the ETS be implemented?

The requirement to ensure that employees who are not fully vaccinated are tested weekly for COVID-19 goes into effect 60 days after the ETS is published in the Federal Register. Assuming a November 5, 2021 publication, this requirement will go into effect on January 4, 2022. To be fully vaccinated by this date, employees will

Attorneys

Luisa Bostick
Joseph Braccio
Jane Bello Burke
Glen Doherty
Andrew Drilling
Ryan Everhart
Andrew Freedman
Peter Godfrey
John Godwin
Michael Hecker
Charles H. Kaplan
Karl Kristoff
Jason Markel
Christopher Massaroni
Elizabeth McPhail
Lindsay Menasco
Kinsey O'Brien
Jeffrey Swiatek
Michael Zahler

Practices & Industries

Occupational Safety & Health Act
(OSHA)

OSHA ISSUES EMERGENCY TEMPORARY STANDARD MANDATING COVID-19 VACCINES OR WEEKLY TESTING

need to receive their final COVID-19 vaccine dose by December 21, 2021.

Employers must comply with all other requirements of the ETS (i.e., develop their written program, collect vaccination records, provide training, etc.) within 30 days after its publication, or December 5, 2021.

Are there any employers or employee situations excluded from the ETS?

Yes. The requirements of the ETS do not apply to the following:

- Workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors.
- Settings where any employee provides healthcare services or healthcare support services when subject to the OSHA Emergency Temporary Standard applicable to Healthcare Workers issued in June 2021. See, "Understanding OSHA's New COVID-19 Emergency Temporary Standard and What it Now Requires Healthcare Employers to Do to Minimize Exposure Risks".
- Employees of a covered employee who do not report to a workplace where other individuals (e.g., co-workers or customers) are present.
- Employees of a covered employer while they are working from home.
- Employees of a covered employee who work exclusively outdoors.

Are covered employers required to develop written policies?

Yes. Employers must establish, implement, and enforce one of two types of written policies:

1. A mandatory vaccination policy; or
2. A policy allowing employees to choose to either: (a) become fully vaccinated, or (b) provide regular proof of testing for COVID-19 and wear a face covering.

A mandatory vaccination policy must require all employees to be vaccinated, except those for whom vaccination is medically contraindicated, for whom medical necessity requires a delay in vaccination, or for whom a reasonable accommodation is required under other federal laws due to a disability or sincerely held religious beliefs, practices or observances.

How is the employer required to determine and monitor the vaccinated versus unvaccinated status of employees?

Each covered employer must require partially- and fully-vaccinated employees to provide acceptable proof of vaccination status, which includes any of the following:

OSHA ISSUES EMERGENCY TEMPORARY STANDARD MANDATING COVID-19 VACCINES OR WEEKLY TESTING

- Record of immunization from health care provider or pharmacy
- COVID-19 Vaccination Record Card
- Medical records documenting the vaccination
- Immunization records from a public health, state, or tribal immunization information system
- Any other official documentation that contains the type of vaccine, date(s) of administration, name of the health care professional(s) or clinic(s) that administered the vaccine

The employer must maintain a roster of its employees with their respective vaccination status, and update it. The employer must preserve and maintain these records and proofs of vaccination while the ETS is in effect. Both the roster and records are to be treated as “medical records” and subject to restrictions on their disclosure.

What if the employee claims to be vaccinated, but cannot provide one of the forms of acceptable documentary proof?

The employee may provide a signed and dated statement that attests, under penalty of perjury and criminal penalties, to the following information as being true and accurate:

1. vaccination status (full or partial)
2. the employee lost or is otherwise unable to produce one of the acceptable documentary forms of proof
3. the type of vaccine
4. date(s) the vaccine was administered
5. name of the health care professional(s) or clinic(s) that administered the vaccine.[1]

Any employee that does not provide acceptable documentary proof of vaccination, or submit the above attestation, must be treated as not fully vaccinated.

What does “fully vaccinated” and “not fully vaccinated” mean?

In general, “fully vaccinated” means that two weeks have elapsed since the employee received all required doses of an approved vaccine at the appropriate intervals. The actual definition of “fully vaccinated” in the ETS is more technical, but encompasses situations where an employee was vaccinated in the U.S. with an FDA-authorized vaccine, elsewhere in the world with a vaccine approved by the World Health Organization (“WHO”) for emergency use, or through a U.S. clinical trial. According to OSHA’s “Frequently Asked Questions” Guidance on the ETS, “[b]ooster shots and additional doses are not included in the definition of fully vaccinated under the ETS.”

Employers should carefully review the ETS definition of “fully vaccinated” when developing their written plans. Anyone not meeting the definition would be considered “not fully vaccinated.”

OSHA ISSUES EMERGENCY TEMPORARY STANDARD MANDATING COVID-19 VACCINES OR WEEKLY TESTING

Is the employer required to compensate employees for lost work time while getting vaccinated?

Yes. The employer must provide up to 4 hours paid time, including travel, at the employee's regular rate of pay. Employees are also entitled to reasonable time and paid sick leave to recover from any side effects.

By when must employees become vaccinated?

Employers must provide employees a "reasonable" amount of time to become vaccinated.

If the employer adopts a written plan permitting opt-out testing, what are the requirements for individuals who come to the workplace but are not fully vaccinated?

Such employees must be tested at least every seven days if they report to a workplace where other individuals are present. The employee must provide documentation to the employer of successive weekly test results no later than the seventh day following the date when the last test result was submitted.

For employees who do not report to their workplace for more than a seven-day period, the employee must be tested for COVID-19 within seven days prior to returning to the workplace, and the employee must provide the test result to the employer upon return.

The employer must maintain records of all test results and treat them as "medical records". If an employee fails to provide documentation of the test result as required, the employee must remain outside of the workplace.

Employees who are not fully vaccinated and receive a positive COVID-19 test result or COVID-19 diagnosis are exempt from weekly testing for 90 days following the positive test or diagnosis. According to OSHA, this is because of the "high likelihood of false positives that do not indicate active infection but are rather a reflection of past infection." Such employees must continue to wear a face covering in accordance with the ETS upon returning to work.

If the employer adopts a written plan permitting opt-out testing, is the employer obligated to provide and pay for the COVID-19 testing?

The ETS does not require employers to pay for any costs associated with testing, unless required by other laws and regulations or their collective bargaining requirements. For example, such payment may be required by other laws and regulations (e.g., the Fair Labor Standards Act, New York Labor Law, or other state or local wage and hour legislation). Employers should consult with employment counsel to evaluate any risks associated with requiring employees to cover the cost of testing.

What kind or type of COVID-19 testing is required?

For purposes of the ETS, a COVID-19 test must meet the following requirements:



OSHA ISSUES EMERGENCY TEMPORARY STANDARD MANDATING COVID-19 VACCINES OR WEEKLY TESTING

1. Cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the FDA to detect current infection with the SARSCoV-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.

Both PCR and rapid testing are permitted if the above requirements are met. Examples of acceptable tests 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.

What must an employer do if an employee tests positive for COVID-19?

Employers must require employees to promptly report positive test results or COVID-19 diagnoses. Any such employee must be removed from the workforce until one of the following criteria are met:

1. The employee 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 chooses to seek a NAAT test for confirmatory testing;
2. The employee meets the return to work criteria in CDC's "Isolation Guidance"; or
3. The employee receives a recommendation to return to work from a licensed healthcare provider.

Employers must also report to OSHA any work-related COVID-19 fatality (within 8 hours of learning) and any work-related COVID-19 in-patient hospitalization (within 24 hours of learning).

Must the employee still be paid if removed from work due to a positive COVID-19 test or diagnosis?

The ETS does not require employers to provide paid time to any employee removed as a result of a positive COVID-19 test or diagnosis. Employers may, however, be required to provide such paid time under other laws, such as the New York COVID-19 Paid Sick Leave Law, the New York State Paid Sick Leave Law, or pursuant to the employer's policies or an applicable collective bargaining agreement.

What employees must wear "face coverings" at work?

Under the ETS, employers must ensure that employees who are not fully vaccinated wear "face coverings" over their mouth and nose when indoors and when occupying a vehicle with another person. There are five general exceptions:

1. The employee is alone in an enclosed closed room with the door shut
2. While eating and drinking
3. As necessary to identify the person for safety or security
4. While wearing a respirator or facemask

OSHA ISSUES EMERGENCY TEMPORARY STANDARD MANDATING COVID-19 VACCINES OR WEEKLY TESTING

5. Where use of a face covering is infeasible or creates a greater hazard

Employers must also ensure that employees replace face coverings that become wet, soiled or damaged. The ETS does not require the employer to pay for any costs associated with face coverings.

Under the ETS, employers may not prohibit employees from voluntarily wearing a face covering or facemask, unless the employer can demonstrate that wearing the mask creates a serious hazard for injury or death. Employees must also be permitted to wear respirators if they choose. Employers may elect to provide respirators to employees, but doing so will trigger the requirement to develop and implement a Mini Respiratory Protection Program.[2]

When evaluating the ETS, employers may need to consider other State-based requirements. For example, the New York HERO Act's Airborne Infectious Disease Exposure Prevention Plans require that all employees (vaccinated and unvaccinated) wear appropriate face coverings in accordance guidance from the New York State Department of Health ("NYS DOH") and CDC. The current CDC guidance provides that fully vaccinated individuals wear face coverings in public indoor settings. And the Airborne Infectious Disease Exposure Prevention Standard Emergency Regulation issued pursuant to the New York HERO Act requires employers to select and provide "at no cost to employees" face coverings deemed appropriate and in accordance with guidance from the NYS DOH or the CDC, as applicable. Employers should also be mindful that other laws outside of New York State may require more stringent use of face coverings, and may impact the employer's obligations with respect to covering the costs of such face coverings.

Employers would do well to consult labor counsel to evaluate their circumstances.

For purposes of the ETS, what is the difference between a "face covering," "facemask," and "respirator"?

A "respirator" is a certified form of personal protective equipment that includes filtering facepiece respirators (e.g., N95), elastomeric respirators, and powered air purifying respirators. Face coverings, facemasks, and face shields are not respirators.

A "facemask" is an FDA surgical, medical procedure, dental or isolation mask.

In general, a "face covering" is a covering that completely and snugly covers the nose and mouth, and typically consists of at least a double layer of tightly woven breathable fabric. The FAQs provide that face coverings can be manufactured or homemade, and can incorporate a variety of designs, structures, and materials. The specific definition of "face covering" in the ETS is more detailed and requires certain features and criteria, with some exceptions pertaining to hearing-impaired individuals. Employers should consult and apply the ETS definition when developing their plans and training their employees.

What training must employers provide to their employees about the vaccination policy?

Employers must train all employees on the requirements of the ETS as well as the policies and procedures the employer establishes to implement it. The employer must also train employees on OSHA's non-discrimination and anti-retaliation requirements, criminal penalties for knowingly providing false statements or documentation, and vaccine efficacy, safety, and the benefits of vaccination by providing employees with a copy of the CDC publication "Key Things to Know about COVID-19 Vaccines."

OSHA ISSUES EMERGENCY TEMPORARY STANDARD MANDATING COVID-19 VACCINES OR WEEKLY TESTING

If you have questions about OSHA's vaccination ETS or COVID-19 guidance, mandatory vaccination requirements, or other [general questions about OSHA compliance](#), please contact [Jason Markel](#) (716.848.1395), [Glen Doherty](#) (518.433.2433), or [Charles H. Kaplan](#) (646.218.7513), or any member of our [Labor & Employment Group](#).

[1] The vaccine type, date, and provider name are to the best of the employee's recollection in this circumstance.

[2] The requirements for a Mini Respiratory Protection Program are set forth in 29 C.F.R. § 1910.504.