

# OSHA Releases COVID-19 Vaccination and Testing Rule for Private-Sector Workers

## Labor & Employment Law Update

By Peter Hansen and John Hayes on November 4, 2021



The United States Department of Labor released a long-awaited Emergency Temporary Standard (“ETS”) for private employers with over 100 employees. The 490 page interim final rule answers a number of questions

employers have had since the Biden Administration announced its plan in September, including:

### **What is the application to employers?**

The ETS applies to employers with 100 or more employees as of November 5, 2021, regardless of the number of employees working at a specific location. The ETS does not, however, apply to employers covered by the CMS rule or federal contractors, so health care providers (other than physician groups) should review the CMS rule and federal contractors should follow the guidance published by the Safer Federal Workforce Taskforce.

The 100 employee count includes part-time, temporary, and seasonal employees, as well as home workers – however, employees who work exclusively outdoors and/or at home are not subject to the mandatory vaccination/testing requirements.

### **Do employers have to adopt a COVID-19 policy?**

Employers must develop, implement and enforce either: (1) a mandatory vaccination policy; or (2) a policy requiring employees to either get vaccinated or test once a week and wear a face covering at work.

Employers choosing to implement the mandatory vaccine policy should start with OSHA's sample policy, available [here](#). It contains all the necessary information that an employer needs to implement a vaccine mandate policy in compliance with the ETS. Specifically, it contains information for employers to

use regarding vaccination dates, acceptable supporting documentation of vaccination, employee notification and removal from the workplace with a positive COVID-19 test, and information on testing and masking requirements.

Employers who instead decide to have an optional vaccine policy with mandatory weekly testing must also have a written policy, OSHA template available [here](#). If the employer goes with this option, it must “establish, implement, and enforce a written policy allowing any employee not subject to a mandatory vaccination policy to either choose to be fully vaccinated against COVID-19 or provide proof of regular testing for COVID-19 and wear a face covering in lieu of vaccination.” Similar to the vaccine mandate policy, the testing policy contains all the relevant information for the mandatory weekly testing and mask wearing, as detailed in the ETS.

**If the employer adopts a mandatory vaccination policy, can employees request a religious or medical exemption?**

Yes, employers who adopt mandatory vaccination policies cannot require vaccination for employees:

1. For whom a vaccine is medically contraindicated;
2. For whom medical necessity requires a delay in vaccination; or
3. Who are legally entitled to a reasonable accommodation because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.

**Do employers have to provide paid leave for employees to get vaccinated?**

Employers must provide up to 4 hours of paid leave for employees to become vaccinated and, if necessary, “reasonable time and paid sick leave” to recover from side effects experienced that prevent them from working.

**What are the testing requirements and do employers need to pay for testing?**

The ETS provides several examples of testing that would satisfy the weekly requirements, including tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens), proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer. Testing cannot be both self-administered and self-read.

The ETS clarifies that employers do not need to provide or pay for weekly testing for unvaccinated employees — unless required by other laws, regulations, employment contract, and/or collective bargaining agreements. For example, employers would typically need to pay the cost of testing for employees who

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receive a medical or religious exemption from a mandatory vaccination policy.

### **What are the upcoming vaccine deadlines?**

Employers must begin providing paid time off to get vaccinated and/or recover from vaccination, and implement face mask requirements, by December 5, 2021. The deadline for employees to become fully vaccinated – meaning the deadline to have received their second dose of Pfizer or Moderna, or single dose of Johnson & Johnson – is January 4, 2022.

### **Are employers required to keep records of employee vaccinations?**

Employers must obtain and keep proof of vaccination from employees. Documentation should generally include the name of employee, which vaccine was received, name of the health care provider, and date of vaccination. For unvaccinated employees, employers must maintain a record of each test result the unvaccinated employee is required to produce. Notably, the recordkeeping requirements apply only while the ETS remains in effect. During that time, they must be treated like any other confidential medical record.

### **Can OSHA request access to policies and records?**

Employers must provide OSHA with access to their written policy and the aggregate number of vaccinated and unvaccinated employees within 4 hours of a request, and any other records and documents “by the end of the next business day after a request.”

### **What is the deadline for federal contractors to be vaccinated?**

The date for the implementation of the federal contractor vaccine mandate Executive Order is also moved from December 8, 2021 to January 4, 2022.

We will provide updates as we continue to closely analyze the ETS. In the meantime, OSHA's webinar and FAQs on the ETS are extremely helpful (albeit dense) and address a wide range of issues.

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