



COMPLIANCE ALERT



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OSHA Issues COVID-19 Vaccination and Testing Emergency Temporary Standard

Introduction

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued the highly anticipated COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS) implementing certain workplace safety elements of [President Biden's COVID-19 Action Plan](#). The ETS requires employers with 100 or more employees, to develop, implement, and enforce a mandatory COVID-19 vaccination policy or implement an alternative standard that includes weekly testing. Covered employers are required to determine the vaccination status of each employee, obtain proof of vaccination, properly maintain records and a roster of vaccination status. To support employee vaccination, employers must provide employees with up to four hours of supplemental paid leave for employees to receive each primary vaccination dose (up to eight hours where two shots are required), and “reasonable” time and paid leave for an employee to recover from the side effects of the COVID-19 vaccine (up to two days per vaccination dose). The ETS also includes employee notice requirements, where employees must promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19 and a requirement that employers immediately remove employees with COVID-19 from the workplace. Finally, the ETS includes employer notice, reporting requirements, and recordkeeping requirements. The ETS is effective upon publication and employers must comply with most ETS provisions within 30 days (December 5, 2021) and with optional testing requirements within 60 days (January 4, 2022). An overview of the relevant ETS provisions is provided below. The full ETS is available [here](#) and supporting materials (including policy templates) are available [here](#).

Covered Employers and Employees

As noted above, the ETS applies to all private employers with 100 or more employees, which is determined on a company-wide basis. An employer should count all employees at all U.S. locations, regardless of employees' vaccination status or where they perform work. Part time employees, fully remote employees, temporary and seasonal workers count towards the 100-employee threshold but properly classified independent contractors do not. Employers in states with OSHA-approved State Plans are not covered by the ETS, as they will be covered by those state occupational safety and health requirements. The ETS also does not cover federal contractors and subcontractors, workplaces where employees provide healthcare services or healthcare support services covered by the Healthcare ETS, and public employers in states without State Plans. It will not apply in specific situations for those who do not report to a workplace where other individuals (e.g., co-workers or customers) are present, while working from home, or who work exclusively outdoors (not including many construction sites or where employees share vehicles). Notably, the determination of whether a particular *employer* is covered by the ETS is a separate analysis from whether individual *employees*

are covered by the requirements. This means that employers must count all U.S. employees when determining coverage, regardless of whether the ETS requirements apply to a particular employee.

Required Policy

The ETS requires covered employers to develop, implement, and enforce written policies on COVID-19 vaccination in the workplace. Employers have the option to implement either a mandatory vaccination policy or a policy requiring employees to elect to either receive the COVID-19 vaccination or undergo weekly COVID-19 testing and wear a face covering at the workplace (an “elective policy”). A mandatory policy requires all employees to be fully vaccinated, other than those employees falling into one of the following categories:

1. Individuals for whom a vaccine is medically contraindicated;
2. Individuals who require a delay in vaccination; and
3. Individuals entitled to a reasonable accommodation because of a disability or sincerely held religious beliefs, practices, or observances that conflict with a vaccine requirement.

Importantly, the ETS provides that employers may choose to implement a mandatory policy that only applies to a subset of its employees and to have an elective policy for other employees (e.g., mandatory for customer-facing employees but elective for employees working in a corporate headquarters).

Determination of Vaccination Status

To comply with the written policy requirements, covered employers must be aware of an employee’s vaccination status. This means that covered employers are required to determine the vaccination status of each employee, maintain proper records of each employee’s vaccination status, maintain and preserve appropriate proof of vaccination for each employee who is fully or partially vaccinated, and maintain a roster of each employee’s vaccination status. Booster shots and additional doses are not included in the definition of fully vaccinated under the ETS. The requirement to determine the vaccination status of each employee is an ongoing requirement, which must be updated as employees proceed through the vaccination process. The ETS describes “acceptable proof of vaccination status” to include the following:

1. A record of immunization from a health care provider or pharmacy;
2. A copy of the U.S. CDC COVID-19 Vaccination Record Card;
3. A copy of medical records documenting vaccination;
4. A copy of immunization records from a public health, state, or tribal immunization information system; or
5. A copy of any other official documentation containing the type of vaccine, date(s) of administration, and the name of the health care professionals or clinics administering the vaccine.

Digital copies may be sufficient if they clearly and legibly display the necessary information, but the employer must be able to retain either a physical or digital copy of the documentation. In situations where an employee is unable to provide proof of vaccination as described above, a signed and dated statement by the employee will be acceptable. To meet the requirements, the statement must attest

to vaccination status, that they have lost or are otherwise unable to produce proof of vaccination, and include specific language (as provided in the ETS) declaring that the information is true and that providing false information may subject them to criminal penalties.

In addition to obtaining and maintaining proof of vaccination status, covered employers must maintain a roster of each employee's vaccination status. The roster must list all employees and clearly indicate whether each employee is fully vaccinated, partially vaccinated, not vaccinated because of a medical or religious accommodation, or not vaccinated because of a lack of acceptable proof.

The records and roster required by the ETS are considered employee medical records, must be properly maintained in accordance with OSHA [exposure and medical records requirements](#), and must not be disclosed unless required or authorized by the ETS or other federal law.

Paid Time Off for Vaccination and Recovery

The ETS requires covered employers to provide employees with reasonable time, including up to four hours of supplemental paid leave, for employees to receive each primary vaccination dose, and “reasonable” time and paid leave for an employee to recover from the side effects of the COVID-19 vaccine. The paid time is for actual time taken to receive the shot, including travel, up to 4 hours for each vaccination shot (up to eight hours total where two shots are required). The supplemental paid leave for receiving the COVID-19 vaccine dose may not be offset by any other leave the employee has accrued (e.g., sick, PTO, vacation, etc.) and must be paid at the employee's regular rate of pay. The ETS provides that OSHA presumes that an employer making available up to two days of paid sick leave per vaccination dose for side effects, would be in compliance with the “reasonable” paid leave requirement.

An employer may require an employee to use accrued and unused paid sick leave to recover from the side effects of the vaccine but may not require employees to “go in the negative” to recover from the side effects of the vaccine. Employers that provide a single PTO bucket may require employees to use accrued and unused PTO for recovery, but employers providing multiple types of leave (e.g., sick or vacation) may only require employees to use accrued and unused sick leave for recovery. Employers are not required to provide supplemental paid sick leave if an employee chooses to receive the vaccine during non-work hours, however, employers must still provide them a reasonable amount of leave to recover from any side effects they experience during scheduled working time.

Testing and Masking for Those Not Fully Vaccinated

The ETS requires that covered employers ensure that each employee who is not fully vaccinated and reports at least once every seven days to a workplace where other individuals are present:

1. Is tested for COVID-19 at least once every seven calendar days (regardless of an employee's work schedule); and
2. Provides proper documentation of the most recent COVID-19 test result no later than the seventh day following the date on which the employee last provided a test result.

This requirement applies to all employees who are not fully vaccinated, including those entitled to a reasonable accommodation from vaccination requirements. However, there may also be situations where testing for COVID-19 may conflict with an employee's sincerely held religious belief, practice or observance and require a reasonable accommodation. If the employee is not reporting to a covered workplace on a regular basis (e.g., if an employee is teleworking for an extended period), the employer must ensure the employee is tested for COVID-19 within seven days prior to returning to the workplace and provides documentation upon returning to the workplace.

Significantly, the ETS does not require employers to pay for any costs associated with testing. However, employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements. Employers are not required to comply with these testing requirements until January 4, 2022. Employers may also be required to pay for testing under certain [EEOC guidance](#) if testing is a reasonable accommodation for employees who are not able to be vaccinated because of a disability or a sincerely held religious belief.

In addition to weekly testing, the ETS requires employers to ensure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with others for work purposes. There are, however, the following exceptions to the face covering requirements:

1. When an employee is alone in an enclosed room with floor to ceiling walls and a closed door;
2. While an employee is eating or drinking in the workplace;
3. For identification purposes in compliance with safety and security requirements;
4. When an employee is wearing a respirator or facemask; and
5. Where the employer can show that the use of face coverings is infeasible or creates a greater hazard that would excuse compliance.

Also, employers must not prevent any employee, regardless of vaccination status, from voluntarily wearing a face covering unless it creates a serious workplace hazard. Employers should be prepared to evaluate accommodation requests relating to face coverings in accordance with applicable law(s).

Employee Notice Requirements and Removal

The ETS requires covered employers mandate that each employee "promptly" notify the employer when they receive a positive COVID-19 test or are diagnosed with COVID-19, regardless of vaccination status. If an employee is not at the workplace when they receive a positive COVID-19 test or diagnosis, "promptly" means notifying the employer as soon as practicable before the employee is scheduled to start a shift or return to work. If the employee is notified in the workplace, they should notify the employer as soon as safely possible while avoiding exposing other individuals in the workplace.

The employee notification requirement is connected to a parallel requirement for employers to immediately remove any employee who receives a positive COVID-19 test or diagnosis from the workplace (regardless of an employee's vaccination status). An employer can, however, require an employee to work remotely or in isolation if suitable work is available and if the employee is not too ill to work. Employees must not return to the workplace until the employee:

1. 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. Meets the return-to-work criteria in the CDC’s “[Isolation Guidance](#)”; or
3. Receives a recommendation to return to work from a licensed healthcare provider.

Employers are not required to provide paid leave to any employee removed because of a positive COVID-19 test or diagnosis, however, employers may be required to provide paid leave under other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements. Additionally, employers should allow employees to use any accrued and unused leave in accordance with relevant policies.

Employer Notice Requirements

The ETS requires covered employers to inform each employee, in a language and at a literacy level the employee understands, of the following:

1. The requirements of the ETS and any policies and procedures the employer establishes to implement the ETS, which must include:
 - Any employer policies on vaccination;
 - The process used to determine employee vaccination status;
 - The time and paid leave employees are entitled to for receiving and recovering from vaccinations;
 - The procedures to follow when providing a positive COVID-19 test or diagnosis;
 - The procedures used for requesting records; and
 - Information about policies and procedures for COVID-19 testing and face coverings (to the extent relevant).
2. The COVID-19 vaccine efficacy, safety, and benefits of being vaccinated by providing the CDC’s “[Key Things to Know About COVID-19 Vaccines](#)”;
3. Information about employee protections against retaliations and discrimination; and
4. Information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.

Employers have flexibility to communicate the above information using any effective methods that are typically used in their workplaces and may choose any method of informing employees so long as each employee receives the information in a language and at a literacy level they understand. Examples of employer communication may include providing this information to employees through e-mail communications, printed fact sheets, or during a discussion at a regularly scheduled team meeting. There are no formal training requirements.

Employers must also report work-related COVID-19 fatalities to OSHA within 8 hours of learning about them, and work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization.

Availability of Records

The ETS requires employers to “make, keep, and preserve, and make available” an individual’s COVID-19 vaccine documentation and any COVID-19 test results required by the ETS. Additionally, an employer must maintain and make available the aggregate number of fully vaccinated employees in the workplace and the total number of employees in the workplace. An employer must make these records available to the employee, and to anyone having the written authorized consent of the employee, by the end of the next business day after a request. Employers are not required to submit their written policy to OSHA but must provide OSHA with access to its COVID-19 vaccination policy and to the aggregate number of fully vaccinated employees in the workplace and the total number of employees in the workplace within four business hours of a request. Employers must provide OSHA with all other records and other documents maintained in accordance with the ETS by the end of the next business day after a request.

Next Steps

The ETS will almost certainly be subject to legal challenge. However, it is unclear whether any challenges will temporarily delay implementation of the ETS. Employers should review the ETS, Fact Sheets and other supporting information and engage with employment law counsel as well as workers compensation and workplace safety advisors on how to implement the ETS requirements. Note that [OSHA penalties](#) can be significant.

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