

ALERT

OSHA Issues Emergency Temporary Standard Requiring Businesses with Over 100 Employees to Implement Vax-or-Test Policies

November 5, 2021

What: On November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued its much-anticipated Emergency Temporary Standard (ETS), which requires businesses with 100 or more employees to ensure that their workers are either fully vaccinated against COVID-19 or subject to weekly COVID-19 testing.

Dates to Remember: There are two critical compliance deadlines for covered employers. The first is a December 5, 2021, deadline for covered employers to implement a written policy that is compliant with the ETS. The second is a January 4, 2022, deadline to ensure that all covered employees are either fully vaccinated or subject to testing at least weekly.

Key Provisions of the ETS:

Besides requiring covered employers to ensure that their employees are either fully vaccinated or subject to regular COVID-19 testing, the ETS also requires covered employers to ensure that unvaccinated employees wear face coverings in the workplace. Some of the critical questions we anticipate about the ETS are highlighted below:

Who is a “covered employer”?

The ETS applies to employers with 100 or more employees companywide at any time the ETS is in effect. The ETS does not apply to workplaces subject to Executive Order (EO) 14042—which requires covered federal contractors to certify that their covered employees are fully vaccinated—or workplaces subject to OSHA’s healthcare ETS.

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Practice Areas

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Federal government contractors subject to the EO should note that, although their workplaces covered under the EO are not subject to the ETS, the release of the ETS has had an ancillary effect on compliance with the EO. Specifically, on November 4, in conjunction with the release of the ETS, the White House issued a Fact Sheet that extended the deadline for compliance with the EO from December 8, 2021 to January 4, 2022, “[t]o make it easy for all employers to comply with [the multiple federal workplace vaccination requirements].” As of the publication of this Alert, the Safer Federal Workforce Task Force had not updated its guidance for contractors to reflect the new deadline, but we expect to see that change (and perhaps others) soon.

How should employers determine whether they meet the 100-employee threshold?

Single-entity employers with multiple locations must consider their total employee headcount at all sites to determine whether the company employs 100 or more employees. Similarly, two or more related entities may be regarded as a single employer that must tally their combined employee headcount for purposes of the ETS if they handle safety matters as one company.

Companies that host staffing agency workers at their workplaces do not have to count the staffing agency’s employees to determine whether the ETS applies to them, though, the staffing agency must count those on-site employees for purposes of its own 100-employee threshold.

What does it mean to be “fully vaccinated,” and how do employers verify vaccination status?

An employee is fully vaccinated two weeks after completing primary vaccination with an FDA-authorized COVID-19 vaccine (*i.e.*, not the booster vaccination) with at least the minimum recommended interval between doses, if applicable. Currently-authorized FDA vaccines include the single-dose Johnson & Johnson vaccine and the two-dose Pfizer-BioNTech and Moderna vaccines. Notably, the ETS does not permit employers to accept “natural immunity” and requires employees who previously contracted and recovered from COVID-19 to either vaccinate or submit to regular testing.

Employers must determine the vaccination status of each employee by collecting their vaccine card, records from a pharmacy or health care provider, or “any other official document” that contains information addressed to the date, type, and place of vaccination. Alternatively, employees who cannot produce the preceding records may provide a signed and dated attestation stating their vaccination status (*i.e.*, fully or partially vaccinated) and the fact that their other forms of proof of vaccination were lost or could not be produced. The attestation must also include the following statement: “I declare 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.” The ETS provides that employees who supply such an attestation “should, to the best of their recollection,” include information about the type of vaccine they received, the date of administration, and the professional or entity that administered the vaccination in their attestation.

What are the parameters and requirements for unvaccinated employees?

Unvaccinated employees who report to a workplace at least once every seven days must be tested at least once every seven days. Those who work remotely and only occasionally report to a workplace must be tested within seven days of reporting to the workplace. Unvaccinated employees must provide proof of their testing results to the employer. Employees who fail to provide a negative test result or who test positive (including vaccinated employees who test positive) must be barred from the workplace.

Unvaccinated employees must also wear an approved face covering while indoors or in a vehicle with a coworker. Those employees must wear face coverings unless: (a) they are alone in a room with floor to ceiling walls with the door closed; or (b) while eating or drinking, but only for a “limited time”; (c) when they are wearing a respirator or face mask; or (d) if they can demonstrate that wearing a face covering is infeasible or causes a more significant hazard (e.g., situations where the work requires the employee’s mouth to be uncovered for safety reasons). In what appears to be recognition that some employers have restricted mask-wearing, the ETS requires employers to permit all employees who choose to wear face coverings, face masks, or respirators (even if the ETS does not require it) to do so.

Are there categories of workers that are exempt from the ETS’ requirements?

The ETS does not apply to workers who do not report to a workplace where they will come into contact with coworkers, customers, or other individuals (i.e., fully remote workers). Employees who work exclusively outdoors are also excluded from the scope of the ETS.

Who bears costs associated with the ETS?

Per the ETS, “OSHA only requires employers to bear the costs of employee compliance with the preferred, and more protective, vaccination provision, but not costs associated with testing.” Specifically, covered employers must give employees up to four hours of paid time off to receive a primary vaccination dose and provide “reasonable time and paid sick leave to recover from side effects.” But employers are not required to pay for COVID-19 testing for employees who choose to forgo vaccination (outside of the reasonable accommodation context). According to OSHA, “[t]he agency does not believe it appropriate to impose the costs of testing on an employer where an employee has made an individual choice to pursue a less protective option.” Importantly, employers may still be required to pay for testing if an employee receives an exemption from the vaccination requirement as a reasonable accommodation under either the Americans with Disabilities Act or Title VII of the Civil Rights Act of 1964. The ETS does not require employers to pay for face coverings (though the preceding caveat about reasonable accommodations still applies). It also does not require employers to provide paid time off to employees who are removed from the workplace due to a positive test or failure to provide a test result.

Are there notice requirements?

Covered employers must provide employees the following information to employees “in a language and at a literacy level the employee understands”:

- Notice of the requirements of the ETS and the policies the employer has implemented to comply with it.
- A copy of a publication from the Centers for Disease Control & Prevention titled document entitled “Key Things to Know About COVID-19 Vaccines.”
- Notice of employees’ rights under the whistleblower provision of the OSH Act and section 1904.35(b)(1)(iv) of the recordkeeping regulation, which prohibit discrimination or retaliation for exercising their rights under the ETS, engaging in activities required by the ETS, filing a health and safety complaint, or reporting work-related injuries.
- Notice of the criminal provisions in the OSH Act and federal law, which provide for criminal penalties related to knowingly supplying false statements or documents.

Are there recordkeeping requirements?

The ETS requires employers to maintain records of each employee’s vaccination status and test results for as long as the ETS is in effect. The records must be maintained as confidential medical records and must not be disclosed except as required or authorized by this ETS or other federal law.

Employers must also provide the following information upon request and according to the following schedule:

- Copies of an employee’s vaccination and testing records upon the request of the employee or a recipient with the employee’s written authorization to receive the information within one business day of the request.
- A copy of the employer’s written COVID-19 policy requiring vaccination or requiring vaccination and testing, as well as testing records for each employee within four hours of a request from OSHA.
- Copies of any other written records required by the ETS by the end of the next business day after receiving a request from OSHA.

Must employers report fatalities and hospitalizations due to COVID-19 to OSHA?

Employers are required to report any work-related COVID-19 fatality to OSHA within eight hours of their notice of the fatality. Additionally, employers must report each COVID-19 case that results in in-patient hospitalization to OSHA within 24 hours of their notice of hospitalization. The provision requiring the reports of hospitalization is a departure from previous OSHA requirements and further is notable because OSHA’s recordkeeping regulation before the ETS required employers to report hospitalizations only if an employee was admitted to the hospital within the 24-hour window after exposure to the virus. That change will substantially increase employers’ reporting requirements because it is rare for individuals who test positive for COVID-19 to be hospitalized within the first 24 hours of exposure to the virus, given how symptoms typically manifest.

Does the ETS preempt state or local laws?

OSHA has stated expressly that the ETS preempts any state law that may run contrary to its provisions. Accordingly, employers should carefully evaluate any course of action that is based on state or local legislation, orders, or regulations that may prohibit masking requirements or vaccination mandates. That said, employers can simultaneously comply with the ETS and state laws that prohibit vaccination mandates by requiring unvaccinated workers to submit to testing.

Practical Implications: The ETS will certainly see litigation addressed to whether it was lawfully issued. In September, more than two dozen state Attorneys General indicated that they planned to challenge OSHA's legal authority to issue the ETS. Florida Governor Ron DeSantis also announced on November 4 that Florida will join Alabama and Georgia in filing a legal challenge in the 11th Circuit Court of Appeals. Employers should monitor the status of those challenges, but employers who fail to make reasonable efforts to comply with the ETS before a court issues an injunction or other ruling limiting the ETS' scope and applicability should be aware that they may be subject to fines by OSHA.

Employers may find the ETS more flexible than the EO because there is a vaccination or testing option. Employers should also be pleased to hear that the ETS does not create an independent obligation to pay for testing for employees who choose to forgo vaccination. Those facts alone could make the ETS more straightforward for employers to implement than the EO.

Federal contractors should carefully analyze whether any of their workplaces not covered by the EO are covered by the ETS. Indeed, the White House's November 4 Fact Sheet expressly contemplates that there may be federal contractors who must follow the EO on some worksites and the ETS on others.

It is essential for employers to work with their management team and counsel to understand whether they are covered by the ETS, Executive Order 14042, or both, and how best to create and implement compliant policies. Employers should also be alert for updated guidance from OSHA and the Safer Federal Workforce Task Force.

For our other coverage related to the vaccine mandate, please [click here](#).

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