



OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard Creates Vaccine Mandate for Numerous Employers

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On November 4, the Department of Labor's Occupational Safety and Health Administration (OSHA) published its COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS). The ETS fleshes out the Biden Administration's directive that all medium and large employers implement mandatory vaccination policies requiring their workers to be fully vaccinated against COVID-19 or undergo weekly testing. While the Administration intends to issue additional guidance in the coming days, highlights of the ETS appear below.

Effective Date: The ETS is effective immediately upon publication in the Federal Register, which is likely to occur on November 5. Employers have 30 days from that date, or until December 5, to comply with all requirements except testing for employees who are not fully vaccinated. Employers must comply with the testing requirement no later than January 4. The practical effect of these dates is that covered employers must disseminate and implement their mandatory vaccination policies no later than December 5 and must ensure that employees are either fully vaccinated or undergoing weekly testing no later than January 4.

Covered Employers: The ETS covers all employers "with a total of 100 or more employees at any time" while the ETS is in effect. In determining the number of employees, an employer must include all employees across all of its United States locations, including part-time employees, regardless of vaccination status or where the employees perform their work (meaning, remote workers count toward the total). Independent contractors do not count toward the company total. If an employer that has fewer than 100 employees on the effective date of the ETS subsequently hires more workers and hits the 100-employee threshold, the employer must come into compliance with the ETS.

The ETS applies even where there are contradictory state or local measures. The ETS does not apply to those employers that are already covered by: (1) the Safer Federal Workforce Task Force COVID-19 vaccine mandate for federal contractors and subcontractors; or (2) OSHA's COVID-19 Healthcare Emergency Temporary Standard.

Covered Employees: The ETS does not apply to employees: (1) who do not report to a workplace where other individuals are present (the ETS gives the example of someone who works at a research station where only one person is present at a time); (2) while working from home; and (3) who work exclusively outdoors and do not routinely occupy vehicles with

other employees for work purposes. Note, however, that employees who are not covered by the ETS still count toward an employer's 100-employee total.

Required Policy: The ETS directs a covered employer to establish, implement, and enforce a mandatory vaccination policy that requires its employees to be fully vaccinated or undergo weekly testing. An employee is fully vaccinated two weeks after receiving one dose of a single-dose vaccine or two weeks after receiving the second dose of a two-dose vaccine, provided the second dose was not received earlier than 17 days after the first dose. An employer may exempt employees: (1) for whom vaccination is medically contraindicated; (2) who must delay vaccination as a medical necessity; or (3) who are legally entitled to a reasonable accommodation due to disability or a sincerely held religious belief, practice, or observance that conflicts with the vaccination requirement.

Testing in Lieu of Vaccination: Under the ETS, an employer has the option of allowing its employees to choose to undergo weekly COVID-19 testing instead of being vaccinated. Unvaccinated employees who report at least once every seven days to a workplace where other employees or customers are present must be tested for COVID-19 at least once every seven days and must provide documentation of their most recent test results no later than the seventh day after the date on which they last provided COVID-19 test results. Note that tests that are self-administered and self-read are not sufficient to satisfy this requirement unless they are observed by the employer or an authorized telehealth proctor.

If an employee does not report to a workplace where other employees or customers are present during a period of seven or more days, the employee must be tested for COVID-19 within seven days before returning to the workplace and must provide COVID-19 test results upon return. If an employee fails to provide the required test results, the employer must remove the employee from the workplace until that employee does so.

An employer must maintain a record of its employees' test results for the entire time the ETS is in effect.

With certain limited exceptions (including time spent eating or drinking or when alone in an enclosed room), an employee who is not fully vaccinated must be required to wear a face covering while at the workplace and while in a vehicle with another person for work-related purposes.

The ETS does not require employers to pay the cost of COVID-19 testing or the cost of face coverings. The ETS specifically states, however, that the employer is not prohibited from paying those costs. It also notes that an employer may be required to pay those costs pursuant to other laws, regulations, collective bargaining agreements, or other negotiated agreements.

Vaccination Status: The ETS requires an employer to determine the vaccination status of each employee, preserve proof of its employees' vaccination status, and maintain a roster of each employee's vaccination status. Acceptable proof of vaccination includes medical records reflecting COVID-19 vaccination or a COVID-19 vaccination card. If an employee is unable to produce acceptable proof of vaccination, an employer may accept a signed statement attesting to the employee's vaccination status and the inability to produce acceptable proof. The statement must include language set forth in the ETS verifying the truth of the statement and acknowledging that knowingly providing false information about the employee's vaccination status may result in criminal penalties.

Paid Time Off for Vaccinations and Recovery from Side Effects: Under the ETS, an employer is required to provide "a reasonable amount of time" during work hours to each employee for the purpose of obtaining the employee's primary vaccination dose(s). That time must include up to four hours of paid time off at the employee's regular rate of pay. The four hours of paid time required by the ETS cannot be offset by any other leave an employee has accrued, such as sick leave or vacation time. If an employee chooses to receive a vaccination dose outside of working hours, the employer is not required to grant the employee paid time off for the time spent receiving the vaccine during non-working hours.

An employer must also provide "reasonable time and paid sick leave to recover from side effects" of each dose of the COVID-19 vaccine. While the paid sick leave can be in the form of an employee's accrued sick leave, if the employee does not have available sick leave, the employer must provide sick leave for this purpose.

Positive COVID-19 Tests: An employer must require employees to "promptly" provide notice when they receive a positive COVID-19 test result or are otherwise diagnosed with COVID-19. An employer is required to remove an employee who has received a positive test result or otherwise been diagnosed with COVID-19 from the workplace (regardless of the employee's vaccination status) and keep the employee out of the workplace until the employee meets the Centers for Disease Control and Prevention (CDC) criteria for returning to work or receives a recommendation to return to work from a health care provider.

The ETS does not require an employer to provide paid time off to any employee removed from the workplace as a result of a positive COVID-19 test or COVID-19 diagnosis.

Information for Employees: Under the ETS, an employer must provide to employees: (1) information about the requirements of the ETS and the policies and procedures the employer will use to implement the ETS; (2) the CDC document "Key Things to Know About COVID-19 Vaccines," available at www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html; (3) information about protections against retaliation and discrimination; and (4) information

about criminal penalties for knowingly supplying false statements or documentation.

Reporting Requirements: The ETS requires an employer to report work-related COVID-19 fatalities to OSHA within eight hours of learning about them and work-related COVID-19 inpatient hospitalizations within 24 hours of learning about them.

Availability of Records: The ETS requires employers to make available for examination and copying an employee's COVID-19 vaccine documentation and any COVID-19 test results to that employee and to anyone with that employee's written consent. Employers are also required to make available to an employee, or an employee's representative, the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace. The ETS also requires an employer to make that same information, as well as its written mandatory vaccine policy, available to OSHA for examination and copying.

Additional Information

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