

## OSHA's New COVID-19 Emergency Temporary Standard

### Executive Summary

#### I. Timing of Implementation

A. OSHA has just published a proposed Emergency Temporary Standard designed to address COVID-19.

B. OSHA's summary of the standard is as follows:

The Occupational Safety and Health Administration (OSHA) is issuing an emergency temporary standard (ETS) to protect unvaccinated employees of large employers (100 or more employees) from the risk of contracting COVID-19 by strongly encouraging vaccination. Covered employers must develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination.

C. The effective date for the ETS is November 5, 2021, which is the date the ETS will be published in the Federal Register. Although the ETS becomes effective immediately, employers are not required to comply with the requirements of the ETS until the compliance dates.

1. For most sections of the ETS, the compliance date will be 30 days after publication (i.e., December 5, 2021).

2. For the portion of the rule that mandates testing of employees who are not fully vaccinated, employers will have 60 days after publication to comply (i.e., January 4, 2022).

D. OSHA is seeking comments from the public during the next 30 days after the publication of the ETS. It will then decide whether modifications of the ETS are necessary and whether the ETS should become a final standard.

E. For now, the ETS will remain in place until OSHA finds that COVID no longer poses a grave danger in the workplace.

## **II. Rationale Underlying the ETS**

- A. Under Section 6(c)(1) of the Occupational Safety and Health Act, the Secretary of the Department of Labor is authorized to issue an emergency temporary standard when he or she finds that it is “necessary” to address a “grave” danger to workers.
- B. A grave risk is the most serious level of risk, more serious than the “significant” risk OSHA usually needs to demonstrate to pass a rule.
- C. Whether the standard is necessary includes consideration of its economic and technological feasibility.

## **III. Scope of the ETS**

- A. The ETS will cover all private sector workers with 100 or more employees.
  - 1. It will not cover healthcare employers who are subject to a different standard issued by the Centers for Medicare & Medicaid Services (CMS).
  - 2. It will not cover federal contractors and subcontractors who are covered by a separate guidance document issued by the Safer Federal Workforce Task Force.
- B. In counting employees, employers must follow these rules:
  - 1. Count employees at all locations of the business, including those working remotely.
  - 2. Include part-time, temporary, and seasonal employees.
  - 3. Do not include independent contractors or workers provided by staffing companies.
  - 4. Franchisors do not need to count employees of their franchisees, and vice versa.

#### **IV. Effect of the ETS**

- A. The ETS will preempt any state or local rules that are contrary to its provisions.
  - 1. For example, provisions of state or local laws that prevent employers from requiring vaccination or the wearing of face coverings would have to give way to the rules in the ETS.

#### **V. Not Applicable to Certain Employees of Covered Employers**

- A. Some employees of otherwise-covered employers are not subject to the requirements of the ETS:
  - 1. Employees who do not work in workplaces where other individuals are present.
  - 2. Employees who work from home.
  - 3. Employees who work exclusively outdoors.
- B. Note: The employer likely still needs to count these employees towards the 100-employee total unless some other exclusion is available under the counting rules.

#### **VI. Substance of the ETS**

##### **A. Mandatory Vaccination Policies**

- 1. A covered employer must establish a mandatory vaccination policy.
  - a. A covered employer may also establish a policy that combines vaccination requirements with an alternative for regular testing plus face coverings.
- 2. A mandatory vaccination policy is one that requires that all employees be fully vaccinated.
- 3. “Fully vaccinated” means that it has been at least two weeks since the employee has received the second dose of an approved or authorized vaccine (or the second dose of a combination of such vaccines).

- a. Booster shots or additional doses are not included in the definition and do not need to be required or tracked.
- 4. Employees do not need to be fully vaccinated if they can show that they cannot be vaccinated because of:
  - a. Medical contraindications;
  - b. A medical reason for delaying vaccination; or
  - c. A legal entitlement to reasonable accommodation
- 5. Reasonable accommodations may be based on disabilities or sincerely-held religious beliefs.
- 6. Religious accommodations may include exemptions from vaccination, testing, or wearing of face-coverings.
- 7. The vaccination policy must be in writing.

B. Determining Employee Vaccination Status

- 1. The employer must determine the vaccination status of each employee.
- 2. The employee may provide any of the following proof:
  - a. A record of immunization from a health-care provider (HCP) or pharmacy;
  - b. A vaccination card;
  - c. A copy of medical records showing vaccination;
  - d. A copy of immunization records from a public-health entity; or
  - e. A copy of any other “official documentation” that shows type of vaccine, date administered, and name of HCP or clinic administering the vaccine.
- 3. If none of those are available, the employee may submit a signed and dated statement containing:
  - a. An attestation of vaccine status;
  - b. An attestation that other forms of proof are lost and otherwise unable to be produced; and
  - c. A certification of the truth of these attestations using specific language set out in the ETS.

4. An employee who cannot provide one of these forms of proof must be treated as not fully vaccinated.

C. Record keeping

1. The employer must keep records of the following:
  - a. each employee's vaccination status; and
  - b. acceptable proof of each employee's vaccination.
2. These records are considered confidential employee medical records and must be protected as such.

D. Support for vaccination

1. The employer is required to support COVID-19 vaccination for each employee by providing reasonable time to each employee during work hours for each of their primary vaccination dose(s), including up to four hours of paid time, at the employee's regular rate of pay, for the purposes of vaccination.
2. The maximum of four hours of paid time that the employer must provide for the administration of each primary vaccination dose cannot be offset by any other leave that the employee has accrued, such as sick leave or vacation leave.
3. If the employee gets vaccinated outside of regular working hours, the employee does not have to be paid for that time.
4. The ETS does not require payment of travel time. According to OSHA's FAQs:

The ETS requires employers to support COVID-19 vaccination for each employee by providing reasonable time to each employee during work hours for each of their primary vaccination dose(s), including up to four hours of paid time, at the employee's regular rate of pay, for the purposes of vaccination. Reasonable time may include, but is not limited to, time spent during work hours related to the vaccination appointment(s), such as registering, completing required paperwork, all time spent at the

vaccination site (e.g., receiving the vaccination dose, post-vaccination monitoring by the vaccine provider), and time spent traveling to and from the location for vaccination (including travel to an off-site location (e.g., a pharmacy), or situations in which an employee working remotely (e.g., telework) or in an alternate location must travel to the workplace to receive the vaccine).

**Employers are not, however, obligated by this ETS to reimburse employees for transportation costs** (e.g., gas money, train/bus fare, etc.) **incurred to receive the vaccination.** This could include the costs of travel to an off-site vaccination location (e.g., a pharmacy) or travel from an alternate work location (e.g., telework) to the workplace to receive a vaccination dose.

5. If an employee experiences side effects from a vaccination, the employer must provide reasonable time and paid sick leave to recover.
  - a. The employer may require the employee to use PTO or sick time during the recovery (but not vacation time, if that is tracked separately from sick time).
  - b. The employer can set a reasonable cap on time allocated for recovery.

#### E. Required Testing

1. If an employee who works in a workplace where other individuals are present is not fully vaccinated, the employer must require the employee to be tested for COVID once every seven days. The employee must provide the test results to the employer within seven days after the test.
2. The test that is used must be approved by the FDA and cannot be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. Examples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens), proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by the employer.

3. If the employee is out of the workplace for more than seven days, the employee must be tested at least seven days before returning to the workplace and must provide the results to the employer upon return.
4. The employer does not have to pay the actual cost of the testing.
  - a. However, OSHA has left open the possibility that other laws may require such payments.
5. Even employees who are entitled to a reasonable accommodation must undergo weekly testing, unless the accommodation itself precludes such testing.
6. The employer must maintain records of each test result provided by an employee.
7. If the employee fails to provide documentation of testing, the employer “must keep the employee removed from the workplace until the employee provides a test result.”

F. Notification of positive tests or diagnoses

1. An employee must provide his or her employer with prompt notice of a positive test or diagnosis.
2. The employer must then exclude the employee from the workplace until one of the following:
  - a. The employee receives a negative result on a confirmation test;
  - b. The employee meets the criteria for return to work established by the Centers for Disease Control;
  - c. The employee receives a recommendation to return to work from a licensed health care provider.
3. The employer need not pay the employee for the time that the employee is excluded.
  - a. However, OSHA does not rule out the possibility that other laws, regulations, or collective bargaining agreements might require such payment.

4. Once an employee has tested positive or received a COVID diagnosis, the employer must suspend testing requirements for that employee until 90 days have passed.

G. Use of face coverings

1. The ETS distinguishes between different types of protection. In ascending order of protection, they are:
  - a. Face coverings (cloth masks, gaiters, etc.)
  - b. Facemasks (medical procedure masks)
  - c. Respirators
2. The employer must make sure any employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle for work purposes with another person, except:
  - a. When along in a room with floor-to-ceiling walls and a closed door;
  - b. For a limited time when eating or drinking or complying with identification checks;
  - c. When wearing a facemask or respirator;
  - d. Where the employer can show that wearing a face covering or creates a greater hazard that would excuse compliance.
3. The employer cannot prevent any employee from wearing a face covering or facemask unless doing so would create a hazard of serious injury or death.
4. The employer must permit the employee to wear a respirator instead of a face covering, whether required or not.
5. The employer must not prohibit customers or visitors from wearing face coverings.

H. Provision of information

1. The employer must provide certain information to each employee:
  - a. The requirements of the ETS, as well as any policies adopted to comply with it;



- b. The CDC publication entitled “Key Things to Know About COVID-19 Vaccines;”
  - c. OSHA’s anti-retaliation requirements;
  - d. OSHA’s requirements regarding truthfulness in reporting required information.
2. This information must be presented to employees “in a language and at a literacy level that the employee understands.”

I. Reporting fatalities and hospitalizations

1. Work-related COVID-19 fatalities must be reported to OSHA within 8 hours.
2. Work-related COVID-19 hospitalizations must be reported to OSHA within 24 hours.
3. Fatalities or hospitalizations that are not work-related do not need to be reported.
4. OSHA recognizes that it may be difficult for an employer to determine whether an employee’s COVID-19 illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace. Employers are expected to follow OSHA’s published guidelines for making such determinations.

J. Availability of records

1. When requested by an employee or anyone having written authorized consent from the employee, the employer must make available by the end of the next business day the employee’s COVID-19 vaccine documentation and test results.
2. When requested by an employee or an employee representative, the employer must make available by the end of the next business day:
  - a. the employer’s aggregate number of fully-vaccinated employees at a workplace; and
  - b. the employer’s total number of employees at that workplace.
3. When requested by OSHA, the employer must make available within four hours:

- a. The employer's written vaccination policy;
- b. the employer's aggregate number of fully-vaccinated employees at a workplace; and
- c. the employer's total number of employees at that workplace.

## **VII. Enforcement**

1. OSHA does not have the ability to unilaterally issue and enforce citations for violations of this ETS.
2. If you are issued a citation by OSHA, you will have an opportunity to
  - a. Request an informal conference with the OSHA Area Director to discuss citations, penalties, abatement dates, or any other information pertinent to the inspection or citation; and
  - b. File a Notice of Intent to Contest to the OSHA Area Office within 15 working days from the date the citation is issued.
3. If you file a Notice of Intent to Contest, the OSHA Area Director forwards your case to the OSHRC, which is the body that oversees employer contests of OSHA citations. The OSHRC assigns the case to an ALJ, who will hear the case and issue a ruling. The ALJ's ruling is subject to appeal, first to the OSHRC and then, ultimately, to the federal circuit court in which the case arose or where the employer has its principal office.

## **VIII. Useful Information**

1. The newly-issued ETS can be reviewed in its entirety [here](#).
2. Click [here](#) for useful FAQs on the new ETS published by OSHA.
3. For generalized guidance from the CDC for workplaces and business, please visit the CDC website found [here](#).
4. A link to the CDC brochure that the ETS requires employers to provide to their employee can be found [here](#).