

DOL-OSHA Announces New COVID-19 Vaccine ETS for Private-Sector Workers

WRITTEN BY

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Who Needs to Know

Private companies with 100 or more employees.

Why It Matters

On November 4, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) announced an emergency temporary standard (ETS), containing the anticipated COVID-19 vaccination rule covering private companies with 100 or more employees. The ETS became **effective immediately** on November 5 upon [its publication in the *Federal Register*](#). **On November 6, the Fifth Circuit Federal Court of Appeals granted an emergency motion to stay enforcement of the ETS effectively nationwide, pending further action by the court, which could come as early as November 9 at 6 p.m. ET. Other challenges to the ETS's enforcement have been filed in the Eighth, Sixth, and Eleventh circuits thus far.**

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Below find the key takeaways from this emergency rule:

Requirements

- Under the ETS, employers with 100 or more employees (excluding independent contractors) must either (1) “develop, implement, and enforce a **mandatory COVID-19 vaccination policy**” or (2) **adopt a policy** (a) requiring employees to be either vaccinated by January 4, 2022 in lieu of implementing a vaccine mandate, (b) enforce a policy requiring employees not fully vaccinated (i) to undergo regular COVID-19 testing (once every seven days, along with providing documentation of the most recent COVID-19 test result) AND (ii) wear a face covering at work. If employees refuse to take a COVID-19 test, employers must remove them from the workplace until they receive documentation of the test result.

- Employees working remotely must be **tested** for COVID-19 **within seven days prior to returning to the workplace** and must provide documentation of that test result to the employer to return to work. If employees work from their homes or from workplaces where no other people are present (e.g., a remote worksite) or if work exclusively outdoors, they are exempt from the ETS.
- If the emergency rule remains in place, as of December 6, employers must provide up to **four hours of paid time** for workers **to get vaccinated** and **allow reasonable paid sick leave time** to recover from any side effects. While the four hours of paid time for the administration of each primary vaccination dose cannot be offset by any other leave the employee has accrued, paid sick leave to recover from the side effects of any vaccine dose can be in the form of an employee's accrued sick leave, if available. If the employee does not have available sick leave, leave must be provided for both purposes.
- Employers are not required to pay for COVID-19 testing or for face coverings under this rule. Employers will however need to **check any applicable state or local laws** when developing their COVID-19 testing policies. Some states and local governments require employers to pay for mandatory medical tests or require that employers reimburse for any such testing. If the emergency rule remains in place, as of December 6, employers also must ensure that unvaccinated employees wear face coverings at work.
- If the emergency rule remains in place, **as of January 4, 2022**, employers must ensure that their workers are **either fully vaccinated or in compliance with the ongoing COVID-19 testing**
- Employers also must provide **certain information to employees**, including a copy of the CDC's document, "Key Things to Know About COVID-19 Vaccines." Further, employers must inform employees about prohibitions against discrimination and retaliation against employees for reporting a work-related injury or illness or exercising rights under, or as a result of actions required by, the ETS or for filing an occupational safety or health complaint, reporting a work-related injury or illness, or otherwise exercising rights afforded under the OSH Act. Employers also must explain the prohibitions of § 18 U.S.C. 1001 and Section 17(g) of the OSH Act, which provide for criminal penalties associated with knowingly supplying false statements or documentation.

Testing

- The ETS states that COVID-19 diagnostic tests must include those that are "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." The diagnostic COVID-19 tests permitted under this ETS are: (1) **nucleic acid amplification tests** (NAATs) and (2) **viral antigen tests**. These types of tests must be administered in accordance with authorized instructions and may not be self-administered and self-read "unless observed by the employer or an authorized telehealth proctor." Note that employers "have the flexibility to select the testing scenario that is most appropriate for their workplace," such as setting up their own on-site testing program and partnering with a health care organization (e.g., local hospital or clinic), or having

employees perform and read their own over-the-counter test while an authorized employee or telehealth provider observes the administration and reading of the test.

Recordkeeping

- Employers must **maintain records and a roster of each employee's vaccination status** and **any COVID-19 testing** undergone by employees who did not receive vaccination. Employers may collect these vaccine records by asking employees to provide an acceptable proof of vaccination status, such as:
 1. a record of immunization from a health care provider or pharmacy;
 2. a copy of the COVID-19 Vaccination Record Card;
 3. a copy of medical records documenting the vaccination;
 4. a copy of immunization records from a public, state, or tribal immunization 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.

Employers also may request a signed and dated employee attestation, but only where an employee is unable to produce proof of vaccination. These records must be preserved, but only while the ETS is in effect. Also, vaccination status records are subject to applicable legal requirements for confidentiality of medical information.

Covered Workers

- For enforcement purposes, the ETS states that for a single corporate entity with multiple locations, **all employees at all locations are counted** for purposes of the 100-employee threshold for coverage under this ETS. Further, “traditional joint employer principles would apply [in settings where there are employees of two employers present] where both employers are covered by the ETS.” For example, if a host employer has 80 permanent employees and 30 temporary employees supplied by a staffing agency, the hosting employer would **not count the staffing agency employees for coverage purposes** and thus would not be covered by the ETS. The determination of whether an employer falls within the scope of this ETS based on the number of employees is **made as of the effective date** of the ETS — November 5, 2021.
- The ETS recognizes **limited exceptions** to the mandatory vaccination policy, including those employees (1) for whom a vaccine is **medically contraindicated**; (2) for whom **medical necessity requires a delay** in vaccination; or (3) those legally entitled to a reasonable accommodation under federal civil rights laws due to a **disability or sincerely held religious beliefs**, practices, or observances that conflict with the vaccine requirement. If one of these exceptions applies, the employer may choose to provide an alternative policy that allows the employee to be regularly tested while wearing a face covering. Employers should designate an

individual or select group of management to review exemption requests and communicate with employees to gather additional information, if necessary, and provide the employer's decision on exemption status on the same date and at the same time.

- *The Centers for Medicare & Medicaid Services (CMS) issued its own emergency regulations, which apply to health care workers.* OSHA's new ETS will not apply in workplaces covered by the CMS rule or in settings where any employee provides health care services or health care support services while they are covered by the health care-specific ETS that went into effect last summer. Nor will this ETS apply to workplaces already covered by the separate White House directive (Executive Orders 14042 and 14042) covering federal contractors. **Please note, the compliance deadline for federal contractors to comply with the executive orders has been adjusted to January 4, 2022.**
- OSHA's **ETS preempts** any contradictory state or local laws, including those that restrict a covered employer's ability to impose a vaccine mandate. Additionally, 21 states and Puerto Rico have OSHA-approved state plans that govern workplace safety. Within 30 days, those states must enact vaccination rules of their own that are at least as effective as the federal rule.

Takeaways

While the extent to which the ETS will remain in force is unclear at this time, employers with 100 or more employee that have not yet required the vaccine as a condition of employment should engage a [Troutman Pepper Labor and Employment attorney](#) now to examine vaccination policies and procedures for the possible implementation of the ETS. Such policies should include decisions, such as 1) the method to implement the mandate, 2) whether to allow employees to submit weekly test results in lieu of becoming vaccinated, 3) which tests will be accepted and who will pay for them, 4) mandatory face coverings for unvaccinated employees in the workplace, 5) pay for time spent becoming vaccinated, and 6) use of paid leave to recover from any vaccine side effects.

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