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November 05, 2021

Frequently Asked Questions on OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) [issued](#) its long-awaited emergency temporary standard (ETS) requiring all employers with a total of 100 or more employees to mandate vaccination and/or weekly COVID-19 testing. OSHA also released a comprehensive [FAQ](#) to address questions. Frequently asked questions of the ETS are below:

1. Who Are Covered Employers?

Covered employers are those employers with a total of 100 or more employees at any time the ETS is in effect (Covered Employers).

How do employers calculate the number of employees for applicability?

Employers must include all employees across all of their U.S. workplaces, regardless of where they perform their work. The count should be done at the employer level (firm- or corporate-wide), not the individual location level. The count must include all part-time, full-time, temporary, seasonal, and minor employees, but not independent contractors and not workers obtained from a temporary staffing agency. Staffing agencies must count their own employees, even if employees are placed at host employer locations. Employers must count all employees regardless of employees' vaccine status and whether they perform their work exclusively outdoors (even though employees working exclusively outdoors are not subject to the ETS—see Q. 2 below).

Employers with employees working at a multiemployer worksite, such as a construction site, need only count their own employees.

What is the date upon which an employer determines if they have 100 employees?

The determination of whether an employer falls within the scope of the ETS based on the number of employees should initially be made as of the effective date of the ETS: November 5, 2021. If an employer has 100 or more employees on the effective date, the ETS applies for the duration of the standard.

If an employer has fewer than 100 employees on November 5, 2021, the ETS will not apply to that employer as of the effective date. However, if the employer subsequently hires more workers and hits the 100-employee threshold for coverage, the employer would then be expected to come into compliance with the ETS requirements. Once an employer has come 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.

2. Are There Employees Who Are Not Subject to the ETS?

The OSHA ETS does not apply to the following categories of employees:

- **Remote workers.** The ETS does not apply to employees who do not report to a workplace where other individuals such as coworkers or customers are present or while working from home.

- **Employees working exclusively outdoors.** In order to qualify as work performed exclusively outdoors, the following criteria must be met:
 - The employee must work outdoors on all days (i.e., an employee who works indoors on some days and outdoors on other days would not be exempt from the requirements of this ETS).
 - The employee must not routinely occupy vehicles with other employees as part of work duties (i.e., do not drive to worksites together in a company vehicle).
 - The employee works outdoors for the duration of every workday except for *de minimis* use of indoor spaces where other individuals may be present—such as a multistall bathroom or an administrative office—as long as the time spent indoors is brief, or occurs exclusively in the employee's home (e.g., a lunch break at home).

The employee's work must truly occur "outdoors," which does not include buildings under construction where substantial portions of the structure are in place, such as walls and ceiling elements that would impede the natural flow of fresh air at the worksite.

- **State and local government employees in states without State OSHA Plans.** State and local government employers and employees are exempt from OSHA coverage under the OSH Act (29 U.S.C. 652 (5)). However, in states with OSHA-approved occupational safety and health programs (State Plans), state and local government employers with 100 or more employees will be covered by state occupational safety and health requirements, and State Plans must adopt requirements for state and local employers that are at least as effective as federal OSHA's requirements in this ETS. State Plans may also choose to adopt more protective occupational safety and health requirements (29 USC 667(c)).
- **Federal Contractor employees already covered by the Safer Federal workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors.** Because covered contractor employees are already covered by the protections in the federal contractor guidelines, OSHA has determined that complying with the ETS is not necessary to protect employees at workplaces covered by those guidelines from a grave danger posed by COVID-19.
- **Employees working for federal agencies.** The ETS also does not apply to employees of federal agencies, with the exception of those employed by the U.S. Postal Service, as federal agencies are already obligated to implement a vaccination program under Executive Order 14043 and/or Executive Order 13991.
- **Employees covered by OSHA's Healthcare ETS (29 CFR § 1910.502) issued in June 2021.** The ETS does not apply to employees covered by OSHA's [COVID-19 Healthcare ETS](#) (Healthcare ETS) while that ETS is in effect. If, however, the Healthcare ETS is no longer in effect at any point while this ETS is in effect, some employees working in settings covered under section 1910.502 of the Healthcare ETS may become covered by this ETS. Additionally, this ETS applies to employees working in healthcare settings not covered by the Healthcare ETS.

3. When Must Covered Employers Comply?

The ETS is effective upon publication in the Federal Register on November 5, 2021. The first compliance deadline for Covered Employers to provide time off for workers to get inoculated and ensure unvaccinated employees are wearing masks is December 5. The second deadline, January 4, 2022, requires employees to be fully vaccinated or submit to testing. These deadlines are only applicable to Covered Employers operating in states regulated by federal OSHA.

States with State Plans are allowed an additional 30 days to adopt regulations identical to or more stringent than the ETS. State Plans are OSHA-approved workplace safety and health programs operated by individual states or U.S. territories. There are currently 22 State Plans covering both private sector and state and local government workers. State Plans are monitored by OSHA and must be at least as effective as OSHA in protecting workers and in preventing work-related injuries, illnesses, and deaths. Thus, Covered Employers in these state plan states should watch carefully to determine the compliance deadlines applicable to the states where they do business.

4. What Must Be Set Forth in a Mandatory Vaccination Policy?

Covered Employers must establish, implement, and enforce a written mandatory vaccination policy, which requires all employees, including new hires, to become fully vaccinated by January 4, 2022, except for those employees who are entitled to an accommodation (see Q. 5 below). However, Covered Employers are exempted from implementing a mandatory vaccination policy only if they instead establish, implement, and enforce a written policy that gives its employees the option of becoming fully vaccinated by January 4, 2022, or submitting to COVID-19 testing and wearing a face covering in accordance with the requirements set forth in the ETS. OSHA has [published](#) two sample policy templates.

Covered Employers may choose to implement partial mandatory vaccination policies, such that only a subset of the workforce (e.g., those regularly interacting with the public) must get vaccinated while the remainder of the workforce may choose whether to get vaccinated or be subject to testing and wear a face covering. Covered Employers choosing this mixed approach should ensure that they can articulate a legitimate, nondiscriminatory reason for treating these groups of employees differently.

Covered Employers policies must address specific requirements of the ETS (see Q. 14 below). Covered Employers with existing policies must modify and/or update their current policies to incorporate any missing required elements, and they must provide information on these new updates or modifications to all employees.

While OSHA does not require Covered Employers to proactively submit their written policies for approval, they will be required to provide a copy to the assistant secretary of labor for OSHA (the Assistant Secretary) for examination and copying within four business hours of a request.

5. What Accommodation Process Applies?

For Covered Employers who choose to require mandatory vaccination policies, employees are not required to be vaccinated if:

- They have a medical contraindication to COVID-19 vaccines;
- They have a medical necessity that requires a delay in vaccination; or
- They are legally entitled to a reasonable accommodation "under federal civil rights laws" due to a disability or sincerely held religious beliefs, practices, or observances (religious beliefs) that conflict with the vaccination requirement.

The ETS contemplates that a broader range of workers may be excepted or temporarily excepted from a mandatory vaccination policy and is not limited to those who are only entitled to reasonable accommodations under the Americans with Disabilities Act (ADA) or Title VII.

If a worker requests a reasonable accommodation because the worker cannot be vaccinated, be tested for COVID-19, and/or wear a face covering because of a disability (as defined by the ADA) or because it conflicts with their religious beliefs, then Covered Employers will need to assess whether these employees can be reasonably accommodated without imposing an undue hardship. The ETS does not provide a process for analyzing accommodations and exceptions, but instead points Covered Employers to the Equal Employment Opportunity Commission's (EEOC) regulations, guidance, and technical assistance: [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#). For further information on responding to requests for religious accommodations, please see Perkins Coie's [Frequently Asked Questions on Religious Objections to Employer COVID-19 Vaccine Mandates](#).

6. How Do Covered Employers Obtain Proof of Vaccination Status and What Is Sufficient Proof?

Covered Employers must require employees to provide "acceptable" proof of vaccination status, including whether the individual is fully or partially vaccinated. Acceptable proof includes: (1) the record of immunization of healthcare provider or pharmacy; (2) a copy of the COVID-19 Vaccination Record Card; (3) a copy of medical records documenting the 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 that contains the type of vaccine administered, the date(s) of administration, and the name of the healthcare professional(s) or clinic site(s) administering the vaccines.

If the employee is unable to produce proof of vaccination, an employee may be permitted to provide a signed and dated attestation regarding (1) their vaccination status as either fully or partially vaccinated, or (2) that they have lost and are otherwise unable to produce the required proof, which statement includes the following language: "I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties."

7. What Records Must a Covered Employer Maintain and to Whom Must They Be Disclosed and When?

As long as the ETS is in effect, Covered Employers must obtain, verify, and maintain records documenting the vaccination status, as described in Q. 6 above, as well as the results of any employee COVID-19 test results pursuant to 29 CFR Section 1910.1020—Access to Employee Exposure and Medical Records. These records are not, however, subject to OSHA's more burdensome 30-year medical information retention requirement.

Vaccination Records

As long as the ETS is in effect, Covered Employers must maintain a record and a roster of each employee's vaccination status, which should be protected pursuant to applicable laws relating to confidentiality of medical information. Covered Employers have flexibility in how to maintain these records, and we recommend that these records be maintained separately from normal personnel files, treated as confidential medical records (though not subject to HIPAA), and limit access to those who have a legitimate business need to know the information.

Employee Test Results

By January 4, 2022, and as long as the ETS is in effect, Covered Employers are also required to maintain records regarding each COVID-19 test result provided by an employee. Similarly to vaccination status, these records must be maintained as confidential medical records, and should not be disclosed to others (such as other employees without a legitimate business need to know, vendors, customers, etc.) except where specifically required or authorized by this ETS or other federal law.

What if a Covered Employer Has Already Been Collecting Records?

Covered Employers who were collecting and maintaining records of vaccination status (including through other forms of attestation and proof that do not comply with the ETS) prior to the effective date of the ETS are exempt from the new vaccination documentation requirements for each employee whose fully vaccinated status has been ascertained and recorded prior to the effective date of November 5, 2021.

To Whom Must a Covered Employer Provide Copies of Records and When?

Covered Employers must make available, by the end of the next business day after a request, for examination and copying, any individual COVID-19 vaccination record and any COVID-19 test results for a particular employee to that employee or anyone having written authorized consent of that employee. Additionally, by the end of the next business day after a request by an employee or the employee representative, the Covered Employer must make available the aggregate number of fully vaccinated employees at a workplace, along with the total number of employees at that workplace. Within only four business hours of a request, a Covered Employer must also make the entity's written policy and the aggregate numbers available to the Assistant Secretary for examination and copying. A Covered Employer has until the end of the next business day after a request to fulfill the Assistant Secretary's request for any other records and documents required to be maintained pursuant to the ETS.

8. What Are the COVID-19 Testing Requirements?

If a Covered Employer is offering COVID-19 testing as an alternative to vaccination, COVID-19 tests allowed under the ETS include tests that have been approved by federal authorities (including approved through an FDA Emergency Use Authorization) to detect current infection with SARS-CoV-2 virus. The COVID-19 test may be self-administered or self-read, but not both, unless observed by the Covered Employer or an authorized telehealth proctor. COVID-19 tests satisfying the requirements of the standard include tests with home or on-site collected 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 the employer.

A Covered Employer must ensure an employee that is not fully vaccinated is tested for COVID-19 at least once every seven calendar days prior to returning to a workplace where other individuals, such as coworkers or

customers are present. This interval testing is required regardless of the employee's work schedule. This requirement also applies to new hires, before their first day of employment. The employee who is not fully vaccinated must provide documentation of the COVID-19 test result to the employer upon return to the workplace. The employee's test must occur within the seven days before the day the employee is scheduled to report to the workplace, giving consideration to the fact the COVID-19 test must happen early enough to allow adequate time for the results to be received before returning to the workplace. If an employee does not provide the result of a COVID-19 test as required by the ETS, the employer must keep the employee removed from the workplace until the employee provides a test result.

9. Who Pays for Incidental Vaccine Costs, the Cost of Testing, and Masks?

The ETS explicitly states that it does not require Covered Employers to reimburse employees for transportation costs incurred to receive the vaccination or to pay for any costs associated with COVID-19 testing or masking. The ETS then notes that employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements. Such laws may include state and local regulations regarding the reimbursement of expenses and the Fair Labor Standards Act (FLSA). Additionally, to the extent that testing and/or masks are required as an accommodation under the ADA and Title VII, Covered Employers may be required to pay for testing and masks unless doing so would be an undue hardship.

Effectively, for those Covered Employees who choose to remain unvaccinated based on personal preference, the costs are left to the Covered Employer's discretion by the ETS. Covered Employers should consult with experienced attorneys to determine whether there are state or local law requirements that would require payment/reimbursement.

10. When Is a Covered Employer Required to Provide Paid Time Off?

The ETS has two provisions addressing paid time off. First, for those employees who need to obtain a vaccination, the ETS provides that Covered Employers are to provide up to four hours of paid time, including travel time, at the employee's regular rate of pay if the employee receives the vaccination during work hours. There is no requirement to pay if the employee is vaccinated outside of work hours. This paid time off is separate from any other leave that the employee has accrued. If an employee needs more than four hours to receive the primary vaccination doses, the employee may use other leave time that they have available to cover the additional time needed to receive a vaccination doses that would otherwise be unpaid. "The employer cannot terminate the employee if they use a reasonable amount of time to receive their primary vaccination doses."

Second, for employees who obtained a vaccination and experienced a side effect, Covered Employers must provide reasonable time off and paid sick leave to recover. Covered Employers who use a combined paid time off (e.g., PTO) method may require employees to use that leave when recovering. Covered Employers who provide multiple types of leave (vacation and sick) can only require employees to use sick leave. Further, while Covered Employers may require that employees use accrued paid sick leave, employers cannot require employees to accrue negative paid sick leave or borrow against future paid sick leave. Thus, if an employee does not have any paid sick leave to use (either because they have used it all and have a zero balance or because the

employer does not offer sick leave) the employer must provide paid sick leave. The ETS does not specify the amount of paid sick leave that the employer is required to provide, and an employer may set a reasonable cap on the amount of paid sick leave available to employees to recover from any side effects. OSHA presumes that "if an employer makes available up to two days of paid sick leave per primary vaccination doses for side effects, the employer would be in compliance with this requirement."

Note that the paid time requirements under the ETS apply to mandatory vaccination policies and policies where employees may choose vaccination or COVID-19 testing.

Both the paid time for vaccination and paid sick leave to recover from vaccination side effects set forth in the ETS can be satisfied where the employer provides such leave under other federal, state, or local law, or a collective bargaining agreement.

Importantly, neither the paid time to receive any vaccine dose nor the paid sick leave to recover are retroactive requirements for vaccine dose(s) received prior to the promulgation of the ETS.

11. What Steps Must a Covered Employer Take After an Employee Tests Positive for COVID-19?

Covered Employers must require each employee, regardless of COVID-19 vaccination status, to promptly notify the employer when they receive a positive COVID-19 test or are diagnosed with COVID-19 by a licensed healthcare provider. Any employee who receives a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider must be immediately removed and kept away from 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; (2) meets the return to work criteria in CDC's Isolation Guidance; or (3) receives a recommendation to return to work from a licensed healthcare provider. Covered Employers are not required to provide paid time to any employee for removal because of a positive COVID-19 test or diagnosis of COVID-19, unless paid time is required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements.

12. What Are the Masking Requirements?

Under the ETS, employees who are not fully vaccinated are required to wear face coverings in the workplace. A Covered Employer must ensure that each employee who is not fully vaccinated wears a face covering when indoors and when occupying a vehicle with another person for work purposes, with limited exceptions. In most situations, Covered Employers are not required to pay for the cost of such masks.

A face covering is defined in the ETS as a covering that completely covers the nose and mouth, with two or more layers of a breathable fabric that is tightly woven, and is secured to the head with ties, ear loops, or elastic bands that go behind the head. Gaiters can also be considered face coverings if they have two layers of fabric or can be folded to make two layers. Face coverings should fit snugly over the nose, mouth, and chin with no large gaps on the outside of the face. Face coverings should be a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings. The definition of face covering under the ETS also includes

clear face coverings.

Covered Employers must ensure that any face covering required to be worn by the ETS is worn by the employee to fully cover the employee's nose and mouth, and is replaced when wet, soiled, or damaged.

Covered Employers must not prevent any employee from voluntarily wearing a face covering or face mask or respirator, with limited exceptions. A Covered Employer may provide a respirator to an employee, but if they do so the employer must also comply with § 1910.504 (the mini respiratory protection program). The mini respiratory protection program is designed to provide a small set of provisions for the safe use of respirators in relation to employee protections from COVID-19, which differ from the more comprehensive respiratory protection program under 29 CFR 1910.134.

13. What Are the Reporting Requirements?

The ETS has modified the reporting requirements for in-patient hospitalizations and fatalities which occur as a result of a work-related exposure to COVID-19, by requiring employer reporting of inpatient hospitalizations and fatalities regardless of the length of time elapsed between a work-related exposure to COVID-19 and any inpatient hospitalization or fatality due to a confirmed case of COVID-19. A Covered Employer must make a report to OSHA within eight hours of learning both (1) that an employee has died from a confirmed case of COVID-19, and (2) that the cause of death was the result of a work-related exposure to COVID-19. An employer must make a report to OSHA within 24 hours of learning that (1) an employee has been inpatient hospitalized due to a confirmed case of COVID-19, and (2) the reason for the hospitalization was the result of a work-related exposure to the illness.

14. What Do Covered Employers Need to Tell Employees About the ETS Requirements?

An employer must inform each employee about the requirements of the ETS and any relevant employer policies and processes, including:

- The employer's process for determining vaccination status;
- Applicable time off and pay/leave associated with vaccinations and any side effects;
- How to provide notice of a positive COVID-19 test or diagnosis of COVID-19;
- How an employee or the employee's designee can obtain from the employer a copy of the employee's COVID-19 vaccine documentation and, if any, COVID-19 test results;
- Policies and procedures for COVID-19 testing and face coverings.

The ETS does not require an employer to provide information again if the employer has previously provided information that meets all of the requirements of the ETS and the employer's policies and procedures have not changed. However, a communication would be required to any new employee and any other employee who did not receive the prior communication. The employer must notify all employees when the employer's relevant policies or processes change.

A Covered Employer must also provide the CDC's document, Key Things to Know About COVID-19 Vaccines, to each employee.

A Covered Employer must notify employees about protections from retaliation and certain penalties for supplying false statements or documentation:

- That federal law prohibits retaliation against an employee for reporting a workplace injury or illness, complying with federal workplace safety laws, and filing a complaint or exercising other rights under federal workplace safety laws; and
- That there are criminal penalties associated with knowingly supplying false statements or documentation related to the requirements of the ETS, including providing false information to the employer regarding COVID-19 vaccination status or testing required by the ETS.

Required information must be provided in a language and at a literacy level the employee understands. The required information can be provided using any effective method typically used in the relevant workplace, so long as each employee receives the information specified in the standard in a language and at a literacy level they understand. Depending on the workforce, this may require translation of documents, including the "Key Things to Know" document. The notice need not be in writing (but if oral notice is given the employer should follow up with a writing). OSHA recommends, but does not require, that employers identify a point of contact for employees who have questions.

15. What About Covered Employers With Collective Bargaining Agreements?

The ETS takes precedence over a collective bargaining agreement that is less protective than the ETS. The ETS does not, however, prevent Covered Employers and unions from agreeing to additional COVID-19-related policies and processes that are more protective than the ETS. The ETS does not relieve Covered Employers of any duty to bargain with the union over policies, processes, and/or effects. Covered Employers should keep in mind that employees who advocate regarding COVID-19-related working conditions may be engaged in concerted activity that the National Labor Relations Act (NLRA) protects, even if no union represents the employees. An employee cannot be retaliated against for engaging in such protected concerted activity (sometimes referred to as exercising "Section 7 rights").

16. Do Previously Issued COVID-19 Vaccination Mandates Need to Be Updated?

Covered Employers that already have a mandatory vaccine policy in place can continue to enforce it, provided it complies with the new ETS requirements. Covered Employers will likely need to update their policies to address the new ETS requirements and should work with experienced legal counsel to address the required modifications.

17. What Are the Penalties for Non-Compliance?

Covered Employers that do not willingly comply may be liable for penalties within OSHA's discretion up to \$136,532 per violation and may be subject to multiple violations. OSHA penalties for serious violations of the ETS that are not willful may be up to \$13,653 per violation.

18. What About Legal Challenges to the ETS?

A collection of 10 states and other entities have already sued to enjoin implementation of the ETS. The chief allegation in the challenges is that OSHA has not met the standard to establish grave workplace-related dangers exist to promulgate a standard outside the normal course of notice and comment rulemaking. Covered Employers may be hopeful that five of the previous ETS challenges were successful. However, the novel circumstances of the pandemic as well as the persistence (and risks) of COVID-19 variants place this ETS on unique footing and employers should make a plan to comply. We will monitor any future legal developments.

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Employers with questions about the ETS, its applicability to their business, and the implementation process should contact experienced counsel.

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