



Facts on the OSHA Emergency Temporary Standard for Covid-19 Vaccinations

On November 5, the Occupational Safety and Health Administration (OSHA) published in the Federal Register its emergency temporary standard ([ETS](#)) that will require private sector employers with 100 or more workers to ensure that employees are vaccinated against Covid-19. If employers do not want to dismiss employees who are not vaccinated, they have the option to allow those unvaccinated employees to submit a weekly negative COVID test and follow masking requirements when working indoors. Note that the ETS preempts state laws that provide a weaker level of protection, such as those that ban employers from requiring masks or vaccinations.

Here are the facts that you need to know about how this will impact your business.

Establishment of Program:

- Employers will need to develop a program to verify the vaccination status of all employees and maintain records of vaccination status and test results.
- Employers can provide a testing option for those employees who do not wish to be vaccinated. However, employers do not *have* to allow a testing option under the ETS.

Timeline:

- Employers will need to have workers fully vaccinated by January 4, 2022. This same timeline applies to employers covered by the previously announced [government contractor vaccination mandate](#).
- For workers who are not vaccinated, the testing requirement begins on January 5th. Prior to that date, unvaccinated workers do *not* need to be tested.
- However, other parts of the ETS are effective December 5. Starting on that date, unvaccinated workers will need to adhere to masking requirements in the workplace, employers will need to provide four hours of paid leave for workers to get shots, and also provide additional leave for workers who need to recover from side effects.
- The ETS will be in effect for six months. After that, OSHA will determine if the standard should be made a permanent rule.

100 Employee Threshold:

- The 100 or more employee threshold is determined per company, not per location. It covers all U.S. employees. An employer is covered if, at any time during the period the ETS is in effect, they have at least 100 employees, even if at times they have fewer than 100 employees.
- For franchise operations, each franchisee is generally considered a separate business, but operators of multiple locations will be considered covered if collectively there are at least 100 employees at the different locations.
- Part-time employees *do* count towards the 100 employee threshold.
- Independent contractors do *not* count towards the 100 employee threshold.
- Employees of staffing agencies are covered if the staffing agency has at least 100 employees.
- Employees working from home *do* count towards the 100 employee threshold, but they do not have to be vaccinated or tested if they are not coming into contact with other employees or customers.
- Temporary and seasonal workers *do* count towards the 100 employee threshold if they are employed while the ETS is in effect.

Paid Leave:

- Employers must provide four hours of paid leave for workers to receive each vaccination dose. Employers may *not* require employees to use existing leave for vaccinations.
- Employers must allow “reasonable” time off to recover. OSHA suggests providing two days. Employers will not have to account for the rare cases where recovery takes longer than two days. Employers *can* require employees to use existing leave balances to recover from side effects of vaccination.
- The ETS does *not* require employers to provide paid leave to workers who test positive. However, other laws or collective bargaining agreements might.

Testing Option:

- Workers who are unvaccinated will be required to submit negative test results at least weekly starting on January 5, 2022. If an employee is away from work for more than a week, a negative test must be provided within 7 days before returning to work.
- Employers do not have to provide or pay for tests. However, other laws outside of the ETS may require employers to pay for tests, such as those requiring religious or medical accommodations. Employers may question employees about the basis of their religious beliefs related to an exemption from vaccinations. The EEOC has [guidance](#) on how employers should handle requests for a religious or medical exemption.
- Employers must immediately remove from the workplace anyone who tests positive. Employers must notify OSHA within 8 hours of a work-related positive case, and within 24 hours of a work-related case that involves hospitalization.

- Unvaccinated employees will be required to observe masking requirements in the workplace regardless of a negative test result.
- In the event that testing is unavailable or lab delays prevent getting a test result, OSHA will look at an employer's efforts to comply and their record of compliance, and refrain from enforcement where the facts point to good faith efforts to comply with the ETS.

Vaccination:

- Booster shots are not currently considered part of the vaccination requirement under the ETS.
- Employees who have only received one shot of a two-shot regimen are *not* considered fully vaccinated, and thus must abide by testing and masking requirements.
- Employers must obtain proof of vaccination status. However, employers are not responsible for fraudulent documents submitted as proof.
- An employee who is not able to obtain proof of vaccination can provide an attestation.
- The ETS does *not* allow prior infection to count towards the vaccination requirement.
- There are three exceptions to the requirements of the rule:
 - Workers who report to a workplace where no one else is present.
 - Workers who work exclusively remotely.
 - Workers who work exclusively outdoors, which does not include regular transportation in a vehicle with others.
- Workers who express a sincerely held religious belief or cannot be vaccinated for medical reasons can be offered a testing option.

Preemption and State Plan States:

- OSHA has made clear that the ETS preempts any inconsistent state or local laws, including laws that ban or limit an employer's authority to require vaccination, masks, or testing.
- In state plan states, worker safety agencies may develop their own plan that is "at least as protective" as the OSHA standard. If they choose to do so, states must notify OSHA within 15 days and publish a plan within 30 days. The state plan can be *more* protective than OSHA's standard. Click [here](#) for a list of state plan states.

Information Provided to Employees:

- Employers must provide to employees in a language (and to a literacy level) that they can understand: (1) information about the requirements of the ETS and workplace policies and procedures established to implement the ETS; (2) the CDC document "Key Things to Know About COVID-19 Vaccines"; (3)

information about protections against retaliation and discrimination; and (4) information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.