

compliance ALERT

OSHA Issues Emergency Rule Requiring COVID-19 Vaccinations or Tests for Most Employers

UPDATED November 15, 2021

Action Required:

Employers with 100 or more employees should:

- Review and update policies
- Review recordkeeping and disclosure requirements
- Review existing policies and agreements
- Prepare to have employees fully vaccinated or tested weekly by Jan. 4, 2022

On November 4, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) released its Emergency Temporary Standard (ETS) [regulation](#), which requires employees of large employers with 100 or more employees ("covered employers") to either **get vaccinated or to test negative on a weekly basis no later than January 4, 2022**. The ETS also requires such employers to provide employees with paid leave to get vaccinated and requires all unvaccinated employees to wear a face covering at work. OSHA also released a [Fact Sheet](#) that summarizes the new ETS.

On November 12, the 5th Circuit court issued a decision upholding the previous stay of the ETS, which prohibits OSHA from enforcing and implementing the ETS "pending adequate judicial review" of a motion for permanent injunction.

Which Employers Must Comply with the ETS? Which are Exempt from the ETS?

The ETS generally applies to employers in all workplaces that fall under OSHA's authority and jurisdiction and that have at least 100 employees company-wide (not at just one location) with some exceptions.

What Should Employers Do Next?

Review and Update Policies

Covered employers should ensure that their employment policies clearly indicate whether vaccination will be mandatory or whether a test-out alternative will be available and provide all relevant policy details.

Review Recordkeeping and Disclosure Requirements:

Additionally, covered employers need to ensure that they are complying with the ETS rule's recordkeeping and disclosure requirements.

Review Existing Policies and Agreements; Consider Using Third-Party Vendors:

It's important to review applicable policies and state requirements before implementing your organization's ETS-compliant program or policy. Laws in several jurisdictions may apply to require that the employer pay for testing, or it may be required in an applicable CBA or similar negotiated agreement.

Additionally, it may be helpful to work with third-party vendors to assist with a COVID-19 testing program at your workplace. ■

↓ Full Explanation Follows ↓

OSHA Issues Emergency Rule Requiring COVID-19 Vaccinations or Tests for Most Employers

On November 4, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) released its Emergency Temporary Standard (ETS) [regulation](#), which requires employees of large employers with 100 or more employees ("covered employers") to either get vaccinated or to test negative on a weekly basis. The ETS also requires such employers to provide employees with paid leave to get vaccinated and requires all unvaccinated employees to wear a face covering at work. OSHA also released a [Fact Sheet](#) that summarizes the new ETS.

On November 6, the 5th Circuit Court of Appeals issued a [temporary stay](#) of the ETS, effectively blocking enforcement of the ETS until a final decision is made. Subsequently, on November 12, the 5th Circuit court issued a [decision](#) upholding the stay of the ETS, which prohibits OSHA from enforcing and implementing the ETS "pending adequate judicial review" of a motion for permanent injunction. Pending such review, the November 12 ruling effectively nullifies the ETS, as OSHA is barred from both enforcing and implementing it.

How Does the new ETS Change the Law?

The new ETS clarifies the rules and requirements (and compliance deadlines) applicable to covered employers in response to the Biden Administration's [Action Plan](#) to mitigate COVID-19 in the workplace (commonly referred to as the "federal vaccine mandate"). The Action Plan's vaccine mandate, issued in September, had left many questions unanswered. For example, prior to the issuance of the ETS, it was unclear when employees of covered employers would have to be vaccinated or submit to weekly testing, and whether the employer or employee was required to pay for such testing. Those questions have now been answered. What follows is a summary of the major rule clarifications in the new ETS.

When Must Employees be Fully Vaccinated or Commence Weekly Testing? When does the obligation to provide Paid Time Off go into effect?

The new ETS, which is effective immediately, requires that employees of covered employers be fully vaccinated or commence weekly COVID-19 testing no later than January 4, 2022. "Fully vaccinated" is defined as either two doses of the Pfizer or Moderna vaccine, or one dose of the Johnson & Johnson vaccine. Covered employers are required to provide paid time off for unvaccinated employees to receive vaccinations beginning on December 6, 2021.

Which Employers Must Comply with the ETS? Which are Exempt from the ETS?

Covered Employers:

The ETS generally applies to employers in all workplaces that fall under OSHA's authority and jurisdiction, including industries as diverse as manufacturing, retail, delivery services, warehouses, meatpacking, agriculture, construction and logging. Within these industries, all employers that have at least 100 employees company-wide (not at just one location) are covered.

Workplaces not covered by the ETS:

The new ETS does not apply to:

- workplaces covered under [guidance](#) applicable to federal contractors and subcontractors that was recently issued by the Safer Federal Workforce Task Force;¹
- or in settings where employees provide healthcare services or healthcare support services when subject to the requirements of the Healthcare Emergency Temporary Standard [regulation](#) for healthcare employers.

Employees of Covered Employers Not Subject to the Requirements:

The ETS also does not apply to the employees of covered employers:

- who do not report to a workplace where other individuals, such as coworkers or customers, are present;
- while working from home; or
- who work exclusively outdoors.

What Kinds of Policies Must be Implemented under the ETS? How does the weekly "Test-Out Alternative" to vaccination in the ETS

¹Additionally, the White House separately announced in a [Fact Sheet](#) that it is pushing the earliest mandatory vaccination deadlines for these federal contractors and subcontractors from December 8, 2021, to January 4, 2022, consistent with the timing for large employers under the ETS.

Work? What Type of Tests are required?

The ETS requires covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy (a “Vaccine Mandate Policy”), with an exception for employers that instead establish, implement, and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace (a “Test-Out Policy”).

If implementing a Test-Out Policy, the ETS requires the COVID-19 test to be:

- cleared, approved, or authorized, including in an Emergency Use Authorization, by the Food and Drug Administration to detect current infection with the SARS-CoV-2 virus (e.g., a viral test);
- administered in accordance with the authorized instructions; and
- not both self-administered and self-read, unless observed by the employer or an authorized telehealth proctor.

Examples of tests that satisfy these requirements include tests with specimens that are processed by a laboratory (including home or on-site collected specimens that are processed individually or as pooled specimens), proctored over-the-counter tests, point-of-care tests, and tests where specimen collection and processing is done or observed by an employer.

When Must Testing Occur?

Employees who are not fully vaccinated must submit to testing at least weekly if present in the workplace at least once a week, or within seven days prior to returning to work and provide proof of that test upon their return to work.

For individuals who have received a positive COVID-19 test or who have been diagnosed with COVID-19, the ETS provides an exception from testing for the 90-day period following the positive diagnosis or test. Those employees who test positive for COVID-19, or who are diagnosed with COVID-19 by a licensed healthcare provider, are required to be immediately removed from the workplace, regardless of vaccination status, and stay at home until certain return-to-work criteria have been achieved.

Employees who are not fully vaccinated and who do not meet the testing requirements must be removed from the workplace pending a test result.

Do Employers have to Pay for the Weekly Testing?

No, employers do not have to pay for the weekly COVID-19 testing. However, employers do have to pay for the weekly testing if it's required under other laws or regulations, or collective bargaining agreements (CBAs) or other collectively negotiated agreements.

What paid time off must employers provide for employees getting vaccinated?

According to the ETS, employers must provide paid time off for employees to get vaccinated (up to four hours) and to recover from any side effects. The ETS requires up to four hours of paid time to receive each dose of the vaccine, including travel time, at the employee's regular rate of pay. The ETS also requires “reasonable time and paid sick leave” to recover from the side effects of each dose of the vaccine.

How does the ETS interact with state laws restricting or prohibiting vaccine mandates in the workplace?

The ETS states that it preempts any inconsistent state or local laws, including laws that ban or limit an employer's authority to require vaccination, masks or testing. There are currently 19 states that have sued the federal government in response to the federal vaccine mandate that applied to federal contractors and subcontractors, and it is expected that states, companies and business groups will likewise challenge the ETS.

What other policies, disclosures and recordkeeping requirements are in the ETS?

In addition to implementing either a Vaccine Mandate Policy or Test-Out Policy, covered employers must also inform employees of their policies and procedures designed to comply with the ETS. Specifically, employers must disclose the CDC's “Key Things to Know About COVID-19 Vaccines,” OSHA's prohibition against retaliation for reporting workplace illnesses or injuries, OSHA's whistleblower protections, and the criminal penalties associated with knowingly supplying false statements or documentation.

Covered employers must also maintain a record of each employee's vaccination status and test result. With regard to vaccination status, the employer must preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated, along with a roster of each employee's vaccination status. Notably, employers that have already ascertained vaccination status prior to the

effective date of the ETS through another form, attestation, or proof and that have retained such records, are exempted from re-determining the vaccination status of individuals whose fully vaccinated status has been previously documented. These records and roster are considered employee medical records, and accordingly, must be kept confidential and separate from the employee's general employment personnel file.

What Kinds of Exceptions are Allowed in a Mandatory Vaccination Policy?

If an employer adopts a Vaccine Mandate Policy to comply with the ETS, it must require vaccination of all employees (and of all new employees as soon as practicable), other than those:

- for whom a vaccine is medically contraindicated;
- for whom medical necessity requires a delay in vaccination; or
- who are legally entitled to a reasonable accommodation under federal civil rights laws, because they have a disability or sincerely held religious belief, practice or observance that conflicts with the vaccination requirement.

Will Employers and Plan Sponsors Need to Amend Plan Documents or Benefits Policies?

No. Nothing in the new ETS rule expressly requires an amendment to any plan documents or benefits policies. That being said, to the extent that an employer is implementing any kind of wellness program that includes COVID-19 testing, or implementing a premium surcharge or other incentive on the health plan (see our e-Alert [here](#)), then such employers will need to include information about those programs in their plan document and summary plan description.

What Should Employers Do Next?

Review and Update Policies

Covered employers should ensure that their employment policies clearly indicate whether vaccination will be mandatory or whether a test-out alternative will be available. To the extent that vaccination will be mandatory, such policies should make it clear that there will be exemptions for medical reasons, disability, or sincerely held religious beliefs. Such policies should also clearly define the term "fully vaccinated" (discussed above) and indicate that the employer will provide up to four hours of paid time off, including travel time, at the employee's regular rate of pay for purposes of each vaccination dose, as well as a reasonable amount of time and paid sick leave to recover from side effects.

For the policies that offer test-out alternatives to vaccination, such policies should clearly explain whether the employer will or will not be paying for the testing, as well as the specific timing requirements of the testing, such as the weekly testing requirement and the requirements applicable to employees that do not come into the workplace for more than seven days.

Review Recordkeeping and Disclosure Requirements:

Additionally, covered employers need to ensure that they are complying with the ETS rule's recordkeeping and disclosure requirements (discussed above).

Review Existing Policies and Agreements; Consider Using Third-Party Vendors:

While many had expected the new ETS rule to require that employers pay for the COVID-19 testing in the rules applicable to policies permitting a test-out alternative, it looks like the OSHA rule did not end up requiring that. That being said, the law in several jurisdictions may still apply to require that the employer pay for such testing, or it may be required in an applicable CBA or similar type of negotiated agreement, and as such it's important to review those applicable policies and state requirements before implementing your organization's ETS-compliant program or policy.

Additionally, it may be helpful to work with third-party vendors to assist with a COVID-19 testing program at your workplace. Your Corporate Synergies Team can assist with this and can provide additional information and resources to help with implementation. ■

**If you have any additional questions,
please call your Corporate Synergies
Account Manager or 866.CSG.1719.**