



## The Clock Is Now Ticking: Employers Have 30 Days to Comply With Most Aspects of OSHA's Controversial COVID-19 Emergency Temporary Standard

November 5, 2021

### INSIGHTS

**The Situation:** The Occupational Safety and Health Administration (OSHA) has issued its COVID-19 emergency temporary standard (ETS) for covered employers, obligating them to create, implement, and enforce a written policy requiring its employees to become vaccinated or undergo mandatory weekly COVID-19 testing and wear a face covering at the workplace. The controversial ETS contains additional wide-ranging mandates for covered employers related to COVID-19 testing policies, paid leave, information and education, record-keeping, and more. Even employers who already have vaccination policies must ensure their policies comply with the new requirements.

#### Planning Ahead:

- The ETS applies to private employers with more than 100 employees, as well as certain state and local government employers, and it preempts conflicting state and local laws.
- Covered employers have only **30 days**, by December 5, 2021, to comply with most of the new requirements. Employers have an additional 30 days, by January 4, 2022, to comply with the mandatory testing regime for unvaccinated employees. OSHA anticipates the ETS will be in effect for six months (through May 2022), though the ETS could be modified or extended. The ETS, or a version of it, could also become a final rule.
- Among other requirements, covered employers must determine, and obtain proof of, each employee's vaccination status, and maintain certain records, including a roster of all employees' vaccination status.
- The ETS also requires covered employers to immediately remove employees from the workplace who test positive for, or are diagnosed with, COVID-19, and provide employees paid time to receive each vaccine dose and recover from side effects of the vaccine. Covered employers are not required to pay for unvaccinated employees' weekly COVID-19 testing.
- Employers face penalties of up to \$13,653 for each violation. Willful or repeated penalties are \$136,532 per violation.

## OVERVIEW

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Below are some key points of the ETS:

### 1. Which employers are covered:

Private employers with more than 100 employees, as well as certain state and local government employers, are covered by the ETS. The employee threshold is calculated entity-wide, not by location. The employee count is determined as of the date of today's publication (November 5, 2021). Employers with 100 or more employees as of this date are subject to the ETS for the duration of the ETS, even if their employee count later drops below the threshold. The reverse is not true, however. An employer that currently has fewer than 100 employees will be subject to the ETS only upon reaching the threshold, if the ETS is still in effect.

There are a variety of facts to consider in determining whether an employer is covered. Part-time employees count toward the 100-employee threshold, but independent contractors do not. Temporary and seasonal workers, if employed directly by the employer are counted towards the 100-employee threshold. Remote-working employees and employees who work at offsite locations are included in the 100-employee threshold. In independently owned and operated franchisor-franchisee situations, the franchisor would include only its own "corporate" employees and would not count its franchisee's employees. Each independent franchisee would count only its own employees and would not include the franchisor's employees. In multi-employer locations, employees of each entity count towards coverage by that entity only, but entities may wish to require smaller entities or contractors to comply with the requirements.

### 2. Specifics of Mandatory and Optional Vaccination Policies:

#### Mandatory Vaccination Policy

A written mandatory vaccination policy should include all relevant information regarding the policy's effective date, whom the policy applies to, deadlines (e.g., for submitting vaccination information, and for getting vaccinated), and procedures for compliance and enforcement. The written policy must address, *at a minimum*, the information contained in subparagraphs (e) through (j) of the ETS including vaccination requirements, applicable exclusions and accommodations, methods for collecting information, paid time off provisions, notification and removal of employees, notice to employees, and disciplinary actions. Employers with current policies must ensure their policies satisfy these requirements.

Three categories of employees may be exempt from getting the COVID-19 vaccine even under the mandatory vaccination policy:

- those for whom a vaccine is medically contraindicated;
- those for whom medical necessity requires a delay in vaccination; and
- those legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs/practices/observances.

Employees who are exempt from obtaining a vaccine as indicated above are still required to comply with the unvaccinated testing requirements of the ETS, except in limited circumstances (e.g. a sincerely held religious belief that applies to testing in addition to becoming vaccinated).

## Optional Vaccination Policy

An employer who chooses to make vaccinations optional for employees still must create, implement, and enforce a written policy. Under such a plan, employees who are not fully vaccinated must be tested for COVID-19 at least weekly, or within seven days before returning to work (e.g. a remote worker returning to the workplace). The ETS does not require that covered employers pay for any costs associated with testing, though it does not take a position on whether other laws require the employer to shoulder the cost. Moreover, employers should recognize that wage and hour laws might require compensation for the time it takes employees to get tested, depending on the circumstances.

Employees who are not fully vaccinated must wear face coverings when indoors or when occupying a vehicle with another person for work purposes, except for certain limited circumstances. Covered employers are not allowed to prevent employees (regardless of vaccination status) from voluntarily wearing a face covering unless wearing the face covering would create a serious workplace hazard, like interfering with the safe operation of the equipment used by the employees.

### 3. Additional Requirements:

The ETS imposes a host of additional mandates for covered employers, some of which include:

#### COVID-19 Vaccination and Testing Records

Covered employers must determine the vaccination status of each employee, obtain proof of vaccination status, and maintain a roster of all employees' vaccination status. The covered employer must keep a copy (either physical or digital) of each employee's proof of vaccination and must maintain (at least on a weekly basis) the results of every COVID-19 test for each unvaccinated employee. The ETS also requires certain aggregate data be made available to employees and employee representatives. Many of the records required to be maintained by a covered employer under the ETS are considered employee medical records and will, therefore, need to be secured in compliance with other applicable regulations.

#### Encouraging Vaccinations

Covered employers must allow employees reasonable time, at least up to four hours of paid time, to receive each vaccination dose, and reasonable time and paid sick leave for employees to recover from any side effects experienced as a result of obtaining the vaccine. Covered employers must provide every employee with certain information about the company's policy, the available COVID-19 vaccines, and the ETS in a language and at a literacy level that employees can understand.

#### Required Actions for COVID-19 Cases and Reporting Requirements

Covered employers must require employees to promptly provide notice if the employee receives a positive COVID-19 test result or is diagnosed with COVID-19.

Covered employers must also "immediately" remove from the workplace any employee, regardless of vaccination status, who has either been diagnosed with COVID-19 or received a positive COVID-19 test result. The covered employer must keep the employee out of the workplace until the relevant return-to-work protocols have been followed. Those employees removed from the workplace may work remotely if the circumstances allow.

Covered employers must report work-related employee COVID-19 fatalities to OSHA within eight hours of learning about them and must report work-related employee COVID-19 hospitalizations within 24 hours.

#### 4. Exceptions to the ETS:

The requirements of the ETS do not apply to employees who do not report to a workplace where other individuals are present, to employees working remotely (while working remotely), and to employees who work exclusively outdoors. If those employees return to a workplace, however, they will be subject to the mandates of the ETS.

The ETS is a complex, 400-page regulation requiring covered employers to act immediately to comply with a host of mandates. This alert addresses many, but not all, potential issues.

Parker Hudson attorneys are available to answer any questions or concerns you have regarding the implications of this temporary rule and changes you may need to make to ensure compliance with the ETS.

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