

OSHA's Vaccine Mandate for Large Employers: Takeaways and Action Items

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The Occupational Safety and Health Administration (OSHA) issued its long-awaited vaccination standard on November 4, 2021. OSHA's [emergency temporary standard](#) (ETS) requires private employers with 100 or more employees to develop, implement and enforce a vaccination policy requiring all employees (with certain exceptions) to get fully vaccinated or submit to weekly testing and wear a face covering in the workplace. Select key questions employers will confront in implementing the ETS requirements are below.

- **Which employers are required to comply?** Employers who have “a total of 100 or more employees at any time the standard is in effect” are subject to the ETS. However, employees who work in the healthcare services or healthcare support services sectors and the federal government workforce and contractors are covered by separate standards.
- **When must employers comply with the ETS?** Employers have until December 5, 2021, to comply with all requirements of the ETS, with one exception; employees who are not fully vaccinated will not be required to submit to weekly COVID-19 testing until January 4, 2022.
- **How is the 100-employee threshold determined?** Employers must aggregate all employees in their U.S. locations, regardless of the total number of employees at any individual site and regardless of whether they work remotely or in the workplace. Employers should include part-time employees, but not independent contractors or employees leased from staffing agencies in determining whether they meet the 100-employee threshold.
- **What policy must employers enact?** Employers must create and enforce a policy that either (i) mandates COVID-19 vaccines or (ii) gives employees the choice to either get vaccinated or submit to weekly testing and wear a face covering in the workplace.

- **Are remote employees covered?** No, the ETS requirements do not apply to employees: (i) who do not report to a workplace where other individuals such as coworkers or customers are present; (ii) who exclusively telework; or (iii) who work exclusively outdoors. As noted above, such employees still count for purposes of determining the 100-employee threshold.
- **Are any employees exempt?** Employees with qualifying medical conditions or sincerely held religious beliefs may request exemptions from the ETS mandates. If such requests are legitimate, employers may determine whether a reasonable accommodation is feasible and does not create an undue hardship.
- **Does the ETS require employers to determine employees' vaccination status?** Yes, employers must obtain and maintain acceptable proof of vaccination status. Acceptable proof of vaccination status includes a vaccine card, records from a pharmacy or health care provider, or "any other official documentation" that includes the dates and type of vaccination and the place the employee received the vaccine. Digital copies are acceptable provided that they clearly display the required information. If an employee is unable to produce this type of record, an attestation meeting specified criteria is acceptable.
- **What are the requirements for the alternative testing program?** Unvaccinated employees of employers who permit testing in lieu of vaccination must be tested at least weekly if the employees are in the workplace where other individuals are present at least once a week. Unvaccinated employees who primarily work remotely and occasionally report to a workplace must be tested within seven days of reporting to the workplace and present proof of a negative test to the employer.
- **What tests are acceptable?** Acceptable tests include diagnostic tests that are processed by a laboratory (e.g., home or on-site collected specimens which are processed individually or as pooled specimens), "proctored over-the-counter tests, point of care tests and tests where specimen collection and processing is either done or observed by an employer." Importantly, tests that are both self-administered and self-read are not permitted (i.e., an at-home test self-administered and self-read by an employee will not suffice), unless observed by an employer or an authorized telehealth provider.
- **Does the ETS require employees to wear face coverings?** Employers that choose to permit testing as an alternative to vaccination must also require employees who are not fully vaccinated to wear face coverings when indoors or when occupying a vehicle with another person for work purposes.
- **Does the ETS require employers to provide PTO or paid sick leave to employees?** Yes, the ETS requires employers to support vaccination by providing employees reasonable time to receive each primary dose, including up to four hours of PTO at the employee's regular rate of pay, and reasonable time and paid sick leave to recover from side effects of each primary dose. These requirements apply

regardless of whether an employer chooses to allow testing and masking. Employers cannot force use of existing PTO to satisfy the requirement to provide reasonable time for each dose, but can force use of existing sick or unspecified leave to satisfy the requirement to provide reasonable time to recover from side effects. Employers are not required to provide PTO to employees who test positive for COVID-19.

- **Who is required to pay for testing?** Employers are not required to bear the costs associated with testing under the ETS. However, other laws, regulations or contracts such as collective bargaining agreements may provide otherwise (e.g., under the FLSA, an employer may be required to pay for the time it takes an employee to be tested if testing is conducted in the middle of a shift).
- **What records must employers maintain?** Employers must maintain records documenting each employee's vaccination status, proof of vaccination and testing results, all of which constitutes confidential employee medical information and is subject to corresponding confidentiality and access requirements.
- **What information must employers provide to employees?** The ETS requires employers to provide employees with certain information, including (i) the requirements of the ETS and any policies or procedures the employer establishes to implement them; (ii) the CDC's "Key Things to Know About COVID-19 Vaccines" publication, available [here](#); (iii) employer prohibitions against discrimination and retaliation; and (iv) criminal penalties for knowingly supplying false statements or documentation.
- **Are there any form policies or notifications available for employers to use?** Yes, OSHA provided form policy templates and employee facts sheets available [here](#).
- **Are there consequences for non-compliance?** OSHA will initiate planned inspections of workplaces to ensure employers are complying with the ETS. OSHA is empowered to issue civil penalties for employers who fail to comply with the requirements of the ETS. And employees who report workplace complaints related to COVID-19 must be protected from discrimination or retaliation.
- **What states does the ETS apply in?** Federal OSHA [standards](#) are applicable in 29 states, but are generally not applicable in 21 states (and Puerto Rico) that have their own plans covering private employers; however, the latter states will be obligated to adopt their own state-specific rules at least as effective as the ETS.
- **How does the ETS impact state and local requirements?** Where the ETS is applicable, it preempts conflicting state and local workplace guidance and specifically overrules any "ban or limit [of] an employer's authority to require vaccination, face covering, or testing."

Looking Ahead

Multiple lawsuits challenging the ETS have been filed, and more will undoubtedly be filed in the coming days and weeks. Several state governors have already indicated that they intend to challenge the ETS, which will likely lead to uncertainty regarding the status and implementation of the ETS in the near future. Impacted employers should consult their counsel to discuss the potential effect of the ETS on their business.

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