

Updates

November 05, 2021

OSHA Issues COVID-19 Vaccination and Testing Emergency Temporary Standard



The Occupational Health Safety Administration (OSHA) issued the anxiously-awaited COVID-19 Vaccination and Testing Emergency Temporary Standard (Vaccine ETS), which mandates that private employers with 100 or more employees (Employers) implement a COVID-19 vaccination policy. The first compliance deadline—for employers to provide time off for workers to get inoculated and ensure that unvaccinated employees are wearing masks—is December 5. By January 4, 2022, employees are expected to be fully vaccinated or submit to testing. To meet this deadline, employees will need to begin receiving their first shot as early as November 23, 2021.

OSHA has published a fulsome set of FAQs, which is [available here](#). In addition, OSHA has published a number of other materials, including model policies, fact sheets, and a webinar, which are all available [available here](#). Although we anticipate challenges to the Vaccine ETS, Employers should assume that it will go into effect and should begin planning accordingly. A link to Perkins Coie's initial blog post on this subject is available [available here](#).

The Vaccine ETS requires Employers to implement either:

1. A mandatory COVID-19 vaccine policy subject to reasonable accommodations for employees with disabilities or sincerely held religious beliefs (Mandatory Vaccine Policy); or
2. A policy that allows employees to choose between COVID-19 vaccination and weekly testing (Vax or Test Policy).

Employees granted reasonable accommodations under a Mandatory Vaccine Policy or employees who opt to test under a Vax or Test policy will be required to wear face coverings indoors and take weekly COVID-19 tests

(which they may need to obtain at their own expense unless applicable law or a collective bargaining agreement otherwise requires). Employers will be required to keep COVID-19 vaccine and testing records for all employees. Employers must also remove employees from the workplace who test positive for COVID-19 and provide paid leave to employees to obtain the vaccine and recover from any side effects.

Employers that already have a mandatory vaccine policy in place can continue to enforce it, provided it complies with the new requirements. Importantly, Employers do not need to collect vaccine records for employees who have already provided attestations that they are fully vaccinated.

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. Employers should expect robust enforcement of these regulations given that Doug Parker (the former head of California OSHA) has been confirmed as the new OSHA administrator.

Currently, 26 states and two territories have OSHA State Plans, and these states/territories will have 30 days to either adopt the Vaccine ETS or stricter standards. As drafted, the Vaccine ETS will be in place for six months and likely will be converted into a final rule following the required notice and comment period under the Administrative Procedure Act. We recognize that Employers will have many questions about the Vaccine ETS, and our team is in the process of developing more detailed guidance on the new regulations. Perkins Coie will issue additional practical guidance shortly.

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