



## Labor & Employment and Health Care ADVISORY ■

**NOVEMBER 5, 2021**

### What You Need to Know About OSHA's ETS for Employee Vaccination Requirements

On November 5, 2021, the U.S. Occupational Safety and Health Administration (OSHA) released an [emergency temporary standard](#) (ETS) that requires employers with 100 or more employees to establish COVID-19 vaccination requirements for their employees. Under the ETS, covered employers must implement policies and procedures to ensure that all employees are fully vaccinated or submit weekly negative COVID-19 test results. OSHA also issued a series of [Frequently Asked Questions](#) to provide guidance on the requirements of the ETS.

#### Coverage Issues

##### ***Which employers are covered by the ETS?***

All employers with a total of 100 or more employees are covered by the ETS. However, the requirements set forth in the ETS do not apply to (1) federal contractor workplaces covered by the [Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors](#); or (2) settings where any employee provides health care services or health care support services when subject to [OSHA's health care emergency temporary standard](#).

##### ***How must employees be counted to determine if the employer meets the 100-employee threshold?***

The count should be done at the employer level (firm- or corporate-wide), not the individual location level. Therefore, for a single corporate entity with multiple locations, all employees at all locations are counted.

Part-time employees and employees who are working from home count toward the total number of employees. However, independent contractors do not count toward the total number of employees.

The ETS commentary and the FAQs provide additional guidance on calculating the employee threshold in a variety of contexts, including:

- Corporate affiliates and other related entities must aggregate their employees together as part of a single integrated employer if they handle safety matters as one company.

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- In scenarios in which 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. The host employer would only count its permanent employees when determining whether it is covered.
- In a franchisor-franchisee relationship in which each franchise is independently owned and operated, the franchisor and franchisee would generally 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.
- The determination of whether an employer falls within the scope of this ETS based on the number of employees should initially be made as of the effective date of the ETS (November 5, 2021). If the employer has 100 or more employees on the effective date, this ETS applies for the duration of the standard. If the employer has fewer than 100 employees on the effective date of the ETS, the ETS would not apply to that employer as of the effective date. However, if that same employer subsequently hires more workers and hits the 100-employee threshold for coverage, the employer would then be expected to come into compliance with the ETS’s requirements. Once an employer has come within the scope of the ETS, the ETS continues to apply for the remainder of the time the ETS is in effect, regardless of fluctuations in the size of the employer’s workforce.

### ***Which employees are covered by the ETS?***

Individuals employed by a covered employer are subject to the requirements of the ETS. However, the ETS does not apply to employees who do not report to a workplace where others (e.g., coworkers or customers) are present, employees while they are working from home, or employees who work exclusively outdoors.

### ***Are covered employers required to follow the ETS in states or localities that have laws prohibiting employee vaccination mandates?***

Yes. The ETS preempts states, and political subdivisions of states, from adopting and enforcing workplace requirements relating to the occupational safety and health issues of vaccination, wearing face coverings, and testing for COVID-19, except under the authority of a federally approved state plan. OSHA has stated that it intends for the ETS to preempt and invalidate any state or local requirements that ban or limit an employer’s authority to require COVID-19 vaccination, face covering, or COVID-19 testing. Note, however, that it is anticipated that some states – likely including those that have passed such bans – will challenge through legal action OSHA’s authority to issue the ETS.

### ***How long will the ETS be in effect?***

OSHA anticipates that the ETS will be in effect for six months: from November 5, 2021 through May 5, 2022. However, OSHA will continue to monitor trends for COVID-19 infections and deaths and will update the ETS as appropriate. OSHA has also indicated that the ETS will serve as a proposal for a final standard and has invited the public to submit comments on all aspects of the ETS. Stakeholders may submit comments and attachments, identified by Docket No. OSHA-2021-0007, electronically at [www.regulations.gov](http://www.regulations.gov).

## Vaccination Requirements

### ***What does the ETS require for employee vaccination?***

The ETS sets as its default rule a requirement that covered employers establish, implement, and enforce a written mandatory vaccination policy that requires all employees (including all new employees as soon as practicable) to be “fully vaccinated,” other than those employees: (1) for whom a vaccine is medically contraindicated; (2) for whom medical necessity requires a delay in vaccination; or (3) who are legally 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 requirements.

However, the ETS also permits covered employers, as an alternative to a mandatory vaccination policy, to establish, implement, and enforce a policy allowing employees to choose between being fully vaccinated or providing proof of weekly COVID-19 testing, plus wearing a face covering in the workplace.

### ***What does “fully vaccinated” mean, and what types of COVID-19 vaccines are sufficient for the ETS?***

Under the ETS, “fully vaccinated” means two weeks after completing a primary COVID-19 vaccination series, with the minimum recommended intervals between doses, that is:

- Approved or authorized for emergency use by the U.S. Food and Drug Administration (FDA).
- Listed for emergency use by the World Health Organization (WHO).
- Administered as part of a clinical trial at a U.S. site, if the recipient is documented to have been vaccinated with the active (not a placebo) COVID-19 vaccine candidate, which is confirmed as effective or listed for emergency use by the WHO.

Alternatively, a person is considered “fully vaccinated” two weeks after receiving the second dose of any combination of two doses of a COVID-19 vaccine that is approved or authorized by the FDA or listed as a two-dose series by the WHO, as long as the second dose in the series is received at least 17 days after the first dose.

### ***Does the ETS require booster shots of COVID-19 vaccines?***

No. Booster shots and additional doses are not included in the definition of “fully vaccinated” under the ETS. Therefore, covered employers are not required to obtain vaccination-related information beyond what is considered necessary to demonstrate that the employee is fully vaccinated as defined by the ETS.

### ***Do covered employers have to provide paid leave to employees to assist them in getting vaccinated?***

Yes. Employers must provide a reasonable amount of time to each employee to obtain each of their primary vaccination doses and up to four hours of paid time, including travel time, at the employee’s regular rate of pay to do so. In addition, the employer must provide reasonable time and paid sick leave for the employee to recover from side effects experienced following any primary vaccination dose to each employee for each dose.

***How does a covered employer determine an employee's vaccination status, and what type of proof is required?***

Covered employers are required by the ETS to determine the vaccination status of each employee – i.e., whether they are fully or partially vaccinated or not vaccinated at all – and to require each vaccinated employee to provide acceptable proof of vaccination status. Booster shots and additional doses are not included in the definition of fully vaccinated under the ETS. Therefore, the employer is not required to obtain vaccination-related information beyond what is considered necessary to determine that the employee is fully vaccinated as defined by the ETS. The ETS provides that “acceptable proof” of vaccination status is one of:

- The record of immunization from a health care provider or pharmacy.
- A copy of the employee's 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.
- A copy of any official documentation that contains the type of vaccine administered, the date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

Employees who do not provide one of the acceptable forms of proof must be treated as not fully vaccinated.

In instances where a fully vaccinated employee is unable to produce acceptable proof of vaccination, the employer may accept as acceptable proof of vaccination a signed and dated statement by the employee that includes an attestation of vaccination status and that the employee has lost or is otherwise unable to produce proof of vaccination status, as well as certain declaration language listed in the ETS. In addition, employees who attest to their vaccination status should, to the best of their recollection, include the type of vaccine administered, the date(s) the vaccine was administered, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

If an employer has ascertained employee vaccination status before the effective date of the ETS (November 5, 2021) through another form of attestation or proof, and it has retained records of that ascertainment, the employer is exempt from having to require additional proof. However, that exception only applies to those employees whose fully vaccinated status was documented before the effective date.

***Must reasonable accommodations be considered if an employee cannot be vaccinated because of a disability or a sincerely held religious belief?***

Yes. If an employer mandates vaccinations for employees and an employee cannot be vaccinated because of a disability, as defined by the Americans with Disabilities Act (ADA), or a sincerely held religious belief, practice, or observance, the employee may be entitled to a reasonable accommodation under the ADA, Title VII of the Civil Rights Act of 1964, or applicable state law. The ETS refers to the Equal Employment Opportunity Commission's (EEOC) [guidance](#) for determining when reasonable accommodations may be needed due to a disability or sincerely held belief.

***What records must covered employers maintain of employee vaccination status?***

Covered employers must maintain a roster of each employee's vaccination status, and they also must preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated. Because the roster and records are considered to be employee medical records, they must be maintained as such in accordance with OSHA's requirements for employee exposure and medical records set forth in 29 C.F.R. § 1910.1020, kept separate from personnel records, and must not be disclosed except as required or authorized by the ETS or other federal law, including the ADA. The ETS does make clear, however, that these records and roster must only be maintained and preserved while the ETS is in effect and are not subject to the much longer retention requirements – i.e., duration of employment plus 30 years – applicable to other types of medical records per Section 1910.1020(d)(1)(i).

***When must employers implement a written mandatory vaccination policy?***

Employers must implement a written mandatory vaccination policy by December 5, 2021. However, employees have until January 4, 2022 to be fully vaccinated. If employers decide to permit testing for unvaccinated workers, the requirement to test begins on January 4, 2022.

**Testing Requirements*****Are employees who are not fully vaccinated required to test?***

Yes. Employees who report to a workplace where other individuals (e.g., coworkers, customers) are present must be tested at least once every seven days and must provide documentation of the most recent COVID-19 test result to the employer no later than the seventh day following the date on which the employee last provided a test result. Employees who do not report to a workplace during a period of seven or more days must be tested within seven days of reporting to the workplace and must provide documentation of that test result to the employer upon return to the workplace. If an employee does not produce a COVID-19 test result or tests positive, the employee is not permitted in the workplace.

***What kinds of tests are permitted?***

A valid COVID-19 test under the ETS is one that is (1) clear, approved, or authorized, including in an emergency use authorization (EUA) by the FDA, to detect current infection with the Sars-CoV-2 virus (e.g., a viral test); (2) administered in accordance with the authorized instructions; and (3) not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

Acceptable tests include tests with specimens that are processed by a laboratory, proctored over-the-counter tests, point-of-care tests, and tests whose specimen collection and processing is either done or observed by the employer.

***Who pays for the tests?***

The ETS does not require the employer to pay for any costs associated with testing; however, employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements.

***Is the cost of COVID-19 testing (including at-home testing) required to be covered by the employer's group health plan?***

Neither the ETS nor other federal law requires a group health plan to cover testing conducted to screen for general workplace health and safety, public health surveillance, or for any other purpose not primarily intended for individualized diagnosis or treatment of COVID-19. Federal law only requires group health plans to cover COVID-19 testing when such testing is medically appropriate for the individual, as determined by the individual's attending health provider. Employers may voluntarily pay for such tests; however, they should consider whether such payment creates a group health plan subject to other federal laws (such as ERISA). Employers that wish to cover such tests through their group health plan should consult first with their insurance carrier or administrators. Employers that are considering providing or covering COVID-19 tests through their group health plan for OSHA compliance, work safety, or public health reasons should also consider HIPAA's broad reach. While in most cases the HIPAA Privacy Rule does not apply to employers and does not protect employment records (even if the information in those records is health related), HIPAA does apply to most health plans and to health care providers who engage in certain transactions electronically. If HIPAA applies to a COVID-19 testing arrangement, then the HIPAA Privacy Rule, Security Rule, and Breach Notification Rule all should be considered.

***If an employee tests positive, are they still required to test?***

When an employee has tested positive for COVID-19, the employer must not require COVID-19 testing for that employee for 90 days following the date of their positive test or diagnosis.

***What does an employer do with the test results provided by employees?***

Covered employers must maintain a record of each test result provided by each employee or obtained during tests conducted by the employer. These records are considered to be employee medical records and must be maintained as such in accordance with OSHA's requirements for employee exposure and medical records set forth in 29 C.F.R. § 1910.1020 and must not be disclosed except as required or authorized by the ETS or other federal law. However, the records must only be maintained and preserved while the ETS is in effect and are not subject to the much longer retention requirements – i.e., duration of employment plus 30 years – applicable to other types of medical records per Section 1910.1020(d)(1)(i).

***Can an unvaccinated employee still come to the workplace if they did not obtain a COVID-19 test but wears a face covering and is isolated while on-site?***

No. If an employee who is not fully vaccinated does not provide the result of a negative COVID-19 test, the employer must keep the employee removed from the workplace until the employee provides one.

***If an employer allows for testing as an alternative to vaccination or as an accommodation from a vaccination mandate, must reasonable accommodations be considered if an employee cannot be tested because of a disability or a sincerely held religious belief?***

Yes. While the ETS requires weekly COVID-19 testing of all unvaccinated employees, including those entitled to a reasonable accommodation from vaccination requirements, if testing for COVID-19 conflicts with a

worker's sincerely held religious belief, practice, or observance, or is medically contraindicated because of a disability, the worker may be entitled to a reasonable accommodation from the testing requirement, which might include using an alternative test that does not conflict with the worker's religious belief.

### ***When do testing requirements go into effect?***

Testing requirements are effective January 4, 2022. However, employees who have completed the entire primary vaccination series by that date do not have to be tested, even if they have not yet completed the two-week waiting period.

## **Masking Requirements**

### ***What does the ETS require for employee face coverings?***

Covered employers must ensure that each employee who is not fully vaccinated wears a face covering when indoors and when occupying a vehicle with another person for work purposes except in limited circumstances, subject to the following exceptions:

- When an employee is alone in a room with floor to ceiling walls and a closed door.
- For a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements.
- When an employee is wearing a respirator or facemask (see below).
- When the employer can show that the use of face coverings is infeasible or creates a serious workplace hazard.

Employers must also ensure that any face covering is worn by the employee to fully cover the employee's nose and mouth and is replaced when wet, soiled, or damaged (e.g., is ripped, has holes, or has broken ear loops).

In addition:

- The employer must not prevent any employee from voluntarily wearing a face covering or facemask unless the employer can demonstrate that doing so would create a hazard of serious injury or death, such as interfering with the safe operation of equipment.
- The employer must permit the employee to wear a respirator instead of a face covering whether required or not. The employer may provide respirators to the employee, even if not required.
- The employer must not prohibit customers or visitors from wearing face coverings.

### ***What types of face coverings are acceptable?***

The ETS requires that face coverings (1) completely cover the nose and mouth; (2) be made with two or more layers of a breathable fabric that is tightly woven (i.e., fabrics that do not let light pass through when held up to a light source); (3) be secured to the head with ties, ear loops, or elastic bands that go behind the head (gaiters should have two layers of fabric or be folded to make two layers); (4) fit snugly over the

nose, mouth, and chin with no large gaps on the outside of the face; and (5) are a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings.

The ETS permits the use of facemasks or respirators in lieu of face coverings. A facemask is a surgical, medical procedure, dental, or isolation mask that is FDA-cleared, authorized by an FDA EUA, or offered or distributed as described in an FDA enforcement policy. Common types of respirators include filtering facepiece respirators (e.g., N95), elastomeric respirators, and powered air purifying respirators.

### ***Who pays for costs associated with face coverings?***

The ETS does not require the employer to pay for any costs associated with face coverings; however, employer payment for face coverings may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements.

### ***When do masking requirements go into effect?***

Masking requirements are effective December 5, 2021.

## **Notification, Reporting, and Records**

### ***Are employees required to notify employers when they receive a positive COVID-19 test or are diagnosed with COVID-19?***

Yes. Regardless of COVID-19 vaccination status or any COVID-19 testing, covered employers must (1) require each employee to promptly notify the employer when they have received a positive COVID-19 test or are diagnosed with COVID-19; and (2) immediately remove the employee from the workplace.

The employee must be removed from the workplace until the employee:

- 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.
- Meets the return-to-work criteria in the CDC's "[Isolation Guidance](#)."
- Receives a recommendation to return to work from a licensed health care provider.

### ***Are employers required to pay employees following removal from the workplace due to a positive test?***

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

### ***Are employers required to notify employees of the ETS or provide any additional information?***

Yes, employers need to provide information to employees, in a language and at a literacy level they understand, including:

- The requirements of the ETS and the policies and procedures the employer has implemented to comply with the ETS.

- The CDC document "[Key Things to Know About COVID-19 Vaccines.](#)"
- Information about protections against retaliation and discrimination.
- Information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.

***Is there a specific way the required information needs to be provided to employees?***

The manner employers provide the required information to employees may vary based on the size and type of workplace. There are no formal training requirements. An employer may provide this information to employees through email communications or printed fact sheets or during a discussion at a regularly scheduled team meeting.

***When must employers report fatalities and hospitalizations due to COVID-19 to OSHA?***

The employer must report to OSHA each work-related COVID-19 fatality within eight hours of the employer learning about the fatality and each work-related COVID-19 in-patient hospitalization within 24 hours of the employer learning about the in-patient hospitalization.

***Are employers required to make records available for examination and copying?***

Yes, the employer must maintain and provide upon request:

- An employee's COVID-19 vaccination documentation and any COVID-19 test results to that employee, and to anyone having written authorized consent of that employee, by the end of the next business day after a request.
- The aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace by the end of the next business day after a request by an employee or an employee representative.
- The employer's written COVID-19 policy requiring vaccination or requiring vaccination and testing, and the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace, within four business hours of a request from OSHA.
- Any other written records required by the ETS by the end of the next business day after a request by OSHA.

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