

OSHA'S Emergency Temporary Standard on COVID-19 Vaccination and Testing

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In response to President Biden's executive order to stop the spread of COVID-19, the Occupational Safety and Health Administration ("OSHA") released an Emergency Temporary Standard ("ETS") which is both an interim final rule and a request for employer comments on November 4. It was published in the Federal Register and took effect on November 5, 2021. Most provisions summarized below must be complied with within 30 days after publication of the ETS and the vaccination deadline is 60 days after publication. *The ETS widely preempts contrary laws, ordinances and executive orders issued by state and local governments, except as noted below.* To assist employers, OSHA has a designated website for the ETS with template policies, fact sheets, FAQs and more at <https://www.osha.gov/coronavirus/ets2>.

On November 6, a panel of the 5th Circuit Court of Appeals issued a stay, stopping the ETS in its tracks until further court review. Similar lawsuits were filed in other federal Circuit Courts. While it may take weeks for the legal process to give the ETS a final thumbs up or thumbs down, employers will be expected to comply by the stated deadlines if the U.S. Department of Justice prevails. The work needed to comply, as set forth below, cannot be done overnight so employers are advised to begin preparing the necessary plans and communications rather than taking a "wait and see" approach.

Here is a summary of the requirements:

Purpose – To set minimum standards for vaccination, verification of vaccination, face coverings and testing to address the danger of COVID-19 in the workplace and to preempt inconsistent state and local requirements relating to these issues.

Scope – Currently applies to U.S. employers with 100 or more employees at any time the ETS is in effect. When calculating "covered employer" status include full-time, part-time, temporary and employees who work remotely or telework. No need to include temps who are provided by a staffing agency. Once the ETS applies based on headcount, "covered employer" status remains even if headcount later drops below 100. The request for comments reveals OSHA may broaden the scope to smaller employers later.

The ETS does not apply to workplaces already covered by separate rules applicable to federal contractors and subcontractors or healthcare services. This ETS does not apply to employees of covered employers who work from home, work exclusively outdoors or who report to a workplace where there are no other individuals. The ETS does not directly apply to the 22 U.S. states and territories with OSHA-approved workplace safety and health programs run by their respective states rather than by OSHA. However, these state plans have 30 days to amend their plans to adopt a state ETS or demonstrate that one is not needed because their existing plan meets or exceeds the federal ETS.

Requirements – Covered employers must:

Have and enforce a written policy – Employers can choose between having a policy requiring 100% of employees to be vaccinated or one that allows weekly testing and wearing a mask in the workplace in lieu of being vaccinated or a combination policy which uses both approaches in various work locations, such as requiring customer-facing retail employees to be fully vaccinated while giving headquarters employees the option to be tested weekly and wear a mask while at work. Both approaches remain subject to requests for the accommodation of not being vaccinated, not being tested and/or not wearing a mask under Title VII (religion/sincerely held belief) and/or the ADA (medical). See recently updated EEOC guidance on how to handle these requests.

Determine the vaccination status of each employee and keep a roster – Employers must require each vaccinated employee to provide acceptable proof of vaccination such as a CDC vaccination card or other official medical record. If the employee can't produce a card or official record, a signed and dated attestation both as to vaccination status (including best recollection of type of vaccine, date(s) and where administered) and inability to produce a card or official record is acceptable. The ETS contains suggested language for the attestation. Employers must maintain both individual records/attestations and a roster indicating each employee's vaccination status and keep the records and roster confidential. An employee is deemed to be fully vaccinated two weeks after receiving a single-dose vaccination or two weeks after the second shot for a two-dose vaccination. A person who has received the first of two vaccinations is deemed partially, not fully, vaccinated. Booster vaccination is not addressed in the ETS. Unvaccinated individuals who had and recovered from COVID-19 are not deemed fully vaccinated and must comply with the ETS and their employer's policy.

COVID-19 tests are those that are approved by the U.S. Food & Drug Administration to detect SARS-CoV-2 virus, are administered according to authorized instructions and are not both self-administered and self-read unless observed by an employer or an authorized telehealth proctor. Diagnostic tests, which detect current infection, can be used. Antibody tests cannot be used to satisfy the ETS.

Provide support for vaccination – Employers must provide up to four hours of paid time off to each employee to obtain each vaccination and a reasonable amount of paid time off to recover from any side effects of vaccination.

Require weekly COVID-19 testing of unvaccinated employees – Any unvaccinated employee who reports at least once every seven days to a workplace where others are present must be tested for COVID-19 at least once every seven days and must provide the test results to the employer no later than the seventh day following the last provided test result. An employee who is absent from the workplace for seven days or longer must be tested within seven days prior to returning to the workplace and must provide that test result to the employer upon returning to the workplace. This same approach applies to new hires who are unvaccinated. **Employers are not required to pay for these tests**, however payment for tests may be required by other laws, regulations or collective bargaining agreements. For example, Texas state law does not require employers to pay for testing, but California state law does. If the employee does not provide a test, the employer must keep the employee removed from the workplace until a test result is provided. Once an employee tests positive for COVID-19 or has been diagnosed with COVID-19 by a licensed healthcare provider, additional testing is not required for 90 days. Test results must be maintained by the employer and kept confidential.

Require notification of a positive COVID-19 test – Regardless of vaccination status, employers must require all employees to promptly notify the employer when the employee tests positive or is diagnosed with COVID-19 by a licensed healthcare provider. Upon notice, the employer is to immediately remove the employee from the workplace and not allow a return to the workplace until the employee meets the CDC's return to work criteria as stated in the Isolation Guidance, is released to return to work by a licensed healthcare provider or obtains a negative nucleic acid amplification test (NAAT) following a positive antigen test, if the employee opts to seek a NAAT for confirmatory testing. **Employers are not required to provide paid time off due to a positive COVID-19 test or diagnosis**, but paid time off may be required by other laws, regulations, collective bargaining agreements or other collectively negotiated agreements.

Require nonvaccinated employees to wear a mask – Nonvaccinated employees must wear a mask when indoors or occupying a vehicle with another person except when [1] the employee is in a floor-to-ceiling enclosed room with a closed door; [2] briefly lifting the mask to eat, drink or for identification purposes; [3] the employee is wearing a respirator or facemask (see definition below); or [4] the employer can show a mask is not feasible or creates a greater hazard. The employer must ensure the mask is worn correctly (over nose and mouth) and is replaced when wet, soiled or damaged. **The employer is not required to pay for masks**, but payment may be required under other laws, regulations, collective bargaining agreements or collectively negotiated agreements.

A compliant mask [1] covers the nose and mouth; [2] has two or more layers of tightly woven but breathable fabric; [3] is secured to the head with ties, loops or bands that go behind the head (gaiters must have two layers of fabric or be folded to provide two layers); [4] fits snugly over the nose, mouth and chin with no large gaps; and [5] is a solid piece of material without slits, exhalation valves, visible holes, punctures or other openings. The "facemask" referred to in [3] above is a surgical, medical procedure, dental or isolation mask that is FDA-approved.

Inform employees – Using appropriate language and literacy levels, employers must inform each employee about [1] the requirements of the ETS and the employer's implementing policies; [2] vaccination efficacy and safety via distribution of "Key Things to Know About COVID-19 Vaccines" (available on the CDC website); [3] OSHA regulation which prohibits employers from discharging or discriminating against employees who report work-related injuries and illness or otherwise exercise rights under OSHA; and [4] portions of OSHA which provide for criminal penalties for knowingly supplying false statements or documentation. This requirement is in addition to the written policy/plan identified above. Item [4] is a welcome addition, to combat the burgeoning cottage industry supplying fake CDC vaccination cards.

Report COVID-19 fatalities and hospitalizations to OSHA – Fatalities are to be reported within eight hours of learning of the fatality. Hospitalizations are to be reported within 24 hours of learning of in-patient hospitalization. The reporting method is the same as used with nonCOVID employee deaths and hospitalizations.

Make records available to individuals and to OSHA – Upon request from an employee, a person having written authorization of the employee or an employee representative, the employee's vaccine documentation, COVID-19 test results and the aggregate number of fully vaccinated employees plus the total number of employees in the workplace must be provided by the end of the next business day. Upon request, the Assistant Secretary of OSHA or designee is entitled to examine and copy [1] the employer's written policy required under the ETS and the number of vaccinated employees plus the total number of employees in the workplace within four hours; and [2] all other records required to be maintained under the ETS by the end of the next business day.

The nearly 500-page ETS is posted on the OSHA ETS website at <https://www.osha.gov/coronavirus/ets2>. Much of the ETS is foundation material explaining the need for the ETS and OSHA's right to impose it on employers. We recommend you focus on the amendment to the Code of Federal Regulations (located at the end of the document) and *Section VI. Summary and Explanation* as it provides expanded discussion, definitions and helpful examples which may answer many of your questions. If you need further help in understanding what you must do or drafting a compliant employer policy, please let us know or contact our co-chair of employment and labor [Audrey Mross](mailto:amross@munckwilson.com) at amross@munckwilson.com or 972.628.3661.

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