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OSHA PUBLISHES COVID-19 VACCINATION AND TESTING REQUIREMENTS FOR EMPLOYERS WITH AT LEAST 100 EMPLOYEES

Effective November 5, 2021, the Occupational Safety and Health Administration (OSHA) published its new COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS) for employers with 100 or more employees. The stated purpose of the ETS is to minimize the risk of COVID-19 transmission in the workplace and to protect unvaccinated workers from the risk of contracting COVID-19. Under the ETS, employers must comply with many of its requirements by December 5, 2021.

Not surprisingly, several states quickly initiated legal challenges to the ETS. On November 6, 2021, the Fifth Circuit Court of Appeals issued an order staying OSHA's enforcement of the ETS pending further judicial review. The U.S. Department of Labor and OSHA must respond to the order by 5 p.m. on November 8, 2021.

While the status of the ETS is unclear and further legal challenges are anticipated, below is a summary of the ETS's primary requirements as currently set forth by OSHA.

Which employers are covered?

OSHA's ETS applies to employers with at least 100 employees company-wide. This includes employers with unionized workplaces. Nothing in the ETS prevents employers from agreeing with employees and their representatives to implement additional measures, and the ETS does not displace collectively bargained agreements that exceed the requirements of the ETS.

The ETS *does not* apply to:

- Workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors;
- Settings where an employee provides healthcare services or healthcare support services when subject to the Emergency Temporary Standard for healthcare employers; or
- State and local government employers in states without State Plans, such as Nebraska and Colorado, because state or local government employers and employees are exempt from OSHA coverage.

Which employees are covered?

In determining whether an employer meets the applicable 100-employee threshold, employers must include all employees across their U.S. workplaces, regardless of employees' vaccination status or where they perform their work. Part-time employees must be included in calculating the total number of employees, but independent contractors are not.

The count should be done at the employer level (company-wide), not the individual location level. Therefore, for a single corporate entity with multiple locations, all employees at all locations are counted.

The U.S. Department of Labor provides the following examples:

- If a single corporation has 50 small locations (e.g., kiosks, concession stands) with at least 100 total employees in its combined locations, that employer would be covered even if some of the locations have no more than one or two employees assigned to work there.
- If an employer has 150 employees, and 100 of them perform maintenance work in customers' homes, primarily working from their company vehicles (i.e., mobile workplaces), and rarely or never report to the main office, that employer would fall within the scope of the ETS.
- If a franchisor has more than 100 employees but each individual franchisee has fewer than 100 employees, the franchisor would be covered by this ETS, but the individual franchises would not be covered.

Additionally, two or more related entities may be regarded as a single employer for purposes of the ETS if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted.

How do employers with fluctuating employee numbers determine if they meet the 100-employee threshold?

The determination of whether an employer falls within the scope of the ETS based on number of employees should be made as of November 5, 2021, the effective date of the ETS. Once an employer comes within the scope of the ETS, the standard continues to apply for the remainder of the time the standard is in effect, regardless of fluctuations in the size of the employer's workforce. For example:

- If the employer has 100 or more employees as of November 5, 2021, the ETS applies to the employer while the ETS is in effect.
- If the employer has fewer than 100 employees as of November 5, 2021, the ETS would not apply to that employer as of the ETS's effective date. However, if that same employer subsequently hires more workers and hits the 100-employee threshold for coverage, the employer would then be expected to comply with the requirements of the ETS.
- If an employer has 103 employees as of November 5, 2021, but then loses four employees within the next month, that employer would continue to be covered by the ETS.
- Temporary and seasonal workers employed directly by the employer (i.e., not obtained from a temporary staffing agency) are counted in determining if the employer meets the 100-employee threshold, if they are employed at any point while the ETS is in effect.

If an employer is covered by the ETS, are certain employees excluded from the requirements of the ETS?

The ETS does not apply to employees of covered employers within the following categories:

- Employees who work exclusively outdoors: to meet this exception, the employee's work must truly occur outdoors for the duration of every workday, except for limited and brief use of indoor spaces where other individuals may be present (such as a multi-stall bathroom or an administrative office) or occurs exclusively in the employee's home.

- Employees who do not report to a workplace where other individuals, such as coworkers or customers, are present.
- Employees who work exclusively from home.

When does the ETS become effective?

The ETS took effect immediately upon being published in the Federal Register on November 5, 2021. As noted above, however, a federal appeals court has stayed enforcement of the ETS pending further judicial review.

If the ETS is allowed to stand, employers must comply with all requirements by December 5, 2021, other than the requirement to test employees who are not fully vaccinated. Additionally, the ETS requires all covered employees to either be fully vaccinated or begin weekly testing within 60 days of the publication (i.e., by January 4, 2022). The ETS defines “fully vaccinated” to mean two weeks after the employee’s second dose in a two-dose series, or two weeks after a single-dose vaccine.

What does the ETS require covered employers to do?

1. Develop a policy

The ETS requires covered employers to develop, implement, and enforce a written mandatory vaccine policy *or* a written policy that allows employees to either be fully vaccinated or undergo weekly COVID-19 testing and wear a face covering in the workplace.

An employer’s mandatory vaccination policy must require all employees, including new employees, to be fully vaccinated against COVID-19, with the following exceptions:

- Individuals for whom a vaccine is medically contraindicated;
- Individuals for whom medical necessity requires a delay in vaccination; or
- Individuals who are legally entitled to a reasonable accommodation under federal civil rights laws due to a disability or a sincerely held religious belief, practice, or observance that conflicts with the vaccination requirement.

Additionally, the ETS requires employers to provide employees with the following information:

- Information about the employer’s policies and procedures designed to comply with the ETS;
- The CDC’s document [Key Things to Know About COVID-19 Vaccines](#);
- Information about OSHA’s prohibition against retaliation; and
- Information about criminal penalties associated with knowingly supplying false statements or documentation.

2. Determine employees’ vaccination status

The ETS requires employers to obtain employees’ proof of vaccination, including information to determine whether employees are fully or partially vaccinated. Acceptable proof means:

- The record of immunization from a healthcare provider or pharmacy;
- A copy of the employee's 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).

If an employee is unable to produce acceptable proof of vaccination, an attestation may be acceptable if the employee signs and dates a statement:

- Attesting to their vaccination status;
- Attesting that they have lost or are otherwise unable to produce proof of their vaccination status; and
- Acknowledging that providing false information may subject the employee to criminal penalties.

Employers must maintain all proof of vaccination confidentially while the ETS is in effect.

3. Provide leave to receive vaccination

Regardless of whether employers implement a mandatory vaccination policy or a weekly testing and mask policy, the ETS requires covered employers to provide employees up to four hours of paid time off per dose (excluding booster doses) to get vaccinated. Additionally, the ETS requires reasonable paid leave for vaccine-related side effects following each dose.

Under the ETS, necessary paid time off to recover from side effects may run concurrently with existing sick time. Employers may not require employees to use vacation pay to cover side effects, but must instead provide additional sick time if reasonably necessary.

4. Require testing of unvaccinated employees

The ETS requires employers to ensure that every covered employee who is not fully vaccinated is tested for COVID-19 at least weekly if those employees are present in the workplace at least once a week. If an employee who is not fully vaccinated is present in the workplace less than once a week, that employee must submit to testing within seven days before physically returning to work.

According to the ETS, a COVID-19 test:

- must be cleared, approved, or authorized by the FDA to detect a current COVID-19 infection;
- must be administered as instructed by the manufacturer; and

- cannot be both self-administered and self-read, unless observed by the employer or authorized telehealth proctor.

Examples of tests that satisfy the ETS requirement include those with specimens that are processed by a laboratory, proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer. Antibody tests do not qualify as COVID-19 tests under the ETS at this time.

Under the ETS, employers are not required to pay for the costs associated with testing. However, other state laws, regulations, or collective bargaining agreements may impose such a requirement. It is unclear at this time whether, under the Fair Labor Standards Act (FLSA), the cost of testing may drop an employee's effective rate of pay below the federal minimum wage. Additionally, the FLSA and state law will govern whether employers have to pay for the time associated with being tested and awaiting results.

5. Respond to positive COVID-19 tests

Employers must require employees to provide prompt notice of a positive COVID-19 test or diagnosis.

If an employee receives a positive COVID-19 test or has been diagnosed with COVID-19 by a licensed healthcare provider, the employer must remove that employee from the workplace regardless of vaccination status. Additionally, employees who are not fully vaccinated and do not meet testing requirements must be removed from the workplace pending a test result.

For individuals who have received a positive COVID-19 test or who have been diagnosed with COVID-19, the ETS provides an exception from testing for the 90-day period following the positive diagnosis or test.

6. Require face coverings

Covered employers must ensure that all unvaccinated employees wear a face covering while indoors or while occupying a vehicle with another person for work purposes, except in limited circumstances. If an employee cannot wear a face covering because of a disability or a sincerely held religious belief, the employee may be entitled to a reasonable accommodation in accordance with applicable law. Employers are not required to pay for face coverings for unvaccinated employees.

7. Maintain records

The ETS directs employers to maintain a record of each employee's vaccination status. Specifically, the employer must maintain acceptable proof of vaccination for each employee who is fully or partially vaccinated, along with a roster of each employee's vaccination status. Employers must also maintain a record of each test result provided by each employee.

If an employer has already determined employees' vaccination status prior to the effective date of the ETS, it need not re-determine the vaccination status of individuals whose fully vaccinated status has been previously documented.

These records must be maintained confidentially as employee medical records. They also must be maintained and preserved while the ETS remains in effect but are not subject to OSHA's 30-year retention requirement.

Employers must make vaccination or testing records available for examination and copying to an employee or the employee's representative. Employers must also maintain and make available records and policies related to the ETS for inspection by OSHA. The ETS requires employers to make available to an employee or an employee's representative the aggregate number of fully vaccinated employees at a workplace, as well as the total number of employees at that workplace.

8. Conduct proper reporting

Employers must report work-related COVID-19 hospitalizations to OSHA within 24 hours of learning of the hospitalization. Likewise, employers must report work-related COVID-19 fatalities to OSHA within 8 hours of learning of the fatality.

Do employees who have requested reasonable accommodations in lieu of vaccination still have to undergo weekly COVID-19 testing?

Under the ETS, employees who are not fully vaccinated against COVID-19, including those entitled to a reasonable accommodation exemption from the vaccine mandate, must submit to weekly COVID-19 testing. However, if COVID-19 testing contradicts an employee's sincerely held religious belief, the employee may also be entitled to a reasonable accommodation as to testing.

Does the ETS preempt conflicting state or local laws?

OSHA's ETS is intended to comprehensively address the workplace safety and health issues of COVID-19 vaccination, testing, and masking. OSHA's position is that the ETS preempts any state or local requirements on these issues, except those from an OSHA-approved State Plan. Thus, the ETS likely preempts any state or local requirements that ban or limit an employer from requiring vaccines, face coverings, or COVID-19 testing, though further litigation over the enforceability of the ETS is expected.

Currently, 22 states (*not* including Nebraska or Colorado) have OSHA-approved State Plans regulating employers in the private sector. For these states, the federal OSHA ETS will not apply immediately, although the State Plans must be at least as effective as the ETS in protecting workers from COVID-19 hazards.

The full text of the OSHA ETS can be accessed [here](#).

Additionally, OSHA has set forth *Frequently Asked Questions about the ETS*, which can be accessed [here](#).

For more information on these issues, please reach out to the authors of this update, [Tara Stingley](#) and [Libby Stevenson](#), or another member of Cline Williams' [Labor and Employment Law Section](#).

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