

Labor & Employment Alert

OSHA COVID Vaccine and Testing Emergency Temporary Standard

The federal Occupational Safety and Health Administration (**OSHA**) on Thursday released its second emergency temporary standard (**ETS**) addressing COVID-19 in the workplace. The new rule is referred to as the **Vaccine ETS** to distinguish it from the COVID rule issued by OSHA in June, known as the **Healthcare ETS** ([click here](#) for our Client Alert on the Healthcare ETS). The Vaccine ETS was published in the Federal Register on Friday, giving it an effective date of November 5. However, as explained further below, employers have thirty days to comply with most provisions of the new ETS, and sixty days for others. Moreover, a federal appeals court on Saturday issued an order in one of the court challenges filed against the new ETS, delaying the start of the rule temporarily.

The new Vaccine ETS is one in a series of measures that President Biden announced on September 9 as part of his “Path Out of the Pandemic.” [Click here](#) for the White House webpage that outlines those additional measures, including the new rules for federal contractors and healthcare providers. [Click here](#) to link to our Client Alert on the President’s September 9 announcement.

WHO IS COVERED BY THE VACCINE ETS?

The new ETS has some significant carve-outs for employers whose workplaces otherwise are regulated by OSHA. The **first** such exemption is for employers who have fewer than 100 employees company-wide. The **second** is for workplaces that are covered by President Biden’s executive order mandating COVID vaccines for employees of federal contractors and subcontractors. **Third**, employees who work remotely or exclusively outdoors are exempt.

Fourth, the Vaccine ETS does NOT apply to employees covered by the Healthcare ETS. This may sound odd because the Healthcare ETS does not require vaccines for employees, but the vast majority of those workers are covered by a separate vaccine mandate in an Interim Final Rule just published by the Centers for Medicare and Medicaid Services for healthcare providers who participate in Medicare or Medicaid.

KEY DEFINITIONS IN THE ETS

The Vaccine ETS defines nine terms for purposes of the new rule, some of which have a significant effect on the rule. For instance, “fully vaccinated,” which is a central compliance criteria, does not include vaccine “boosters” or additional doses of a vaccine. This should give some comfort to those who were concerned about an open-ended mandate that could expand without agency action as such boosters are developed or come into use.

In addition, the definition of “mandatory vaccination policy,” which refers to a core requirement of the rule, is the vehicle OSHA uses to introduce the exemptions employers not only may allow, but exemptions that employers

must allow. This includes the accommodation rights for employees with objections based on disabilities or religious beliefs, which arise under the Americans With Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII). In addition, however, the definition also exempts employees for whom the vaccine is “medically contraindicated,” which is broader than disability and avoids the need to prove an ADA disability to qualify.

Finally, “Workplace” is defined explicitly to exclude an employee’s residence, which removes any question as to the carve-out discussed above for remote workers.

KEY EMPLOYER DUTIES UNDER VACCINE ETS

There are nine key requirements imposed on employers by the Vaccine ETS, which range from establishing a written policy to requiring employees to report cases of COVID to ensuring that unvaccinated employees actually comply with the alternate testing and reporting requirements. Each requirement is discussed below.

Establish Written Vaccination Policy

The Vaccine ETS requires covered employers to “establish, implement, and enforce” a written vaccine policy for their employees. However, the rule allows employers to choose between two types of policies: a true vaccine mandate (that is, one that allows no exceptions other than as required by law) or an “employee-choice” policy (that is, one that allows any employee to choose whether to be vaccinated).

As already mentioned, the rule acknowledges the federal law duty to accommodate disabilities and religious objections in certain circumstances, and also requires an exemption for employees when a COVID vaccine is “medically contraindicated,” and those requirements apply to both types of policies. However, the ETS goes further to permit an even broader policy that exempts any employee who chooses to opt out of the vaccine for any reason or for no reason. So long as the employer complies with the requirements for unvaccinated employees, discussed below, they may allow all employees to choose whether to be vaccinated.

Employers may differentiate between groups of employees based on the risk of COVID for their respective jobs. For instance, an employer may impose a mandatory vaccine policy on customer-facing employees, but have an “employee choice” policy for all other employees.

As with the Healthcare ETS, OSHA has made development of a written vaccine policy much easier for employers by providing a sample policy that employers can download and conform to their particular company. [Click here](#) for the “mandatory policy” template, and [click here](#) to for the “employee-choice policy” template.

Determine Vaccination Status of All Employees

Once the vaccine policy is established, an employer’s next duty under the ETS is to determine the COVID vaccination status of all employees, including whether they have been “fully vaccinated.” In doing so, the employer must require satisfactory evidence of vaccination, which can be in various forms listed in the ETS. If the employee no longer has any of the explicitly approved forms of proof, the employer may accept a written attestation from the employee, under oath, that states that the employee has been vaccinated.

All records reflecting vaccination status must be treated as confidential medical records. If an employee fails or refuses to provide proof of vaccination, the employer must treat that employee as unvaccinated. The employer must maintain a “roster of each employee’s vaccination status.” If the employer already has ascertained the vaccine status of employees before the effective date of the ETS through a form of proof not provided for in the ETS, the employer is exempt from the specific proof requirements.

Provide Support for Employee Vaccination

Covered employers are required to provide “support for employee vaccination.” This comes in the form of allowing a reasonable amount of time *during the regular workday* for each employee to obtain the vaccine, including up to four hours of paid time to travel to the vaccine site, receive the vaccine, and return to work (for each dose). The employer also must allow reasonable paid time off for an employee to recover from the side effects of receiving either or both doses of the vaccine. The ETS does not set an amount of time that must be allowed for this, but simply states that it must be a reasonable time. OSHA’s non-regulatory guidance, however, states that OSHA presumes that two days per vaccine dose would be a reasonable period for most cases.

If the employee chooses to get the vaccine outside of regular work hours, the employer does not have to pay the employee for that time. The employer also does not have to pay for travel costs to get the vaccine, but must pay for the vaccine itself, if there are charges. Moreover, the employer may NOT count the paid time for obtaining the vaccine against any other form of leave (such as vacation or sick leave). However, an employer may require employees to use other forms of accrued paid leave for the time needed to recover from vaccine side effects.

Ensure Unvaccinated Employees Are Tested

Employers are required to “ensure that each employee who is not fully vaccinated” complies with the COVID testing requirements of the ETS. Those testing requirements depend on the employee’s schedule of reporting to the physical worksite. If the employee reports at least once every seven days, then the employee must be tested at least once every seven days, and must provide documentation of the same to the employer. An employee who reports less frequently must be tested within seven days prior to coming to the worksite (and document the same). Employees who fail, including the documentation, must be excluded from the worksite until they comply.

Employers must maintain a record of all COVID testing pursuant to this rule, and all testing records must be kept as confidential medical records. However, due to the likelihood of false positives, employers may not require unvaccinated employees to undergo further periodic testing for ninety days following their last positive test or COVID diagnosis. Nonetheless, once the unvaccinated employee returns to work, and for the rest of that ninety day period, he or she must still satisfy the face covering requirements discussed below.

The ETS does not require employers to bear the cost of COVID testing required for unvaccinated employees. However, the ETS acknowledges that some employers may be required to bear these costs by virtue of state or local laws or collective bargaining agreements—but the ETS itself does not impose that burden.

Require Notification From—and Removal of—Employees With COVID

Employers must require employees to give notice of a positive COVID test or diagnosis by a healthcare provider—and remove the employee from the worksite until he or she meets return-to-work criteria specified in the rule. Note this is an employer requirement, as OSHA does not impose duties or corresponding penalties on employees.

Require Face Coverings for Unvaccinated Employees

The rule requires employers to “ensure that each employee who is not fully vaccinated wears a face covering” when indoors or when riding in a car with others for work. There are special rules for allowing more robust protective gear, such as N95 masks or other respirators, if employees so choose. In any event, the employer must see that the face covering fits properly and is replaced when needed. As with COVID testing, however, and unlike other protective gear under OSHA standards, the ETS does not require employers to pay for the face coverings—but again acknowledges they may have to do so under state and local laws or collective bargaining agreements.

Finally, if the employee chooses to wear a respirator, the employer must establish a Mini-Respiratory Protection Program and comply with the requirements of that program as set forth in the Healthcare ETS.

Provide Information to All Employees

Employers are required to provide certain information to employees to educate them regarding the benefits of COVID vaccines. In particular, employers must give each employee a document entitled “Key Things to Know About COVID-19 Vaccines,” which is available by [clicking here](#). Employers also must inform employees of their right to be free from retaliation for exercising their rights under the OSH Act and its standards and regulations. Finally, the employer must inform employees of the legal consequences of knowingly giving false documentation or statements in connection with an OSHA inspection or investigation.

Record and Report COVID Cases

As always, employers must record employee cases of COVID that are “work-related,” and report work-related cases to OSHA if the employee is hospitalized or dies as a result. The technical criteria for recording and reporting COVID cases are no different than for other illnesses, but as a practical matter some criteria are more difficult to determine with COVID, while others automatically are present. For instance, it is more difficult to determine if COVID is work related, but the employee automatically has “days away from work” because of the quarantine requirement. [Click here](#) for our 2020 Client Alert that describes the protocol for determining whether a COVID case is work-related.

Make COVID Records and Information Available

Finally, the ETS requires employers to make certain COVID-related records and information available to employees who ask for them (by the end of the next business day) and to OSHA within four hours or by the end of the next business day, depending on what OSHA is requesting.

PREEMPTION OF CONTRARY STATE LAWS AND RULES

The opening section of the Vaccine ETS states that one of its purposes is “to preempt inconsistent state and local requirements relating to these issues,” referring to “vaccination, vaccination verification, face covering, and testing requirements” relating to COVID-19. Moreover, OSHA’s commentary accompanying the ETS makes clear that OSHA intends to completely supplant such efforts by state and local governments. However, the ETS does NOT preempt or supplant state and local laws that impose greater restrictions or requirements on employers for the purpose of enhancing workplace safety or public health, so long as they do not conflict with the ETS.

WHAT ABOUT EMPLOYERS IN STATE PLAN STATES?

The new ETS does not immediately apply in State Plan States, which are the twenty-two states authorized by OSHA to use their own state agencies and laws to regulate private-sector workplace safety and health ([click here](#) for OSHA’s map of those states). However, as with the Healthcare ETS in June, OSHA is requiring those states to adopt the new Vaccine ETS or implement their own that meets the minimum requirements of the federal ETS. The main point here is that the compliance deadlines for those twenty-two State Plan States will be later than the federal OSHA compliance deadlines because those states will probably take thirty or more days to implement or adopt.

EFFECTIVE DATE AND COMPLIANCE DEADLINES

The Vaccine ETS became effective **November 5, 2021**, the date of its publication in the Federal Register. However, the ETS allows thirty days for employers to come into compliance with most of its requirements, which is **December 5, 2021**. The ETS also allows sixty days for employers to comply with the requirements relating to testing of unvaccinated employees, which is **January 4, 2022**.

RESOURCES AVAILABLE TO EMPLOYERS

OSHA’s main webpage for the Vaccine ETS offers a number of useful resources, including sample employer policies, fact sheets on various topics, and a twenty-eight- minute online training webinar. [Click here](#) to visit that main page. OSHA’s Frequently Asked Questions webpage also offers extensive guidance on all aspects of the Vaccine ETS, which can be found by [clicking here](#).