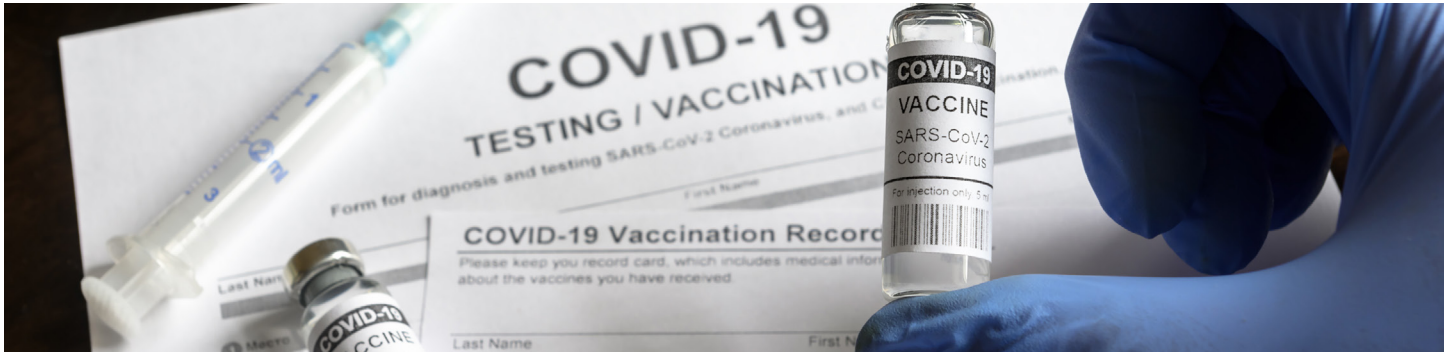




OSHA ETS: Learn About the Recently Issued Mandatory COVID-19 Vaccination or Testing Guidance



Update, November 19, 2021, Latest on OSHA ETS:

On November 12, 2021, the U.S. Court of Appeals in the 5th Circuit granted a motion to stay enforcement of the ETS.¹ The court ordered that OSHA “take no steps to implement or enforce” the ETS “until further court order.” While OSHA believes they will prevail in the litigation, the agency announced it has temporarily suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.

To further complicate matters, on November 16, 2021, the 6th Circuit Court of Appeals was the winner of a multi-district litigation lottery to determine the court who will decide all of the challenges related to the OSHA ETS. The big question right now is whether the 6th Circuit will continue the stay on enforcement granted by the 5th Circuit.

Employer Next Steps

Employers subject to the ETS should carefully consider next steps with their employment counsel. Some options include:

1. Ignore the stay and move forward with full compliance with the ETS, including implementing the mandatory vaccination / testing policies by the originally applicable due dates.
 - This option may present legal challenges for employers with locations in states prohibiting mandatory vaccination or testing practices.
2. Continue to prepare for compliance with the ETS but hold off on actual implementation until there is further guidance out of the 6th Circuit.
3. Discontinue all compliance-related activities until the litigation process has been completed.

While OSHA is not currently enforcing the ETS because of the court’s ruling, if the stay is lifted or OSHA prevails in the litigation, options (1) and (2) will make it easier to quickly comply with the requirements of the ETS, whereas choosing option (3) may make timely compliance more difficult.

Employers will need to evaluate their particular circumstances to determine the best approach as we navigate this uncertain time.

Helpful Resources

To help employers understand the ETS, USI has created an [OnDemand webinar](#) covering the most important aspects of the ETS, including a discussion of the implications of the legal challenges.

Employers who operate in states with [State OSHA plans](#) should keep an eye open for guidance from the state programs, since those programs may impose different or additional requirements irrespective of what the 6th Circuit does.

As always, employers should consult with their legal counsel to further understand the implications of the ETS in light of the court’s rulings.

Introduction

On November 5, 2021, the Occupational Safety and Health Administration (OSHA) published its much-anticipated Emergency Temporary Standard (ETS), which requires most U.S. employers with 100 or more employees to adopt a mandatory COVID-19 vaccination policy with an option to include an alternative weekly testing program.

The ETS is effective immediately, which means that employers need to begin their compliance efforts in earnest. Employers have until December 5, 2021, to come into compliance with all of the requirements of the ETS, except for the weekly testing option for employees who have not been fully vaccinated. Employers have until January 4, 2022, to comply with the weekly testing option (although employers may begin complying with that provision earlier, if they choose).

However, the current ETS may not be the final word, since OSHA is seeking comments from the public on the ETS, and there is a possibility that the requirements will be expanded beyond their current parameters. Additionally, multiple state attorneys general have filed lawsuits challenging the ETS, and on November 6, 2021, a federal appellate court issued a temporary stay on enforcement of the ETS. The outcome of these legal challenges is unknown.

As you can see, this is a rapidly changing environment, but if the ETS survives legal challenge, its current provisions provide employers with a detailed roadmap of what compliance should look like. Even with the legal uncertainty, employers should take steps to prepare for compliance and monitor developments out of the courts.

This article summarizes important aspects of the ETS in an [FAQ](#) format. It is not exhaustive and not a substitute for legal advice.

Which employers are covered?

Private-sector employers

Private employers with 100 or more employees at any time during the effective period of the ETS (beginning on November 5, 2021) will have to comply.

The definition of “employee” includes all employees on an employer’s payroll, including temporary employees, part-time employees, remote employees, seasonal employees, etc. Independent contractors are not counted as employees.

Staffing agency employees are considered employees of the staffing agency and are included in the staffing agency’s headcount, not the host employer’s headcount.

Employers with 100 or more employees on November 5, 2021, must comply with the ETS and will have to continue doing so for the duration of the ETS, even if their employee count subsequently drops below 100.

Employers with fewer than 100 employees on November 5, 2021, are not subject to the ETS. However, if headcount reaches the 100-employee threshold at any time while the ETS is in effect, then the employer must promptly comply.

State and local governments

State and local governmental employers with 100 or more employees [in states that have state-approved OSHA programs](#) must comply.

State and local governmental employers are usually not covered by federal OSHA requirements. However, a condition for a state receiving approval to adopt its own State Plan is that it extends federal OSHA requirements to state and local governmental employers.

State Plans must fully adopt the ETS by December 5, 2021, so the compliance date for state governmental employers will be later than November 5, 2021.

Which employers are not covered?

- Workplaces covered by other federal mandates, such as the previously issued Healthcare ETS (29 CFR 1910.502), or federal contractor employers covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety Guidance
- State and local governmental employers in states without approved state OSHA programs
- Private employers with fewer than 100 employees, unless a state OSHA program requires them to comply

State Plans must adopt programs that are “at least as effective as federal OSHA’s requirements;” however, OSHA allows states to adopt programs that are more expansive or stringent than the federal requirements, so it’s possible that some states may lower the compliance obligation below the 100-employee threshold.

What about state laws that prohibit mandatory vaccinations, testing, or face coverings?

Some states, like Montana and Texas, have laws or executive orders that may prevent vaccine or mask mandates.

OSHA believes it has the authority to preempt or override any attempts by states or localities to prevent vaccination or mask mandates. According to the guidance: “OSHA intends for the ETS to preempt and invalidate any State or local requirements that ban or limit an employer’s authority to require vaccination, face covering, or testing.”

Are any employees of covered employers exempt?

- Employees who work exclusively from home, who work exclusively outdoors, or who come into the workplace only when other employees (or customers) aren’t present are not covered by the ETS.
- However, if any such worker will be entering a covered workplace during times when other employees (or customers) are present, they must either be vaccinated or be able to present a negative test result obtained within seven days of entering the workplace.
- Employees with medical conditions or sincerely held religious beliefs that prevent them from 1) being vaccinated, 2) undergoing weekly testing, and/or 3) wearing a mask may be entitled to accommodations under Title VII of the Civil Rights Act or the Americans with Disabilities Act.
- Employees who have previously been diagnosed with COVID-19 are NOT exempt from compliance and must either be fully vaccinated or submit to weekly testing.

What does it mean to be fully vaccinated?

Employees are considered to be “fully vaccinated” two weeks after receiving a single Johnson & Johnson vaccine, or two weeks after receiving the second dose of a two-dose vaccine series (i.e., the Pfizer or Moderna vaccines). Booster shots and additional doses are not included in the definition of fully vaccinated under the ETS.

Limited exception: Employees who have completed the entire primary vaccination series (e.g., have received both shots) by January 4, 2022, do not have to be tested, even if they have not completed the two-week waiting period.

Do employers have to offer a testing option?

No. The ETS states that employers must adopt a mandatory vaccination program, but that employers may also choose to adopt a weekly testing option. As OSHA puts it, for an employer that decides to adopt a weekly testing option, “that simply means that employees themselves may choose not to get vaccinated, in which case they must get tested and wear face coverings per the requirements of the standard.”

According to the ETS, employers that choose to adopt a mandatory vaccination-only policy may suspend or terminate employees who refuse to get vaccinated, unless their refusal is due to a medical condition or sincerely held religious belief that prevents them from being vaccinated, in which case reasonable accommodations may have to be considered.

How will testing work?

- Covered employees who are not “fully vaccinated” must comply with the weekly testing requirements of the ETS. This includes unvaccinated employees, employees who are partially vaccinated, and employees who are exempt from vaccination due to religious or disability-based restrictions.
- Under the ETS, a “COVID-19 test” is a test that is:
 1. Cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the U.S. Food and Drug Administration (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 processed by a laboratory (whether collected at home or at a testing facility), tests witnessed or overseen by the employers or professionals (including telehealth), and tests where specimen collection and processing is either done or observed by an employer.

Both Nucleic Acid Amplification Tests (NAAT) and antigen tests are acceptable, so long as they are not self-administered and self-read. However, antibody tests do not meet the definition of COVID-19 test for the purposes of the ETS.

- The ETS does not require employers to pay for any costs associated with testing, although employers can choose to do so. However, individual state or local laws may influence whether employers must cover the costs of testing.
- Group health plans are not required to cover COVID-19 testing for employment purposes.
- Employees who fail to provide a weekly test result must be removed from the workplace until they can provide a negative test result.

What are the mask requirements?

- Fully vaccinated employees are NOT required to wear masks.
- Any employee who is not fully vaccinated must wear a mask while in the workplace and when occupying a vehicle with another person for work purposes, except under the following circumstances:
 1. When they are alone in a room with floor to ceiling walls and a closed door.
 2. For a limited time while they are eating or drinking at the workplace, or for identification purposes in compliance with safety and security requirements.
 3. When they are wearing a respirator or facemask.
 4. Where the employer can show that the use of face coverings is infeasible or creates a greater hazard that would excuse compliance with this paragraph (e.g., when it is important to see the employee’s mouth for reasons related to their job duties, when the work requires the use of the employee’s uncovered mouth, or when the use of a face covering presents a risk of serious injury or death to the employee).

When will employers have to provide employees with pay related to getting vaccinated or being tested?

- Employers are required to provide employees with up to four hours of paid time off (PTO) from work for each required dose for a primary vaccination (booster shots are not considered part of the primary vaccination series). Employees cannot be required to use sick, vacation, or PTO time to cover these four hours.
- Employers are required to provide “reasonable time and paid sick leave” to employees who suffer side effects from receiving a vaccination and need time off to recover. Available PTO or paid sick time may be used to cover these absences, but if employees don’t have enough accrued time to cover their absences, employers will have to pay for the remaining time off, and cannot “advance” PTO or sick leave so that the employee has a negative balance.
- The ETS does NOT require employers to provide paid time off in connection with:
 - Weekly testing
 - Positive test results
 - Quarantining or isolation

However, state or local laws may impose pay obligations under some of these scenarios.

What information should employers provide to employees?

- The ETS requires employers to adopt a robust compliance policy and inform employees, in a language and at a literacy level the employee understands, about the key components of their compliance plan, including, but not limited to, the following:
 - Requirements for COVID-19 vaccination
 - Applicable exclusions from the written policy (e.g., reasonable accommodations for workers with disabilities or sincerely held religious beliefs)
 - Information on determining an employee’s vaccination status and how this information will be collected
 - Paid time and sick leave for vaccination purposes and recovery from side effects
 - Employee obligations to provide prompt notification of positive COVID-19 tests and the employer’s removal practices when notified of a positive test result of COVID-19-positive employees from the workplace
 - Testing and masking requirements
 - The disciplinary consequences for employees who do not abide by the policy
 - Vaccine efficacy, safety, and the benefits of being vaccinated (by providing the Centers for Disease Control and Prevention (CDC) document [“Key Things to Know About COVID-19 Vaccines”](#))
 - Protections against retaliation and discrimination
 - OSHA’s prohibitions that impose criminal penalties for knowingly supplying false statements or documentation

What recordkeeping requirements are necessary for compliance?

- Employers must keep a list of employee vaccination status that clearly indicates for each employee whether they are:
 - Fully vaccinated
 - Partially vaccinated

- Not fully vaccinated because of a medical or religious accommodation
- Not fully vaccinated because they have not provided acceptable proof of their vaccination status (this would include employees who have chosen not to get vaccinated and have opted for weekly testing instead)

The following documents are considered acceptable for proof of vaccination:

- The record of immunization from a healthcare provider or pharmacy
 - A copy of the U.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 other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the healthcare professional(s) or clinic site(s) administering the vaccine(s)
- Employers who have adopted a weekly testing option must maintain a record of each weekly test result for every employee subject to testing for the duration of the ETS. Test results are considered medical records under both the ETS and the Americans with Disabilities Act.
 - Upon request, employers must provide employees access to and copies of their individual test records. Additionally, upon request, employers must provide employees or employee representatives (such as union representatives) with the aggregate number of fully vaccinated employees at the workplace by the end of the next business day after the request. There is no limitation on the number of times these requests can be made. Employers will also need to respond to requests from OSHA for certain records.

What happens when an employee tests positive for COVID-19 or has had close contact with someone with COVID-19?

- An employee who has tested positive must immediately be removed from the workplace until they either:
 - Receive a negative result on a COVID-19 NAAT test following a positive result on a COVID-19 antigen test (NAAT tests are less likely to provide false positives);
 - Meet the return-to-work criteria in the [CDC's isolation guidance](#); or
 - Receive a recommendation to return to work from a licensed healthcare provider.

Employees who have tested positive for COVID-19 and returned to the workplace should not be subjected to weekly testing for 90 days following the date of their positive test.

- The ETS does NOT require quarantining of employees who have been exposed to someone diagnosed with COVID-19. However, the CDC continues to recommend that unvaccinated employees be quarantined after close, prolonged contact with a COVID-19 positive person, and OSHA encourages employers to consider a quarantine protocol.
- The ETS does NOT require contact tracing. However, the CDC continues to recommend contact tracing. State and local laws may also require contact tracing.
- The ETS requires that employers must report each work-related COVID-19 fatality to OSHA within eight hours of learning of the fatality and each work-related COVID-19 in-patient hospitalization within 24 hours.

What are the penalties for noncompliance?

Employers that do not timely comply with the OSHA ETS may face penalties of \$13,653 per violation (2021 maximum penalty amounts — 2022 amounts not yet available). Willful or repeated violations can result in penalties of \$136,532 per violation. States that operate their own OSHA plans must adopt maximum penalty levels that are at least as effective as federal OSHA.

Next Steps

While the outcome of the legal challenges remains uncertain, employers should prepare for compliance with the ETS.

By December 5, 2021, covered employers must have the following in place:

- Establish a vaccination policy
 - OSHA made available a [sample mandatory vaccination policy](#) and a [sample vaccination or testing/face covering policy](#)
- Determine vaccination status of each employee, obtain acceptable proof of vaccination, and maintain records and a roster of vaccination status
- Provide support for employee vaccination
- Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis
- Remove any employee who received positive COVID-19 test or COVID-19 diagnosis
- Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes
- Provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation
- Report work-related COVID-19 fatalities to OSHA within eight hours and work-related COVID-19 in-patient hospitalizations within 24 hours
- Make certain records available

By January 4, 2022, employers must ensure employees who are not fully vaccinated are tested for COVID-19 at least weekly (if in the workplace at least once a week) or within seven days before returning to work (if away from the workplace for a week or longer).

For the ETS, visit www.govinfo.gov/content/pkg/FR-2021-11-05/pdf/2021-23643.pdf.

For more information from OSHA about the ETS including FAQs, fact sheets, and a recorded webinar, visit www.osha.gov/coronavirus/ets2.

¹BTS Holdings LLC et al. v. OSHA No. 21-60845 (5th Circuit Court of Appeals, Nov. 12, 2021)