

OSHA Publishes Wide-Ranging Emergency Standard Formalizing Vaccination, Testing and/or Face Covering Requirements

Alert

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On November 4, 2021, the Occupational Safety and Health Administration (OSHA) announced its [Emergency Temporary Standard \(ETS\)](#) requiring employers with 100 or more employees to develop, implement and enforce a mandatory COVID-19 vaccination policy, or a policy requiring employees to either get vaccinated or undergo regular COVID-19 testing and wear a face covering. This action follows the Biden administration's September 2021 announcement of the [Path Out of the Pandemic](#), which directed OSHA to promulgate such a standard. Here are the high points of the emergency standard:

- **Compliance Date:** The ETS will be effective when published in the *Federal Register*, which is anticipated to be November 5. Most requirements of the ETS go into effect 30 days after the effective date (est. Dec. 5, 2021). COVID testing for unvaccinated employees is required to begin 60 days after the effective date (est. Jan. 4, 2022).
- **Scope:** The ETS applies to employers with a total of 100 or more employees. This does not include workplaces covered by the [Safer Federal Workforce Task Force Guidance](#) (federal contractors) or health care workplaces subject to the existing [healthcare ETS](#). Note, however, if federal contractors have not yet entered into a modification of an existing or new single award contract, or a multiple award contract vehicle such as a GSA Federal Supply Schedule contract or indefinite quantity/indefinite delivery contract, and therefore do not have a covered contract by the first OSHA compliance date of December 5, then those employers may need to comply with the ETS until such time as they are covered by EO 14042. The ETS requirements do not apply to employees who report to a workplace where others (including

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coworkers or the public) are not present, employees working from home, or employees who work exclusively outdoors.

- **Core Requirements:** Under the ETS, employers must establish, implement and enforce either: (1) a written mandatory vaccination policy including a requirement to vaccinate all employees, including new hires, unless employees are medically unable to be vaccinated, require delayed vaccination, or are legally entitled to reasonable accommodation under federal law because of a disability or sincerely held religious belief that conflicts with the vaccine requirement; or (2) a written policy allowing employees not subject to a mandatory vaccination policy to either be vaccinated or provide proof of regular testing (every seven days) for COVID-19 and wear a face covering while at the workplace, unless they are legally entitled to reasonable accommodation from those requirements.
- **Vaccination or Test Option Logistics:** Below are specific components required when utilizing the vaccination or testing option:
 - Testing must be approved or authorized, including via an Emergency Use Authorization, to detect current COVID virus (e.g., a viral test). The test must be conducted by a third party (processed by a lab) or observed by the employer or an authorized telehealth provider. An employee may not self-administer and review their own results unless overseen by the employer or authorized telehealth provider. Employers are not required to pay testing costs, though payment may be required by other laws or negotiated agreements. If unvaccinated employees do not provide proof of testing, they may not enter the workplace. All testing records must be maintained by employers as confidential medical records.
 - Employers must enforce face covering requirements for all unvaccinated individuals when indoors or in a vehicle with others. There are limited exceptions where an employee is alone in a room with floor to ceiling walls and a closed door (i.e., not a cubicle), when employees are eating or drinking for a limited time, or where face coverings are infeasible or create a greater hazard. Employers are required to ensure face coverings are properly worn and replaced when wet, soiled or damaged. Employers are not required to pay costs associated with face coverings. Although the ETS only requires unvaccinated employees to wear face coverings, employers should be aware that vaccinated employees may still be subject to a state or local order requiring face coverings.
- **Accommodations:** The ETS includes a note contemplating that employees may be entitled to a reasonable accommodation from the vaccination, testing and/or face covering requirements in the event the vaccination or testing option is utilized.
- **Proof of Vaccination:** Regardless of whether a mandatory vaccination policy or testing policy is selected, the employer must determine the vaccination status of each employee. Per the ETS, employers must require acceptable proof of vaccination, including a vaccine record from a pharmacy, health care provider or health system, copy of the COVID-19 vaccination card issued by the Centers for Disease

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Control and Prevention (CDC), medical records, or a signed attestation. Any attestation must include the statement: “I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.” Employees who do not submit proof of vaccination must be treated as unvaccinated. Employers must maintain these records and treat them as confidential. Employers who obtained proof of vaccination prior to the ETS do not have to re-collect information to comply with these requirements.

- **Time Off:** The ETS requires employers to provide reasonable time off (up to four hours paid) for vaccination and reasonable time and paid leave to recover from any side effects.
- **Positive COVID diagnoses:** Employers must: (1) require employees who test positive for COVID to notify the employer of a positive result; (2) immediately remove COVID-positive employees from the workplace until either they receive a negative test result, meet CDC Return to Work criteria, or are told by a licensed health care provider they may return to work. Employers are not required to provide paid leave under this section, but could be required by other laws or negotiated agreements. Should an unvaccinated employee test positive for COVID, the employee must be exempted from the testing requirement for 90 days following the date of their positive test or diagnosis.
- **Information to Employees:** The ETS requires employers to provide information on the following topics to employees in a language and at a literacy level they understand: (1) the ETS requirements and employer’s procedures; (2) this CDC document regarding COVID vaccine efficacy; (3) anti-retaliation [rules](#) regarding work-related injuries or illnesses; and (4) statutes related to criminal penalties associated with knowingly supplying false statements or documents.
- **Reporting:** The ETS reiterates the reporting requirements for work-related COVID-19 fatalities (eight hours of knowledge) and inpatient hospitalization (24 hours of knowledge).
- **Explicit Preemption:** The ETS notes that it preempts inconsistent state and local requirements relating to vaccination, including requirements that ban employers’ ability to mandate vaccines, face coverings or testing. We discussed this in a [prior alert](#).

[Non-OSHA State Plan states are required to comply with the ETS](#) upon its effective date—it is an enforceable rule that will remain in place for 180 days after publication in the *Federal Register*. The ETS will face legal challenges seeking to stay or invalidate it—a fate that has met many prior OSHA emergency standards. OSHA State Plan states must incorporate the ETS or develop a standard at least as effective within 30 days of publication in the *Federal Register*.

In addition to the OSHA ETS, the administration also released the new [Centers for Medicare and Medicaid Services Interim Final Rule](#), which we discuss in a separate alert. That standard includes a broad vaccination requirement for covered health care workplaces that receive Medicare or Medicaid funding.

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The administration also released a [statement](#) indicating it will extend the vaccination requirement deadline for federal contractors to January 4, 2022, consistent with the OSHA ETS deadline. That action is discussed [here](#).

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