



OSHA VACCINATION AND TESTING REQUIREMENTS FOR EMPLOYERS WITH 100+ EMPLOYEES

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On November 4, 2021, the Occupational Safety and Health Administration (OSHA) released its COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS). The ETS is part of President Biden's COVID-19 Action Plan, which was unveiled several months ago. On Nov. 6, 2021, the U.S. Fifth Circuit Court of Appeals stayed OSHA's ETS pending expedited judicial review. Given that we do not know how long judicial review of the ETS could take and, ultimately, the courts could uphold the ETS and its looming compliance deadlines, employers should still be prepared to come into compliance.

Under the ETS, employers with 100 or more employees must develop, implement and enforce a COVID-19 policy that either: (i) requires mandatory vaccination; or (ii) requires employees to choose to either be vaccinated or undergo regular COVID-19 testing and wear a face covering at work. The ETS also requires covered employers to support vaccination efforts by providing paid sick leave to get vaccinated and recover from the shot, and it imposes recordkeeping requirements.

For more information related to mandatory vaccine policies, please click [here](#).

Information about what is required if an employer chooses to implement a policy allowing employees to choose either showing proof of vaccination or undergoing weekly testing and masking is set forth below. The ETS sets forth the minimum standards required for employers. Certain state and local laws or applicable collective bargaining agreements may impose additional requirements. Employers should consult with their counsel to evaluate what requirements are applicable to their workforces.

Here is a summary of the key provisions under OSHA's Vaccination and Testing ETS:

APPLICABILITY

Who is a covered employer?

The ETS applies to companies with 100 or more employees at any time the ETS is in effect.

How are employees counted for determining applicability?

- In determining the number of employees, employers must include all employees across all of their U.S. locations, regardless of employees' vaccination status or where they perform their work (so employers must count remote workers for purposes of determining employee count even if those workers will not be subject to the vaccination/ testing requirements).
- Part-time employees do count towards the company total, but independent contractors do not.
- For a single corporate entity with multiple locations, all employees at all locations are counted for purposes of the 100-employee threshold for coverage under the ETS.
- Two or more related entities may be regarded as a single employer for OSH Act purposes if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted.
- In a traditional franchisor-franchisee relationship in which each franchise location is independently owned and operated, the franchisor and franchisees would be separate entities for coverage purposes, such that the franchisor would only count "corporate" employees, and each franchisee would only count employees of that individual franchise.
- When employees of a staffing agency are placed at a host employer location, only the staffing agency would count these jointly employed workers for purposes of the 100-employee threshold for coverage under this ETS.
- On a typical multi-employer worksite like a construction site, each company represented (i.e., the host employer, the general contractor, and each subcontractor) only count their own employees; the host employer and general contractor do not need to count the total number of workers at each worksite.

Are there employers to which the ETS does not apply?

The ETS will not apply to employers with less than 100 employees, employers who are already covered by the Federal contractor vaccine mandate (Federal Contractor Guidance), or employers who are already covered by the federal healthcare vaccine requirements (Healthcare ETS).

The ETS imposes no compliance burden on employers whose employees work remotely 100 percent of the time.

Are there employees to which the ETS does not apply even if they work for a covered employer?

The requirements of the ETS do not apply to the employees of covered employers: (1) who do not report to a workplace where other individuals, such as coworkers or customers, are present; or (2) while working from home; or (3) who work exclusively outdoors.

VACCINATION REQUIREMENTS

What vaccine requirements does the ETS impose?

Covered employers must either (i) implement a mandatory vaccination policy, or (ii) implement a policy that allows employees to choose to either become vaccinated against COVID-19 or undergo weekly testing and masking in the workplace.

The employer must determine the vaccination status of each employee. What proof is required?

Acceptable proof of vaccination status is:

- The record of immunization from a health care provider or pharmacy;
- A copy of the COVID-19 Vaccination Record Card;
- A copy of medical records documenting the vaccination;
- A copy of immunization records from a public health, state, or tribal immunization information system; or
- A copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

An employer may accept digital copies of acceptable records, including, for example, a digital photograph, scanned image, or PDF of such a record that clearly and legibly displays the necessary vaccination information. In places using QR codes, the employer must retain a copy of the information retrieved by scanning the QR code.

In instances where an employee is unable to produce acceptable proof of vaccination, the employee can provide a sworn statement that complies with specific requirements in the ETS.

What are the recordkeeping requirements related to vaccination status?

The employer must maintain a record of each employee's vaccination status and must preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated. Required records of vaccination status can be maintained physically or electronically, but the employer must ensure they have access to the records at all times.

The employer must also maintain a roster of each employee's vaccination status. Anyone who has not provided acceptable proof of vaccination should be treated as unvaccinated.

These records are considered employee medical records and must be maintained accordingly and must not be disclosed except as required or authorized by the ETS or applicable law.

These records and roster must be maintained and preserved while the ETS remains in effect.

What paid time off is required for employees who get vaccinated?

Time for vaccination. Covered employers must provide a reasonable amount of paid time (up to 4 hours) during work hours to each employee for each of their primary vaccination series dose(s) at the employee's regular rate of pay for the employee to get vaccinated. The maximum of 4 hours of paid time that employers must provide to get vaccinated cannot be offset by any other leave that the employee has accrued, such as sick leave or vacation leave.

Employers are not obligated by the ETS to reimburse employees for transportation costs (e.g., gas money, train/bus fare, etc.) incurred to receive the vaccination. However, other laws may require reimbursement depending on the employer's jurisdiction.

Because employers are required to provide reasonable time for vaccination during work hours, if an employee chooses to receive a primary vaccination dose outside of work hours, employers are not required to grant paid time to the employee for the time spent receiving the vaccine during non-work hours under the ETS. Other laws may require employers to afford paid time off during non-work hours depending on the jurisdiction.

Time for recovery. Covered employers must provide a reasonable amount of paid time to recover from side effects experienced following a vaccine dose. The ETS suggests that up to two days is reasonable, with the majority of workers recovering more quickly from any negative side effects. The paid sick leave required for recovery from the vaccine can be in the form of an employee's existing accrued sick leave, if available. If the employee does not have accrued available sick leave, leave must be provided for this purpose.

TESTING REQUIREMENT FOR UNVACCINATED EMPLOYEES

Who is considered unvaccinated under the ETS?

Any employee who has not provided acceptable proof that at least 2 weeks have passed since receiving all required doses of an approved vaccine.

What testing requirements apply to unvaccinated employees?

The ETS requires covered employers to ensure that each employee who is not fully vaccinated tests weekly.

An employee who reports at least once every 7 days to a workplace where other individuals, such as coworkers or customers, are present:

- Must be tested for COVID-19 at least once every 7 days; and
- Must provide documentation of the most recent COVID-19 test result to the employer no later than the 7th day following the date on which the employee last provided a test result.

An employee who does not report during a period of 7 or more days to a workplace where other individuals, such as coworkers or customers, are present (e.g., teleworking for two weeks prior to reporting to a workplace with others or on vacation):

- Must be tested for COVID-19 within 7 days prior to returning to the workplace; and
- Must provide documentation of that test result to the employer upon return to the workplace.

Covered employers must specify in their policies how employees should provide their COVID-19 test results (e.g., an online portal, to the human resources department).

If an employee does not provide documentation of a COVID-19 test result as required above, the employer must keep that employee removed from the workplace until they provide a test result. The ETS does not require the employer to provide paid time off to any employee who has been removed from the workplace as a result of the employee's refusal/failure to provide documentation of a COVID-19 test result.

What testing documentation must covered employers collect?

Test results given to the employer must contain information that identifies the worker (i.e., full name plus at least one other identifier, such as date of birth), the specimen collection date, the type of test, the entity issuing the result (e.g., laboratory, healthcare entity), and the test result.

What types of tests are acceptable under the ETS?

An acceptable COVID-19 test under the ETS is a test for SARSCoV-2 that is:

- Cleared, approved, or authorized (including under an Emergency Use Authorization) by the FDA to detect current infection with the SARS-CoV-2 virus (e.g., a viral test); and
- 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.

Acceptable tests include PRC and antigen/ rapid tests. Antibody tests do not meet the definition of a COVID-19 test for the purposes of the ETS.

What happens if an employee tests positive for COVID-19?

The covered employer's COVID-19 policy must include a requirement that any employee who tests positive for COVID-19 be immediately removed from the workplace and follows the CDC guidelines for isolation and return to work.

The ETS does not require employers to provide paid time off to any employee for removal from the workplace as a result of a positive COVID-19 test or diagnosis of COVID-19; however paid time off may be required by other laws, regulations, or collective bargaining agreements.

Do unvaccinated employees who have had COVID-19 still have to be tested weekly?

When an unvaccinated employee has received a positive COVID-19 test, or has been diagnosed with COVID-19 by a licensed healthcare provider, the employer may not require that employee to undergo weekly COVID-19 testing for 90 days following the date of their positive test or diagnosis.

Who pays for the testing?

There is no requirement in the ETS that the employer pay for the required testing.

There may be some instances in which other laws require an employer to pay for required testing, such as when the employee cannot become vaccinated due to a medical condition or sincerely held religious belief and testing is provided as an accommodation alternative to vaccination.

What are the recordkeeping requirements related to testing?

Covered employers must maintain a record of each test result provided by each employee. These records are considered employee medical records and must be maintained accordingly and must not be disclosed except as required or authorized by the ETS or applicable law. These records must be maintained and preserved while the ETS is in effect.

OTHER REQUIREMENTS

When do covered employers have to comply with the ETS?

The ETS requires all covered employees to either be vaccinated or commence weekly testing by January 4, 2022. The deadline to comply with all other provisions under the ETS (i.e., implement a policy, provide paid time for vaccination, etc.) is December 6, 2022.

What other requirements might apply to my business?

The OSHA ETS sets the minimum standards required. Other laws and agreements may impose additional requirements. Employers should consult with their legal counsel to evaluate other requirements that might apply to their workforces under other federal laws, state and local laws, or collective bargaining agreements.

Related Practices

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