

OSHA Issues Federal Vaccination Mandate for Private Employers

On November 5, 2021, the United States Department of Labor's Occupational Safety and Health Administration (OSHA) published an emergency temporary standard (ETS) requiring employers with 100 or more employees to implement a COVID-19 vaccination policy ([here](#)). Legal challenges to the ETS have already begun. More than two dozen states have joined in federal lawsuits aimed at reversing the mandate, and as of the date of this publication, one federal court has already issued a temporary stay of the ETS. As described in more detail below, assuming the ETS remains in effect, covered employers can choose from two options in order to comply: (1) mandating COVID-19 vaccination for all workers (with limited exceptions), or (2) requiring workers either to vaccinate or, if unvaccinated or partially vaccinated, to test for COVID-19 weekly and wear a face covering in the workplace. Employers must develop and distribute a written policy on or before December 6, 2021, and employees must comply with the vaccination requirement by January 4, 2022.

Who Are Covered Employers and Employees?

Covered employers include any private entity with 100 or more employees. For the purposes of this ETS, part-time employees count toward the total number of employees. These regulations do not apply, however, to employers that are already covered by Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors or to healthcare employers that are subject to the requirements of §1910.502.

If an employer is covered, nearly all of its employees are required to comply with the ETS, with very limited exceptions. Employees who work from home or otherwise do not enter a workplace or vehicle with other employees, as well as employees who work exclusively outside, are exempt from the requirement of this ETS; *however*, these employees still count toward the total number of employees for the purposes of determining whether an employer is covered by the ETS.

What Should Employers Know When Implementing a Vaccination Mandate?

OSHA places several obligations on employers in order to comply with the ETS. Key parts of these regulations include:

- Employers are required to collect proof of vaccination from their employees. Proof of vaccination that employers must accept includes: (1) an immunization record from a health care provider or pharmacy; (2) a copy of the U.S. CDC COVID-19 Vaccination Record Card; (3) a copy of medical records documenting the vaccination; (4) a copy of immunization records from a public health, state, or tribal immunization information system; or (5) 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). However, if an employee is unable to produce one of these acceptable proofs of vaccination, the employee may attest to vaccination status with a signed statement including specific information and a knowing acknowledgment that providing false information can result in criminal penalties.

- Employers must keep employee vaccination records private, as with all other medical documentation that an employer collects from its employees, except as necessary to show compliance with the ETS.
- An employee is fully vaccinated 2 weeks after receiving either one dose of a one-dose regimen (such as the J&J vaccine) or the second dose of a two-dose regimen (such as Moderna or Pfizer-BioNTech). An employee is also in compliance with the ETS two weeks after receiving a different COVID-19 vaccination approved or given Emergency Use Authorization (EUA) by the FDA, listed for emergency use by the World Health Organization (WHO), or administered as part of a clinical trial in the U.S. (provided that the employee has documentation of receiving the vaccine and not the placebo).
- However, as a one-time exception to the two-week waiting period and in order to provide employees with incentive to vaccinate before the ETS takes effect, an employee who receives the single dose of a one-dose regimen or the second dose of a two-dose regimen on or before January 4, 2022 does not have to be tested in the workplace. OSHA highlights that this means employees have 39 days from the publication of guidance to start a two-dose regime or 60 days to receive a single-dose vaccination.

If An Employer Implements A Mandatory Vaccination Policy, Must It Allow For Certain Exemptions?

Under the ETS, employers' mandatory vaccination policies must allow for exceptions for (1) employees for whom a vaccine is medically contraindicated, (2) employees for whom medical necessity requires a delay in vaccination, or (3) employees who are entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely-held religious beliefs, practices, or observances that conflict with the vaccination requirement. If an employer has employees who fall under one or more of these exemptions, OSHA notes that possible reasonable accommodations include telework, if the employee's job can be performed remotely, or allowing the employee to test weekly so that the employee may work on-site.

OSHA advises that employers should consult EEOC guidance issued earlier this year in determining whether an employee qualifies for a medical or religious exemption ([here](#)). The EEOC advises that employees' sincerely-held religious beliefs should generally be taken at face value, although limited inquiry is permitted in order to allow the employer to better understand the request. Notably, however, employers do not have to accommodate secular beliefs, such as social, political, or economic views or personal preferences.

What Should Employers Know If They Allow Employees to Test?

Employers who choose to allow employees to test as an alternative to vaccination – or employers who need to provide testing as a reasonable accommodation for employees with medical or religious exemptions – should be aware of the following key parts of OSHA's testing requirements.

- Employees who are unvaccinated or partially vaccinated must test at least once every 7 days. OSHA specifies that an employee is required to provide proof of a negative test no later than 7 days after the employee last provided proof of a negative test. If an unvaccinated employee has been working remotely and is returning to the office, the employee must provide a negative test administered within the 7 days leading up to the employee's return to the office.
- While OSHA states that its ETS regulations allow employers to require employees to pay for tests, employers may be bound by other state or local laws or contractual obligations (such as collective bargaining agreements) that require the employer to pay for tests.

- OSHA specifies that an FDA-approved COVID-19 diagnostic test, including those with EUA, satisfies the requirements under the ETS. Therefore, employees may use PCR tests, rapid antigen tests, or rapid molecular tests for their weekly testing. However, the test may not be both self-administered and self-read by the employee. Therefore, an employee can self-administer a PCR test, including at home, so long as the test is then sent to a lab for processing. Similarly, an employee can self-administer an over-the-counter rapid test, so long as the test and results are observed by a third-party (such as a doctor or pharmacist, a telehealth proctor, or the employer itself).
- Employees who are testing in lieu of vaccination must wear face coverings in the workplace. Under the OSHA guidance (subject to any state or local laws or contractual obligations to the contrary), employers may require employees to provide face coverings at their own cost. Unvaccinated employees may only remove face coverings in the workplace in the following limited circumstances:
 - When an employee is alone in a room with floor to ceiling walls and a closed door;
 - For a short period of time to allow the while employee to either eat and drink or be identified for the purpose of complying with safety and security requirements;
 - When employees are wearing respirators or face masks; and/or
 - Where the employer can show that the use of face coverings is infeasible or creates a hazard in the workplace.

What Information Must Employers Provide by December 6th ?

On or before December 6th, employers must issue to their employees – in languages spoken by their employees – their policies either requiring all employees to vaccinate or giving employees a choice to vaccinate or test weekly. Either within the written policy or otherwise, employers must also notify employees of (1) OSHA requirements prohibiting retaliation or discrimination against an employee who reports an illness or injury or exercises rights under OSHA regulations, and (2) federal statutory prohibitions on knowingly supplying false statements or documentation. Finally, employers must provide employees with the document, “Key Things to Know About COVID-19 Vaccines” ([here](#)).

What Other New Obligations Do Employers Have Under the ETS?

OSHA’s ETS also contains several additional obligations that take effect December 6, 2021. The provisions include the following:

- Employers must provide employees with up to 4 hours of paid sick leave to receive each COVID-19 vaccination.
- Employers must provide employees with “reasonable” paid sick time to recover from any side effects from receiving a COVID-19 vaccination.
- Employer must report to OSHA any COVID-19 deaths or hospitalizations within their workforce that resulted from cases likely contracted in the workplace.
- Employers must require employees – regardless of vaccination status – to notify the employer immediately upon receiving a positive COVID-19 test. The employer must exclude the COVID-19 positive employee from the workplace until the employee either: (1) receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if the employee chooses to seek a NAAT test for confirmatory testing; (2) meets CDC’s guidelines for ending isolation; or (3) receives a recommendation to return to work from a licensed healthcare provider.

Legal Challenges to the ETS

Several states have formed coalitions in order to file lawsuits challenging the ETS. On November 6th, 2021, the U.S. Fifth Circuit Court of Appeals, in response to a lawsuit brought by state attorneys general from Louisiana, Mississippi, South Carolina, Texas, and Utah, issued a temporary stay of the ETS and an expedited briefing process in order to determine whether a permanent stay is warranted. As of the date of this alert, similar actions have been filed in the Sixth Circuit (by Kansas, Kentucky, Idaho, Ohio, Oklahoma, Tennessee and West Virginia), the Seventh Circuit (by Indiana), and the Eighth Circuit (by Alaska, Arizona, Arkansas, Missouri, Montana, Nebraska, New Hampshire, North Dakota, South Dakota and Wyoming) and the Eleventh Circuit (by Alabama, Florida and Georgia).

Given the short timeline for compliance and the unpredictability of these lawsuits, however, employers should continue to prepare for potential implementation of their vaccination and/or testing policies on December 6th.

If you have questions regarding these developments, please contact Alison Reif or Lyndsey Kruzer of the Labor, Employment & Benefits team.

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