



UNCOMMONLY INDEPENDENT

COVID-19 questions and answers for U.S. employers:

# OSHA Emergency Temporary Standard (ETS) guidance

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**Please note:** Effective Dec. 17, 2021, the Sixth Circuit Court of Appeals lifted the stay of the OSHA ETS. The compliance deadlines are extended to Jan. 10, 2022, and Feb. 9, 2022, respectively. See Page 23 for specifics. The below guidance is based on the regulations implementing the OSHA ETS. Businesses should determine whether any applicable state or local laws may also impact operations and carefully review those with legal counsel. The information below is not legal advice.

For the most up-to-date information and resources, visit the Centers for Disease Control and Prevention's National Institute for Occupational Safety and Health (NIOSH). The CDC should be your primary source for emergency preparedness and response to the coronavirus.

Employers with offices outside the U.S. should review their statutory obligations for reporting suspected cases and paid time off policies with employment counsel to ensure compliance with local and national legislation.

## *Sections:*

### **Section 1: The OSHA mandate**

### **Section 2: Communicating with employees**

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## *Section 1: The OSHA mandate*

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### **The application of the ETS with other federal vaccine mandates**

#### **Does the ETS apply to workplaces covered by the federal contractor vaccine mandate?**

No. A covered federal contractor must abide by the protections in Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors. *Note:* As of Dec. 7, 2021, the federal contractor vaccine mandate is stayed nationwide. This issue continues to evolve and should be reviewed with your legal counsel to determine whether any part of the workforce not otherwise covered by the federal contractor vaccine mandate would be subject to the OSHA ETS.

#### **Does the ETS apply to employees of federal agencies?**

No. The ETS does not apply to employees of federal agencies with the exception of the U.S. Postal Service employees since the U.S. Postal Service is treated as a private employer (and subject to the ETS). Every federal agency is required to implement a vaccine mandate which is a more stringent requirement than the ETS.

#### **Does the ETS apply to employees covered by OSHA's Healthcare ETS?**

The OSHA Healthcare ETS six-month effective period was exhausted on Dec. 21, 2021. On Dec. 27, 2021, OSHA announced that it is working on issuing a final standard to protect healthcare workers. For the latest updates see the website [here](#). Despite the expiration of the Healthcare ETS, OSHA urges healthcare providers to continue complying with the ETS while OSHA works toward issuing a final standard. [In its statement](#), OSHA announced that the record-keeping portions of the Healthcare ETS, which require healthcare providers with more than 10 employees to maintain a record of each time the employer learns an employee has tested positive for COVID-19, remain in effect. Healthcare providers remain obligated to ensure a healthy and safe workplace under OSHA's general duty clause.

It will be necessary for employers covered by the Healthcare ETS to determine if they also have employees covered by the main ETS (effective Nov. 5, 2021). For instance, if a pharmacy chain operates care clinics within a retail store, those clinics are the only area of the store covered by the Healthcare ETS. These employers would need to ensure that the remainder of their employees in other parts of the store are protected under the ETS if the company meets the 100-employee threshold. An employer in this context would count the employees subject to the Healthcare ETS when determining whether the 100-employee threshold is met for the ETS.

## **Employers covered by the ETS**

### **How must employees be counted to determine whether the 100-employee threshold is met?**

The following employees are considered when determining whether the threshold is met:

- Part-time employees, temporary employees (not from a staffing agency), seasonal employees and remote employees are counted.
- Independent contractors do not count toward the 100-employee threshold.
- Employers must include all employees across all their U.S. workplaces, regardless of where they perform their work or their vaccination status. An employer with 200 vaccinated employees is still covered by the ETS, but the protections of the ETS would not apply.
- The employee count is done at the employer level and the number of employees at a specific location does not matter. A single corporate entity with multiple locations must count employees at all locations. A single corporation with 25 small locations with a combined total of at least 100 employees would be covered.

### **Are employees outside of the U.S. counted when determining whether an employer meets the 100-employee threshold?**

No. An employer only counts employees working in the U.S. Employees working outside of the U.S. are not required to comply with the OSHA ETS if the employer is covered. There may be other laws or regulations by which an employer must follow outside of the U.S.

### **How are franchisor/franchisee employees counted?**

Where each franchise location is independently owned and operated, the franchisor and franchisees would be separate entities for ETS coverage. The franchisor would only count the corporate employees and each franchisee would only count employees for that individual franchise.

### **How are staffing agency employees counted?**

When a staffing agency places employees at a host employer location, the staffing agency would count those jointly employed workers to determine if the agency met the threshold. The host employer would be covered if it has 100 or more employees excluding those from the staffing agency. If the host employer has 75 employees and 40 temporary employees from the staffing agency, it would not be covered.

If the host employer is covered by the ETS and the staffing agency is not covered, the host employer may require that the staffing agency ensure that its employees working at the host employer comply with the host employer's policy (either to be vaccinated or tested weekly and wear a face coverings).

**For related entities which individually have fewer than 100 employees, but collectively have 100 or more employees, how should they determine if the ETS applies?**

It depends. OSHA may review the interrelationship between and among related companies. Factors when evaluating how to count employees of related companies include the following: whether there is common management, the interrelation of operations, whether there is common control of human resources and whether there is common ownership. In particular, if each entity has its own safety manager, its own safety policies and has previously responded to OSHA inspections and/or citations as separate entities, the entity may be able to count employees individually rather than collectively. This issue should be reviewed with legal counsel.

**What if the number of employees fluctuates above and below the 100-employee threshold?**

The initial determination of employee count should be made as of Nov. 5, 2021. Once an employer meets the 100-employee threshold it is covered for the duration of the ETS which is currently set to expire May 5, 2022, unless made a permanent standard. It is of no consequence if the employee count drops below 100 at any point during the ETS period. For example, if Employer A has 105 employees on Nov. 5, 2021, it is covered for the duration of the ETS. If Employer A has only 97 employees by Jan. 1, 2022, it is still covered by the ETS. If Employer B does not have 100 employees until Dec. 15, 2021, Employer B is covered beginning Dec. 15 through the duration of the ETS. Simply stated, once an employer meets the 100-employee threshold and is covered by the ETS, it continues to be covered regardless of the number of employees.

**Can an employer choose to implement the ETS even if it falls below the 100-employee threshold?**

Yes. An employer can choose to implement the ETS within its workplace even if it is not required to do so.

**What is the impact of a State OSH Plan?**

A state with a State Plan has 30 days to notify federal OSHA of what action the state intends to take. A State Plan must be at least as effective as the OSHA ETS. The federal standard is the floor, but not the ceiling. A state could choose to enact a more stringent requirement.

**Are state or local government employers with 100 or more employees covered by the ETS?**

In states with a State Plan, state and local government employers with 100 or more employees are covered by State occupational safety and health requirements. State Plans must adopt requirements for state and local employers that are at least as effective as the Federal OSHA ETS.

The following states have State Plans which cover both private employers and state and local government workers:

- Alaska
- Arizona
- California
- Hawaii
- Indiana
- Iowa
- Kentucky
- Maryland
- Michigan
- Minnesota
- Nevada
- New Mexico
- North Carolina
- Oregon
- South Carolina
- Tennessee
- Utah
- Vermont
- Virginia
- Washington
- Wyoming

The following State Plans cover state and local government workers only: Connecticut, Illinois, Maine, New Jersey and New York. The federal OSHA ETS applies to private employers in these states.

**What happens if a state with a State Plan does not adopt the federal OSHA ETS within the 30-day time period?**

In the event a State Plan fails to adopt the ETS, or a standard at least as effective, Federal OSHA may take steps to ensure covered workers within the state are adequately protected. For State Plans covering the private sector that have final approval, OSHA may reconsider and possibly revoke the State Plan's final approval status and reinstate concurrent federal enforcement authority as necessary within the State Plan. For State Plans covering the private sector without final approval, OSHA may revise the State Plan's Operational Status Agreement to provide for federal enforcement activity.

**Can an employer in a State Plan state proceed to comply with the ETS based on the effective dates for federal OSHA?**

Yes. There is nothing in the ETS that would prohibit an employer from doing so. Note that once a State Plan state issues its safety measures, it is possible for the state to issue measures in addition to or different from those required by the ETS. In that case, the employer would need to comply with the applicable state standard.

**What impact does a union have on the ETS?**

Employers with unionized workforces are subject to the ETS if they meet the 100-employee threshold. The ETS does not prevent employers from agreeing with employees and their union representatives to implement additional measures. The ETS does not displace collective bargaining agreements that exceed the requirements of the ETS. For instance, employers subject

to a union contract may agree to pay for face coverings, vaccinations, provide paid time when employees test positive for COVID-19 or agree that all employees regardless of vaccination status must wear a face covering indoors.

### **Are nonprofit organizations and religious organizations covered by the ETS?**

Yes. The ETS does not make any exclusion for these organizations.

### **Employees exempt from the ETS requirements**

#### **Which employees are potentially exempt from the ETS?**

The following employees may be exempt from the ETS, but are still counted when determining whether an employer meets the 100-employee threshold:

- Employees reporting to a workplace with no contact with other co-workers or customers.
- Remote workers who never work on-site or meet with co-workers or customers.
- Employees who work exclusively outdoors.

#### **When is an employee considered to work exclusively outdoors?**

To be considered working exclusively outdoors, the employee must satisfy each of the following:

- The employee must work outdoors on all days. This does not include construction work in buildings where substantial portions of the structure (walls and ceilings) are in place that would impede natural airflow at the workplace.
- The employee must not routinely occupy vehicles with other employees as part of work duties (e.g., employees cannot drive to work sites together).
- The employee works outdoors for the duration of every workday except for *de minimis* use of indoor spaces where other individuals may be present. The time spent indoors must be brief (less than 10% of the workday) or occur exclusively in the employee's home. For instance, using a multi-stall bathroom or dropping off paperwork at an administrative office is generally *de minimis*. If there are several brief periods in a day when an employee goes inside, OSHA will total those periods of time when determining whether the exception for exclusively outdoors work applies.

#### **Does the ETS apply to remote workers?**

Remote workers are counted when determining whether an employer meets the 100-employee threshold. The requirements of the ETS would not apply to employees working exclusively from their homes. For instance, an employer may have 175 employees with 125 working exclusively remotely. The employer is covered by the ETS, but the requirements only apply to the 50 employees in the workplace, not to the 125 working remotely.

#### **Does the ETS apply to truck drivers?**

The ETS does not expressly exempt solo truck drivers. If the truck driver is an independent contractor, the ETS would not apply. The Secretary of the U.S. Department of Labor Marty Walsh stated in a Nov. 5, 2021, interview, "We've heard some pushback from truckers today. The ironic

thing is most truckers are not covered by this because they're driving a truck, they're in a cab, they're by themselves, they wouldn't be covered by this."

Secretary Walsh's statement does not apply to all truck drivers. It may be possible in limited situations that for truck drivers (other than independent contractors) who are employed by a business covered by the ETS that the ETS may not be applicable. If there is a driver team, the ETS would likely apply (there may be an argument that if the team is spouses, the ETS would not apply). Depending on the situation, a solo driver may not report to a workplace where other individuals such as co-workers or customers are present. It's unlikely driving a truck would be considered "remote work" even if the driver's truck is their "home." To fall into the category of being a workplace with no interaction with others, the employer may need to modify the duties of the driver to eliminate any interaction with co-workers or customers. More guidance on this issue may be issued by the DOL or the DOT.

## **How to address conflicting state laws and legal challenges to the ETS**

### **What if a state law conflicts with the ETS?**

The ETS preempts any states and political subdivisions of states from adopting and enforcing workplace requirements relating to vaccination, face coverings and COVID-19 testing (e.g., prohibiting employers from implementing vaccine mandates or from requiring face coverings in the workplace). Section 18 of the OSH Act provides that once OSHA promulgates a federal standard addressing an occupational safety and health issue, states may no longer regulate the issue except with OSHA's approval and the authority of a federally approved State OSH plan.

### **What type of policy is required?**

#### **Does an employer's existing mandatory vaccination policy comply with the ETS even if all employees are not vaccinated?**

A mandatory vaccination policy will comply so long as it requires the vaccination of all employees other than the following:

- Employees for whom a vaccine is medically contraindicated.
- Employees for whom medical necessity requires a delay in vaccination.
- Those legally entitled to a reasonable accommodation under Title VII (sincerely held religious belief) or the ADA (disability).

An employer should evaluate its current policy to ensure it satisfies the ETS. An employer may need to modify or update an existing policy to incorporate any of the ETS requirements that are missing from the policy. Even employers that did not have a policy but confirmed the vaccination status of all employees will still need a policy to be compliant with the ETS.

**Can an employer mandate the vaccine for some employee groups, but not others?**

Yes. An employer may choose to require that only a subset of the employee population be vaccinated and treat vaccination as optional for other employees. So long as the employer meets the ETS requirements for each respective group, all employees do not need to fall under the same program. For instance, an employer may only require employees facing customers to be vaccinated and allow those employees working solely in an office to comply with testing requirements if they are unvaccinated.

**Can an employer mandate the vaccine for minors?**

The OSHA ETS indicates that parental consent may be needed for a minor to be vaccinated or tested for COVID-19.

Most states require parental consent for the vaccination of minors below the age of 18 (the exception is Nebraska which requires consent for minors below the age of 19). With the approval of the vaccination for minors and the goal of encouraging vaccination, states or localities may change restrictions. Many states allow for minors who are emancipated, homeless or living apart from their parent or guardian, or married, to self-consent. Minors in San Francisco, CA ages 11 and older and minors ages 12 and older in Pittsburgh, PA may self-consent for the COVID-19 vaccine. Other states have varying ages for self-consent: North Carolina, Rhode Island and South Carolina – 16; Oregon – 15; Alabama – 14; and the District of Columbia – 11. Several states (AR, ID, NC, TN, WA) have no specific age cut-off and use the “mature minor doctrine” which gives providers discretion to decide if a minor possesses the maturity to consent for themselves. In Arizona, if a parent refuses to give consent for the vaccine, but a child or doctor requests it, a court order can be obtained to allow for vaccination.

At this time, OSHA does not provide for an exemption for minors. An employer employing minors may choose to not mandate the vaccine for that group but require unvaccinated minors to be tested weekly. Even then, consent is likely required for testing based on CDC guidance that before a school may test students both the student and parent or guardian must give consent.

**What must a mandatory vaccination policy contain?**

To comply with the ETS, a mandatory vaccination policy must be in writing and include the following:

- Require each employee to be fully vaccinated including new employees as soon as practicable, other than those employees:
  - For whom a vaccine is medically contraindicated.
  - For whom medical necessity requires a delay in vaccination.
  - Who are legally entitled to a reasonable accommodation under the ADA or Title VII.
- Information on determining the employee’s vaccination status and how the information will be collected.
- Paid time and sick leave for vaccination purposes.



- Notification of positive COVID-19 test and removal of COVID-19 positive employees from the workplace.
- Information to be provided to employees and how the employer is making that information available.
- Disciplinary action for employees who do not abide by the policy.

The policy should include the policy's effective date, who the policy applies to, deadlines for submitting vaccination information and for getting vaccinated, and procedures for compliance and enforcement.

Employers will need to include provisions about testing and face coverings applicable to those employees who are unable to be vaccinated for one of the reasons identified above. OSHA provides a template mandatory vaccination policy that can be found [here](#).

OSHA does not comment upon accommodations under the ADA or Title VII but refers employers to review the [EEOC Guidance](#) (Sections K and L).

**Can an employer implement safety precautions and be exempt from the testing and face-covering requirements of the ETS for unvaccinated employees?**

No. While employers are not required to mandate the vaccine, if they choose to let employees decide not to get vaccinated, these employees must get tested and wear face coverings pursuant to the ETS. An employer is free to adopt safety precautions in addition to the ETS requirements.

**Is an employer required to submit its policy to OSHA?**

No. The employer should make its policy accessible to employees and have the written policy available to submit to OSHA upon request. The employer will have four business hours to comply with a request from OSHA's Assistant Secretary to examine and copy the policy.

**If an employer mandates the vaccine and an employee refuses to be vaccinated, does OSHA require the employer to continue the unvaccinated employee's employment?**

No. An employee's refusal to be vaccinated would not be protected under the OSH Act. Employers would want to ensure compliance with all applicable federal, state and local laws as well as union contracts before taking action.

**How will OSHA respond when an employer mandates the vaccine but has a small portion of unvaccinated workers in the workplace?**

OSHA advises that it will exercise discretion when employers have made good faith effort to implement a vaccine mandate and the vast majority of employees at the work site are fully vaccinated. In evaluating good faith efforts, OSHA will consider the proportion of the workforce that is fully vaccinated and steps taken by the employer to protect unvaccinated workers taking into consideration whether some employees are partially vaccinated, whether contact with

unvaccinated workers is limited, and whether there is a high employee turnover rate but efforts are made to have new employees vaccinated.

**Does a prior COVID-19 infection constitute fully vaccinated if the employee has antibodies or other natural immunity through a previous infection?**

No. According to the OSHA ETS, there are no exceptions for fully vaccinated. An employee who does not meet the following definition is not considered fully vaccinated regardless if they previously tested positive for COVID-19.

Fully vaccinated means an employee's status two weeks after completing primary vaccination with a COVID-19 vaccine with, if applicable, at least the minimum recommended interval between doses in accordance with the approval, authorization or listing that is:

- Approved or authorized for emergency use by the FDA;
- Listed for emergency use by the World Health Organization; or
- Administered as part of a clinical trial at a U.S. site, if the recipient is documented to have primary vaccination with the active (not placebo) COVID-19 vaccine candidate, for which vaccine efficacy has been independently confirmed or if the clinical trial participant at U.S. sites had received a COVID-19 vaccine that is neither approved nor authorized for use by FDA but is listed for emergency use by WHO.

Any combination of two doses of a COVID-19 vaccine that is approved or authorized by the FDA or listed as a two-dose series by the WHO is also acceptable.

**How do employers confirm an employee's vaccination status?**

**What is an acceptable documentation of the COVID-19 vaccine?**

An employer must require each employee to provide acceptable proof of vaccination status, including whether they are partially or fully vaccinated. The following are acceptable forms of documentation:

- The record of immunization from a health care provider or pharmacy.
- A copy of the U.S. CDC COVID-19 Vaccination Record Card.
- A copy of medical records documenting the vaccination.
- A copy of immunization records from a public health, state, or tribal immunization information system.
- A copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the healthcare professional(s) or clinic site(s) administering the vaccine(s).

Generally, the documentation should contain the employee's name, type of vaccine administered, dates of administration and name of the healthcare provider or clinic. Some state records may not include all data. Digital copies are acceptable. This includes a photo scanned

image, PDF and quick response (QR) codes that when scanned provide the same information. An employer must retain a copy of the information retrieved when the QR code is scanned, not just the QR code itself.

**What if the employee's name on the vaccine card does not match the employee's name?**

The employer should request an explanation of why the name on the vaccine record does not match the employee's name and documents to support the employee's position that the vaccine record is accurate. This situation may trigger a need to review other employment-related documents for the employee (e.g., Form I-9).

**Can an employer use a third party to collect proof of vaccination?**

Yes. Be aware that the employer will need to be able to quickly and conveniently access this information in the event OSHA requests a specific vaccination record.

**Does it matter which vaccine an employee receives?**

Employees may "mix-and-match" vaccinations in any combination of two doses of a COVID-19 vaccine approved or authorized by the FDA or listed as a two-dose series by the World Health Organization. The employee must still provide acceptable proof of vaccination.

Vaccines administered overseas are acceptable if (i) approved or authorized for emergency use by the FDA; (ii) listed for emergency use by the WHO; or (iii) administered as part of a clinical trial at a U.S. site, if the recipient is documented to have primary vaccination with the active (not placebo) COVID-19 vaccine candidate with independently confirmed vaccine efficacy or if the clinical trial participant at a U.S. site had received a COVID-19 vaccine that is neither approved nor authorized for use by the FDA but is listed for emergency use by WHO.

**What if an employee has lost their COVID-19 vaccine card or had it stolen and has no documentation that they were vaccinated?**

An employee who no longer has their COVID-19 vaccination record must first contact the vaccine provider (healthcare provider or clinic) to obtain a new copy of the vaccine record or utilize their state health department's immunization information system for this information. In the event an employee's efforts to obtain a copy of the vaccination record are unsuccessful, then the employee may provide a signed and dated attestation. The attestation must state their vaccination status including the vaccine manufacturer, date(s) of dose(s) and the name of the healthcare provider or clinic administering the vaccine. The attestation must include the following declaration "I [state, certify or declare] that this statement about my COVID-19 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 including fines or imprisonment." An attestation template can be found [here](#).

**Are employers liable if an employee fraudulently represents their vaccine status?**

The ETS does not require employers to monitor for or detect fraud perpetuated by employees with regard to their vaccination status. However, employers cannot facilitate fraud. If an

employer knowingly accepts proof of vaccination that is fraudulent, the employer is subject to penalties.

To be sure employees understand the consequences of providing false information regarding vaccination status, the ETS requires employers to provide each employee with information regarding criminal penalties for knowingly supplying false statements or documentation.

**What if an employee refuses to provide information regarding their vaccination status?**

The employer should treat an employee as unvaccinated if they refuse to provide information about their vaccination status. If the employer has a mandatory vaccination policy and the employee refuses to provide their vaccination status, the employer should engage in the interactive process to determine whether an accommodation is needed and can be provided absent an undue hardship. In the absence of an accommodation, the ETS advises employers to “consult applicable law” when determining whether to place an unvaccinated employee on lay off or to terminate employment. The EEOC guidance is that employers cannot mandate the vaccine for fully remote employees.

**For vaccination status, what recordkeeping obligations does the ETS impose on employers?**

Employers must maintain a physical or digital record of vaccine status – a verbal response by an employee is not enough. Vaccination records must be kept for the duration of ETS (not OSHA’s 30-year document retention requirement). Records can be physical or electronic, but employers must have access to the records at all times.

**Is an employee required to receive the COVID-19 booster if they are eligible in order to be considered fully vaccinated?**

No. The ETS does not require that any employee receive the booster.

**Must employers keep records of COVID-19 booster shots received by employees?**

No. Boosters or any other additional doses are not part of the ETS definition of “fully vaccinated” and, therefore, employers are not required to collect or maintain this information.

**What information must the roster of vaccination status contain?**

The roster must list all employees (even those unvaccinated) and identify each employee’s vaccination status as:

- Fully vaccinated
- Partially vaccinated
- Not fully vaccinated because of a medical or religious accommodation
- Not fully vaccinated because they have not provided acceptable proof of vaccination status
- Unvaccinated

Through the roster, an employer should be able to quickly and easily access the vaccination status for any employee. The roster is intended to help the employer implement the required written policy and comply with other requirements of the ETS. The roster must also be provided to OSHA on request and will aid OSHA's ability to effectively and efficiently enforce this ETS. The roster will be useful should the employer need to respond to a request from an employee or employee representative for the aggregate number of fully vaccinated employees at a workplace (along with the total number of employees at that workplace), as required by the ETS.

**Are employers required to maintain the confidentiality of vaccination records and the required roster?**

Yes. This documentation is considered to be employee medical records and should not be disclosed unless authorized by the ETS or other applicable federal or state law. Employees with a "need to know" can have access, but employers should take care to limit the access as much as practical.

**What if a customer or third-party vendor asks for vaccine records for the employer's employee?**

The ETS does not address this question. Based on EEOC guidance and privacy concerns, an employer should not advise a third party of an employee's status as vaccinated or unvaccinated. The third-party requesting the information can ask the employee directly for proof of vaccination or the employer may ask the employee for written authorization to permit the employer to disclose the employee's vaccination status to the identified third party.

**Supporting employee vaccination efforts**

**What are an employer's obligations to provide paid time off for vaccinations?**

Beginning Jan. 10, 2022, an employer must provide employees with up to four hours of paid time during work hours at the employee's regular rate of pay for each dose of the COVID-19 vaccine. This time includes time spent during regular working hours registering, completing required paperwork, time spent at the vaccination site and travel time to and from the vaccination site. Employers are not required to pay any incidental costs associated with being vaccinated such as gas, mileage or public transportation costs.

If an employee chooses to be vaccinated outside of work hours, the ETS does not require an employer to provide paid time to the employee for the time spent receiving the vaccine.

Employers cannot use existing accrued vacation, sick leave or PTO for purposes of compensating employees for time spent being vaccinated. Note that state or local law may have paid leave requirements which can be found [here](#).

**Do employers have to provide remote employees with paid time off for vaccination?**

Yes. The ETS does not provide any exemptions based on employee work location. All employees must be afforded paid time off to be vaccinated.

**If an employer is not making the vaccination mandatory, does it still have to provide paid time off for the vaccination?**

Yes. The ETS requires paid time off for vaccination regardless of whether the vaccine is mandatory.

**What are an employer's obligations to pay an employee for time off to recover from the side effects of the COVID-19 vaccine?**

Beginning Jan. 10, 2022, the ETS requires that employers provide employees with reasonable paid leave to recover from vaccine side effects. "Reasonable" is not defined, but OSHA estimates that most employees who suffer ill effects from the vaccine will recover within two days. An employer would potentially provide four days of paid leave if an employee had ill effects following both vaccine doses if a two-dose regimen was followed. There may be instances in which more than two days per dose is needed.

The ETS does allow employers to require employees to use existing accrued, unused paid sick leave or PTO for this purpose. Employers cannot require employees to use accrued, unused vacation. Employers cannot "advance" leave to employees for purposes of providing paid leave to recover from vaccine side effects meaning employees must not accrue negative paid sick leave or borrow against future paid leave to recover from vaccine side effects. For employees with no existing bank of leave, an employer would be required to provide paid leave at the employee's regular rate of pay for recovery.

Note that applicable state or local law may require an employer to provide this paid leave without deducting from any existing leave available to the employee. These laws are summarized [here](#).

**Are the paid time off requirements retroactive?**

No. The ETS paid time off provisions relating to vaccinations and recovery are not retroactive. Note that state or local law may require an employer to compensate an employee for time off to get the COVID-19 vaccine and/or recover from side effects. These laws are summarized [here](#).

**If an employer does not mandate the vaccination, is it still required to provide paid time off to be vaccinated and recover from any resulting ill effects?**

Yes. Whether the employer mandates the COVID-19 vaccine or makes it voluntary, if an employee is vaccinated, the employee is entitled to paid time off.

**If an employer offers an on-site vaccination clinic to employees, is it still required to provide paid time off to be vaccinated and recover from any resulting ill effects?**

Yes. The same paid leave benefits for vaccination and recovery apply even if the employer offers vaccination on-site. The employer will likely reduce the compensation required for obtaining the vaccine given the convenience of vaccinations being offered on-site. An employee cannot be required to be vaccinated on-site either.

**Does an employer need to provide paid time off for an employee to get a COVID-19 booster?**

The ETS does not address booster shots. No paid time off for this purpose is required by the ETS.

**Testing employees who are not fully vaccinated**

**For what period of time are unvaccinated employees to be tested weekly?**

Unvaccinated employees are subject to the weekly testing provisions of the ETS beginning Feb. 9, 2022, for as long as the ETS is in effect.

**Are unvaccinated remote workers required to be tested?**

No. Remote workers who do not report to a workplace where co-workers and customers are present are not subject to testing.

**Do unvaccinated employees who only come into the workplace occasionally need to be tested weekly?**

No. The testing requirements differ for employees who report at least once every seven days to a workplace compared to those who do not. For an employee who only occasionally comes into the office, the employee must be tested for COVID-19 within seven days of reporting to the workplace and must provide documentation of the test result to the employer upon return to work.

**If an unvaccinated employee wears a face covering and maintains physical distance from co-workers, will that be an adequate substitute for COVID-19 testing?**

No. In the absence of a compliant COVID-19 test result, the employer cannot allow the unvaccinated employee to be present at the workplace.

**How frequently are unvaccinated employees to be tested?**

Unvaccinated employees must be tested for COVID-19 at least once every seven days and must provide documentation of the most recent test result to the employer no later than the seventh day following the date on which the employee last provided a test result. Unvaccinated employees must be tested at least once every seven calendar days regardless of their work schedule.

**Will employees who have received the second dose of a two-dose vaccine sequence but are not two-weeks past the second dose need to test weekly?**

According to the ETS, it depends on the date of the last dose. Any employee having received the second dose of a two-dose regimen by Feb. 9, 2022, or the single dose of a one-dose regimen by Feb. 9, 2022, is not subject to testing even if they have not completed the two-week waiting period following the last dose. To meet this, an employee would need to complete a vaccination series as follows:

- For the Janssen (Johnson & Johnson) COVID-19 vaccine, employees who receive the Janssen vaccine would need to be vaccinated on or before Feb. 9, 2022, to be exempt from testing.
- For the Pfizer-BioNTech COVID-19 vaccine, the vaccination series takes 21 days to complete so employees receiving the Pfizer-BioNTech series would need to have their first dose on or before Jan. 19, 2022 and get their second dose 21 days later.
- For the Moderna COVID-19 vaccine, the vaccination series takes 28 days to complete so employees receiving the Moderna series would need to have the first dose on or before Jan. 12, 2022 and get their second dose 28 days later.

Employees who have not completed a vaccine regimen by Feb. 9, 2022 but do so later are subject to the requirement that they be “fully vaccinated” before testing is stopped. This means that any employee with the last dose on Feb. 10, 2022, or later must continue testing for the two-weeks following the last dose of the vaccine regimen.

**Are employers required to test employees after the employee tests positive for COVID-19 or is diagnosed with COVID-19?**

Testing requirements are temporarily suspended for 90 days from the date of the positive test or diagnosis. Employers should track this time frame and resume testing on the 91st day. Even if an employee tests positive prior to Feb. 9, 2022, the 90-day “pass” would apply.

**When is an employer required to test unvaccinated new hires?**

Unvaccinated new hires need to be tested for COVID-19 within seven days before reporting to work and provide a test result no later than their first day of work.

**What are the recordkeeping requirements related to testing?**

Employers must maintain a record of each test result required to be provided by each employee or obtained during tests conducted by the employer. The records should be treated as medical records and maintained confidential. Employers need to maintain these records for the duration of the ETS.

**Are employers required to pay for COVID-19 testing?**

It depends. If an employee chooses to be tested weekly rather than vaccinated, the ETS does not require employers to pay for the cost of testing. State law may require that the employer pay for COVID-19 testing or the terms of a collective bargaining agreement may require an employer to bear this expense. A chart identifying potentially applicable state laws enacted prior to the



COVID-19 pandemic can be found [here](#). Note that the state laws do not pertain specifically to COVID-19 tests; rather, these laws address an employer's responsibility to pay for a required medical exam or reimburse an employee for "business expenses." This is another area of the law that continues to evolve. Check any applicable state law that may expressly prohibit employers from requiring employees to pay for the ETS COVID-19 testing.

Even if not required to pay for testing, an employer may choose to do so.

Testing offered as an accommodation under the ADA or Title VII (or any applicable state law) would be paid for by the employer.

**Assuming there is no legal hurdle to requiring employees to pay for testing, can the employer deduct the cost of testing from the employee's paycheck?**

Most states that permit such a payroll deduction require an employer to have the employee's written consent to make deductions from a paycheck. In addition, employers will need to ensure that a payroll deduction does not take the employee's pay below minimum wage or impact the calculation of overtime. Check applicable state law before making a payroll deduction for this purpose.

**What types of testing are permitted?**

The mandate states, "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." This translates to rapid antigen testing, nucleic acid (PCR) testing, and pooled testing. Antibody tests are **not** an option. The test must be administered in accordance with the authorized instructions. The test cannot be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor, as OSHA requires an independent confirmation of the test to ensure the integrity of the result. It is not acceptable for an employee to submit a photograph of their test results to their employer if the test is self-administered and self-read. Similarly, it is not acceptable for an employer to retroactively review video of an employee self-administering and self-reading an OTC COVID-19 test.

The ETS does allow employers to utilize live streaming video conference programs such as Zoom, Skype or Microsoft Teams in order to remotely observe the self-administration of an OTC COVID-19 test.

The ETS provides that OTC tests which feature digital reporting of date and time stamped results (e.g., results available through an app, QR code, RFID), are not considered to be "self-read" and do not require observation by the employer or an authorized telehealth proctor. According to the ETS, tests that are digitally read reduce the potential for falsified results by ensuring a new test result is generated each week and each test is used only once. If an employer elects to perform testing on-site, then biohazardous waste management regulations must be considered.

**Is the weekly testing requirement satisfied with the use of a single OTC COVID-19 test even for an OTC test that requires completion of more than one test per the Emergency Use Authorization?**

Yes. The ETS only requires employers to ensure covered employees who are not fully vaccinated are tested once every seven days (or within seven days of returning to the workplace) even though the OTC tests are sold with two tests. The test must be administered in accordance with the authorized instructions (e.g., specimen collection and handling, test procedures for processing, result interpretation).

**Can an employer or authorized telehealth proctor observe more than one OTC COVID-19 test at the same time?**

So long as the COVID-19's test's FDA emergency use authorization permits the observation of more than one test at a time, this is acceptable. Employers or proctors must be able to validate each test result with confidence so they should not observe more tests at a time than they are able to accurately validate.

**How do employers document OTC COVID-19 test results?**

For test results obtained from tests observed or conducted by the employer, employers may document the test result through a written statement (e.g., a note indicating the date and time observed, the observer, and the results), a photo of the test result, or a video of the test result, if documented and recorded by the employer-observer *at the time* the test is conducted or observed. The employer must preserve this documentation.

The employer must make a record of a test result. Verbally obtaining an employee's test result information without any record of the test does not satisfy the ETS record maintenance requirements. Similarly, the ETS record maintenance requirements are not satisfied when an employee simply shows the employer their test result or the employer simply observes the test result (e.g., by seeing the employee's test results after observing the test in person without any documentation).

**Is an employer subject to liability under the ETS in the event an employee cannot be tested because of a lack of testing supplies?**

OSHA maintains that there is a sufficient supply of COVID-19 tests to meet the anticipated testing demand. In the event an employer is unable to test employees as required by the ETS due to inadequate supply or on account of laboratory issues, OSHA will look at the efforts made by the employer to comply, the employer's pattern and practice with regard to its testing program, and will determine whether a citation is appropriate after reviewing the good faith efforts of the employer to comply with the ETS. In the event of issues with testing supplies or laboratory capacity to issue testing results, employers should document the delays and steps taken to resolve these issues to demonstrate their good faith.

If an employee is tasked with testing on his/her own and contends that there was a lack of testing supplies, the employer would need to confirm that was true and should look to whether other employees experienced the same issue. Additionally, employers may want to have a provision in their policy requiring employees to notify a designated person in the event the employee is tasked with finding a testing location and cannot find a place at which the employee can be timely tested.

**If a laboratory test result is delayed, may the employee report to the workplace?**

In the event of a delay associated with off-site laboratory testing results that are beyond the employee's or employer's control, the employer may permit the employee to continue working. OSHA will consider refraining from enforcement when the employer can show a good faith effort to comply with the ETS. OSHA will review the pattern and practice of the individual employee or the employer's testing verification process as well. Employers should document situations involving a delay to demonstrate good faith efforts to comply with the ETS.

**Positive COVID-19 test notification and employee removal process**

**Do employees who test positive for COVID-19 need to be removed from the workplace?**

Yes. An employee's vaccination status is of no consequence. The employer must immediately remove any employee who tests positive for COVID-19 or who is diagnosed with COVID-19 by a licensed healthcare provider.

**When does an employee need to notify their employer of a positive COVID-19 test result?**

An employee must notify their employer as soon as practicable before the employee is scheduled to start their shift or return to work. If the employee is already at work when the positive result is learned, the employee should notify the employer as soon as safely possible while avoiding exposing any other individuals in the workplace.

**Once an employee tests positive for COVID-19, what is the return-to-work criteria?**

After testing positive for COVID-19 or being diagnosed with COVID-19, the employee must not return to the workplace until the employee:

- Receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if the employee chooses to see a NAAT test for confirmation;
- Meets the return-to-work criteria in the CDC's Isolation Guidance; or
- Receives a recommendation to return to work from a licensed healthcare provider.

**When pooled testing is used and there is a positive result, are all employees removed from the workplace?**

No. A positive pooled test result triggers the need to immediately re-test those employees in the pool using an individual COVID-19 test. Only those employees who test positive based on their individual test would need to be removed from the workplace.

**Are employers required to provide paid time off to an employee removed from the workplace due to COVID-19?**

No. The ETS does not require employers to provide paid time off in this situation. Other state or local laws, regulations or a collective bargaining agreement may require employers to provide paid time off. Employers may choose to provide employees with paid time off. The ETS provides that employers should allow employees to use any accrued leave as permitted by company policy.

**Can an employer require a COVID-19 positive employee to work remotely?**

Yes. If the employee is not too ill to work, the employer can require the employee to work remotely or in isolation.

**Are employers required to remove employees who were in close contact with a COVID-19 positive employee in the workplace?**

No. The removal of other employees is not required, but employers may choose to do so.

**Once an employee is COVID-19 positive, is the employer required to conduct contact tracing?**

No. The ETS does not require contact tracing, but employers should follow any applicable state or local public health guidance for contact tracing.

**Are employers required to keep records of when it is notified of a COVID-19 positive test or diagnosis?**

No. There is no requirement related to notifications in this regard. If an employer determines that a COVID-19 case is work-related, that will trigger OSHA recording requirements on OSHA Forms 300, 300A and 301. A COVID-19 case is a recordable illness if:

- The case is a confirmed case of COVID-19
- The case is work-related (29 CFR part 1904.5)
- The case involves one or more of the general recording criteria set forth in 29 CFR part 1904.7 (e.g., medical treatment beyond first aid, days away from work)

If an employee asks that their name not be entered on the 300 log the employer must treat their illness as a privacy concern case and not enter their name on the log.

**Face covering requirements****What is a face covering as used in the ETS?**

For purposes of the ETS, a "face covering" is one that:

- Completely covers the nose and mouth
- Is made of two or more layers of a breathable fabric that is tightly woven
- Is secured to the head with ties, ear loops or elastic bands that go behind the head (gaiters can be worn if they have two layers of fabric or are folded to make two layers)

- Fits snugly over the nose, mouth and chin with no large gaps
- Is made of a solid piece of material without slits, exhalation valves, visible holes, punctures or other openings

Face coverings can be manufactured or homemade.

### **Which employees are required to wear a face covering?**

Only employees who are not fully vaccinated are required to wear a face covering when indoors and when occupying a vehicle with another person for work purposes. An employer cannot prohibit any employee, regardless of vaccination status, from wearing a face covering unless it would create a hazard. Further, employers may choose to require all employees to wear a face covering regardless of vaccination status. The ETS is a floor, not a ceiling.

### **What are the exceptions to the face covering requirement?**

An employee who is otherwise required to wear a face covering may be exempt in the following circumstances:

- When an employee is alone in a room with floor to ceiling walls and a closed door
- For a limited time while the employee is eating or drinking at the workplace or for identification purposes
- When the employee is wearing a respirator or facemask
- Where the employer can show that the use of face coverings is not feasible or creates a greater hazard

### **If an unvaccinated employee tests negative for COVID-19, is the employee still required to wear a face covering?**

Yes. It is of no consequence that an unvaccinated employee tests negative for COVID-19. The unvaccinated employee must still wear a face covering in the workplace.

## **The accommodation process**

### **Do the ETS allow an employer to grant accommodations?**

Yes. OSHA defers to the [EEOC Guidance](#) (Sections K and L). Accommodation templates for [medical](#) and [religious](#) exemptions are available.

### **What should an employer do if an employee seeks an accommodation from the testing process?**

If the employee seeks an accommodation for a medical reason, the employer should follow the accommodation process under the ADA and other applicable state law. If the accommodation is sought due to a religious objection to testing, the employer should follow the Title VII accommodation process as well as any other applicable state law.

## **Information employers must provide to employees**

### **What information must employers provide to employees regarding the ETS?**

Employers must inform each employee (in a language and at a literacy level they can understand) about the following:

- The requirements of §1910.501 and any policies and procedures the employer establishes to implement the ETS including:
  - Policies under (d)
  - The process the employer will use to determine employee vaccination status
  - The time and paid leave employees are entitled to for vaccinations and any side effects following vaccination
  - The procedures employees need to follow to provide notice of a positive COVID-19 test or diagnosis of COVID-19 by a licensed healthcare provider; and
  - The procedures to be used for requesting records.
- Employers must provide additional information to unvaccinated employees, including information about the employer's policies and procedures for COVID-19 testing and face coverings.
- In addition, employers must provide information addressing the following:
  - Information regarding COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated by providing a copy of the CDC's [Key Things to Know About COVID-19 Vaccines](#).
  - The requirements of 29 CFR 1904.35(b)(1)(iv) which prohibits the employer from discharging or in any manner discriminating against an employee for reporting work-related injuries or illness, and Section 11(c) of the OSH Act which prohibits the employer from discriminating against an employee for exercising rights under, or as a result of actions that are required by, the ETS. Section 11(c) also protects the employee from retaliation for filing an OSH complaint, reporting a work-related injury or illness, or otherwise exercising any rights afforded by the OSHA Act (See OSHA [Workers' Rights under the COVID-19 Vaccination and Testing ETS](#)).
  - The prohibitions of 18 U.S.C. § 1001 and of Section 17(g) of the OSHA Act, which provide for criminal penalties associated with knowingly supplying false statements or documentation (See OSHA Information for [Employees on Penalties for False Statements and Records](#)).

**Does the ETS require employers to provide the identified information to employees through a specific method or means?**

No. The manner in which employers provide the required information to employees may vary based on the size and type of workplace. Employers may use any effective method typically used in the workplace so long as employees receive the required information in a language and at a literacy level they can understand. Employers may use e-mail, printed fact sheets or during a meeting.

**Are employers required to provide training to employees?**

No. The ETS does not contain training requirements.

**Employer reporting requirements for COVID-19 fatalities and in-patient hospitalizations**

**How does an employer determine if a COVID-19 fatality or in-patient hospitalization was work-related?**

When evaluating whether a fatality of in-patient hospitalization is the result of a work-related case of COVID-19, employers need to follow criteria in OSHA's recordkeeping regulation at 29 CFR 1904.5 for determining work-relatedness. See this OSHA [Fact Sheet](#) for more details.

**Record availability for employees**

**Are employers required to provide employees with access to their COVID-19 test records?**

Yes. An employer must allow an employee to review and copy the individual's COVID-19 vaccine documentation and any COVID-19 test results required by the ETS by the end of the next business day following the request. An employer is also required to provide this information to anyone having the employee's written authorized consent.

**What other information about this ETS must employers provide to employees?**

Employers are required to provide an employee or the employee's representative with the aggregate number of fully vaccinated employees at the workplace along with the total number of employees at the workplace by the end of the next business day after a request. OSHA believes this information will allow employees to calculate the percentage of fully vaccinated employees at the workplace, evaluate the efficacy of the employer's vaccination policy, raise any concerns identified to SOAH, and actively participate in the employer's vaccination efforts. Short of this, OSHA reasons the only other "potential check" on an employer's compliance would be an OSHA inspection.

## **Key dates**

### **What are the effective dates of the ETS?**

The ETS became effective Nov. 5, 2021, when it was published in the Federal Register. OSHA identifies the following compliance deadlines:

Requirement	Jan. 10, 2022	Feb. 9, 2022
Establish policy on vaccination (paragraph (d))	<b>X</b>	
Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status (paragraph (e))	<b>X</b>	
Provide support for employee vaccination (paragraph (f))	<b>X</b>	
Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis (paragraph (h))	<b>X</b>	
Remove any employee who received positive COVID-19 test or COVID-19 diagnosis (paragraph (h))	<b>X</b>	
Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes (paragraph (i))	<b>X</b>	
Provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation (paragraph (j))	<b>X</b>	
Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours (paragraph (k))	<b>X</b>	
Make certain records available (paragraph (l))	<b>X</b>	
Ensure employees who are not fully vaccinated are tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer) (paragraph (g))		<b>X</b>

### **Does the ETS expire after May 5, 2022?**

If OSHA does not make the ETS a permanent rule, the ETS will expire with no further compliance required. Keep in mind, there may be other state or local requirements an employer must abide by.



## **Miscellaneous issues**

### **Do the ETS apply to customers?**

No. There is no obligation in the ETS for employers to ensure that customers or visitors are vaccinated or subject to testing and face covering requirements. Employers should follow any applicable CDC or state or local guidance.

### **Where can I find the complete regulation?**

The complete regulation can be found [here](#).

### **Can employees pay for COVID-19 screening tests with an FSA/HRA/HSA?**

Yes. Screening tests are FSA/HRA/HSA eligible.

### **Are there any special waste disposal rules for COVID-19 screening tests administered at the workplace?**

All waste and test kit components should be treated as biohazardous waste. Follow instructions provided with testing kits. The [CDC](#) has information on waste disposal as well. Employers will also need to determine whether there are any applicable state, local or other regulations governing the disposal of screening tests.

## *Section 2: Communicating with employees*

JULIE GIBSON, EVP – DIRECTOR, MARKETING, COMMUNICATIONS & EXTERNAL AFFAIRS

### **Can you provide guidance or resources for a sample disclaimer to include on job postings and/or job descriptions?**

If the company decides to mandate the vaccine, a disclaimer that includes the company's policy should be included with a job posting or job description. If the company is simply complying with the OSHA ETS, a disclaimer would be unnecessary.

### **Can we send to all employees the following: Weekly testing is required/mandatory for every employee in the office regardless of vaccination status per company policy?**

Each company needs to address the OSHA guidance in the way that is best for their company.

### **Any tips on addressing backlash from employees who were fully vaccinated before the ETS and demand retroactive pay for the PTO (four hours per dose and two days of recovery)?**

Employers should focus on compliance with the current OSHA guidance and make decisions beyond that in the best interest of your business and all employees.