



OSHA's COVID-19 Vaccination and Emergency Testing Standards (ETS)

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On November 5, 2021, OSHA published its ETS for employers with over 100 employees in the Federal Register. These standards take effect immediately to protect unvaccinated workers from the risk of contracting and transmitting COVID-19 in the workplace and are expected to cover 2/3rds of all private sector workers in America or about 83 million workers. Initially, OSHA expects the ETS to remain in place for up to 6 months.

Covered Employers - The ETS apply to all workplaces under OSHA's authority which have over 100 employees company-wide (regardless of location and at any time during the period when the ETS are in place), who work either full-time, part-time, or remotely. While all employees are counted to determine if the employer is a covered entity, the ETS themselves do not apply to employees who work remotely or outside 100% of the time.

ETS Vaccine Requirements - Covered Employers must either have a (1) mandatory vaccine policy for all employees who come to a workplace, or (2) policy that requires either vaccination or regular testing for those unvaccinated employees who must always wear a mask in the indoor work space. The company's ETS policy must be in place by December 5, 2021.

Non-vaccinated workers (after Dec. 5, 2021) must wear a mask in indoor work spaces and if riding in a vehicle for work with a co-worker.

Non-vaccinated workers (after Jan. 4, 2022) must be tested once per week if in the workplace at least one (1) day per week or tested within seven (7) days before returning to work if away for one week or longer.

If unvaccinated workers want to be vaccinated in time to avoid weekly testing effective January 4, 2022, the ETS provide the following dates based on the vaccine given:

J&J vaccine - vaccination to occur on or before 60 days after November 5, 2021.

Pfizer vaccine - 1st dose on or before 39 days after Nov 5th and 2nd dose 21 days later.

Moderna vaccine - 1st dose on or before 32 days after Nov. 5th and 2nd dose 28 days later.

Any other WHO or FDA-approved vaccine may also be used.

Paid Time-Off to be Vaccinated or if Sick from Vaccination - The ETS require the employer to pay the employee for up to 4 hours time off work to be vaccinated and a reasonable time if sick from receiving a vaccination dose at the "regular" rate of pay.

Payment for COVID-19 Weekly Testing, Travel Time & Parking for the Unvaccinated after January 4, 2022 - Generally, the employee will pay for weekly testing, although the employer can agree to pay the cost; however, this may vary based upon the common law of the state in question,

or the contents of the employer's employee handbook or union contract, if applicable.

Employer Documentation Requirements - Starting December 5, 2021, employers must document the vaccination status of all employees as follows:

1. Determine vaccine status of each employee;
2. Obtain acceptable proof of vaccination;
3. Keep a record of each employee's vaccine status; and
4. Maintain a comprehensive roster of the vaccination status of each employee and type of proof of vaccination provided.

Acceptable proof of vaccination includes a record from a pharmacy, vaccine site, or doctor's office where the vaccine was given, a public health, state or tribal record of receiving the vaccine, "any other official document" of the vaccine given and location provided, or an attestation from the employee of being vaccinated made under penalty of perjury.

Employees providing false COVID-19 vaccination data or information to an employer are subject to criminal penalties either under the Occupational Safety & Health Act or the federal criminal code.

Employer Notice Requirements - By December 5, 2021, each covered employer must provide notice to all employees of the course of events which must occur when an employee either (1) tests positive for COVID-19, or (2) is diagnosed with COVID-19. The employer's notice must contain the following:

1. That the employee must promptly provide notice to the employer of a positive test or a diagnosis of COVID-19;
2. In which case that employee will be immediately removed from the workplace; and
3. The employee will be kept out of the workplace until he/she has met the established criteria to return to work.

Employer Must Provide Documentation to Employees by December 5, 2021

1. ETS information from OSHA and the Employer's ETS policy it will implement;
2. CDC Document, "Key Things to Know About COVID-19 Vaccines;"
3. Information about protection from employer retaliation and discrimination; and
4. Information about laws that provide criminal penalties for supplying false statements or documents to the employer.

Employer Reporting COVID-19 Fatalities/Hospitalization

Employers are required to report to OSHA: (1) COVID-19 fatalities (within 8 hours of becoming aware), and (2) COVID-19 related hospitalizations (within 24 hours of hospitalization).

Employee COVID-19 Records Access

Employers must provide employees or the employee's representative within a short time of making a request (1) access to that employee's COVID-19 documentation and testing, and/or (2) a list of fully-vaccinated employees at the work site along with a total number of employees at that same work site.

Exceptions to ETS Compliance

1. Is there a medical contraindication to being vaccinated? Like an anaphylactic reaction to the vaccine or a component of the vaccine or a known allergy to a component of the vaccine.
2. Is there a medical necessity that requires a delay in getting the vaccine? Medical necessity includes immunocompromised status, if receiving an antibody treatment, or if had recent exposure to COVID-19.
3. An individual with a disability or a sincerely-held religious belief may ask for a reasonable accommodation under the ADA or Title VII of the Civil Rights Act.

Federal Preemption

States and political subdivisions are preempted from adopting and enforcing workplace testing, mask wearing and vaccination policies which are contrary to the ETS except under a federally-approved State Plan.

Legal Challenges to the ETS/Penalties for Non-Compliance

Legal challenges to the ETS were filed on November 5, 2021. The 5th Circuit Court of Appeals did temporarily halt implementation of the ETS in several states, including LA and TX. However, since the ETS are scheduled to last up to 6 months, it is doubtful there will be court resolution before the end of this time.

While the ETS are in effect, OSHA penalties per violation of the ETS are as follows:

1. Other than Serious - up to \$13,653/violation;
2. Serious - \$13,653/violation; and
3. Willful - \$136,532/violation

The time for compliance with the majority of the requirements set forth in the COVID-19 ETS is fast approaching on December 5, 2021. In the meantime, the states of Texas, Mississippi, Louisiana, So. Carolina, and Utah, among other petitioners, obtained a temporary restraining order from the 5th Circuit Court of Appeals last Friday. The government must respond to the petitioner's motion for a permanent injunction today and the petitioner's reply is due tomorrow. Numerous other cases have been filed in other federal circuit courts, such that the legal process will likely take place via a "lottery" to determine which circuit court will hear all consolidated cases.

However, these cases may well take longer to play out than employers have to implement the ETS, and there is no certainty that the ETS are unenforceable. And the state of Colorado has not joined in any legal action against the ETS.

OSHA is currently determining whether the gravity of COVID-19 cases warrants the ETS to be applied to companies with under 100 employees. I expect that OSHA will release these ETS requirements for companies with between 50 – 100 employees in the near future, and most likely for even smaller companies soon thereafter.

If you have any questions, please contact [Karen Spaulding](#).

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