

Legal Update

OSHA Issues Emergency Temporary Standard on Mandatory COVID-19 Vaccination or Testing of US Employees by Large Employers

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) released its much-anticipated [Emergency Temporary Standard](#) (ETS) regarding COVID-19 vaccination and testing requirements for large US employers, i.e., those employers with 100 or more employees. OSHA explained that it issued the ETS because of the “grave danger” that COVID-19 poses to workers and in order to “minimize the risk of COVID-19 transmission in the workplace.”

As we discuss below, the ETS requires covered employers to either (1) devise, implement and enforce a mandatory COVID-19 vaccination policy or (2) instead adopt a policy requiring employees “to elect either to get vaccinated or to undergo regular COVID-19 testing and wear a face covering at work.”

In either instance, covered employers must be prepared to implement and comply with the requirements outlined in the ETS by December 5, 2021, and January 4, 2022, as applicable. All employers with 100 or more employees should carefully examine the ETS and its accompanying substantive and procedural requirements, such as the administrative requirements on the gathering, verification, storage and disclosure of vaccination-related information.

Employers have only a short period of time to educate themselves on the requirements and options spelled out in the ETS, to develop vaccination plans and protocols, to train their workforce, and to implement and enforce the mandates that OSHA has imposed through the ETS. This is a challenge even for employers that have already implemented mandatory vaccination policies.

Scope and Application of the ETS

The ETS applies to all private employers that have 100 or more employees company-wide in the United States at any time that the ETS is in effect. Part-time workers and employees who work exclusively outdoors or work from home must be included in calculating the employee headcount, even though, as noted below, the ETS does not impose requirements with respect to employees who work exclusively outdoors or from home. Independent contractors, on the other hand, do not need to be counted toward the 100-employee threshold.

In addition, OSHA does not require a host employer to count employees of third parties, such as temporary staffing agencies, IT contractors and business services contractors as employees under the ETS—either for purposes of calculating the 100-employee threshold or more generally with respect to compliance with the ETS. Rather, the actual employer of those individuals bears responsibility for complying with the ETS. The host employer is, however, permitted to impose more stringent requirements on employees of third parties.

Certain workplaces are not subject to the requirements of the ETS if they are covered by separate regulations. Specifically, the requirements of the ETS do not apply either to workplaces that are covered under the [Safer Federal Workforce Task Force's COVID-19 Guidance for Federal Contractors and Subcontractors](#) or to workplace settings in which employees provide healthcare services or healthcare support services, as they are already subject to OSHA's June 2021 Healthcare ETS. In addition, in states with OSHA-approved State Plans, private employers with 100 or more employees will be covered by the state occupational safety and health requirements rather than the ETS. Notably, the ETS explicitly provides that it preempts all state and local requirements, including in states with State Plans, that ban or limit the authority of employers to require vaccinations, face coverings or testing.

Through the ETS, OSHA also excludes three categories of employees from the vaccination or testing/face covering requirements: (1) employees while working from home; (2) employees who work exclusively outdoors; and (3) employees who do not report to a workplace where other individuals, such as customers or coworkers, are present. However, employees who are in a vehicle with other employees for work purposes are subject to the ETS-required vaccination or testing regime.

Compliance Deadlines

Employers must comply with all of the provisions set forth in the ETS by December 5, 2021, except for testing. With regard to those employers who choose to offer employees the option to elect weekly testing in lieu of mandatory vaccination, the testing requirements must be implemented by January 4, 2022.

Mandatory Vaccination or Else Weekly Testing Plus Face Coverings

Regardless of whether a covered employer elects to “develop, implement and enforce a mandatory COVID-19 vaccination policy” or to create, implement and enforce a policy that requires employees “to elect either to get vaccinated or to undergo weekly COVID-19 testing and wear a face covering” while at work, the ETS imposes a number of procedural and policy requirements.

MANDATORY VACCINATION

- **Definition of Fully Vaccinated.** The ETS defines “fully vaccinated” as a person’s status two weeks after completing primary vaccination with a COVID-19 vaccine with, if applicable, at least the minimum recommended interval between doses. Booster shots and additional doses of the vaccine are not included in the definition of fully vaccinated under the ETS. In addition, “natural immunity” or the presence of antibodies does not qualify an employee as exempt.
- **Time Off for Vaccination and Recovery (Sometimes Paid):** An employer must provide employees with reasonable time, including up to four hours of paid time, in order to receive each vaccination dose. An employer must also provide employees with reasonable time to recover from any side effects following each dose. Although it is not covered by the ETS, employers should be

aware that they may be required by applicable wage and hour laws to pay employees for the time they spend getting vaccinated pursuant to an employer's mandatory vaccination policy.

- **Records of Vaccination Status:** The ETS also imposes obligations on employers to gather and maintain records related to vaccination status. Specifically, employers must determine the vaccination status of each employee and obtain acceptable proof (such as a copy of the Centers for Disease Control and Prevention (CDC) Vaccination Card) and must maintain records of vaccination status as well as a roster of each employee's vaccination status. It is not sufficient for the employer to view the vaccination record—the employer must keep a paper or digital copy of the record. (Because booster shots are not included in the definition of fully vaccinated, employers are not required to obtain vaccination-related information about them.) Vaccination records are to be treated as confidential medical information and must be kept confidential. At the same time, employers are obliged to make available to an employee, or the employee's representative, the aggregate number of fully vaccinated employees at the workplace along with the total number of employees at that workplace. However, employers must protect the confidentiality of specific employees if asked for such aggregate vaccination status data.

If, prior to November 5, 2021, employers already have gathered records of employees' vaccination status and still possess those records, the employers are not required by the ETS either to re-evaluate the vaccination status of those employees or to obtain their records a second time.

- **Limited Exemptions from Mandatory Vaccinations:** If the employer implements a mandatory vaccination requirement, the ETS provides that the following categories of employees must be granted exemptions: (1) employees for whom a vaccine is medically contraindicated; (2) employees for whom medical necessity requires a delay in vaccination; or (3) employees who are legally entitled to a reasonable accommodation, such as for a disability or sincerely held religious belief, practice or observance.

WEEKLY TESTING AND FACE COVERING OPTION

- **No Exemptions from Testing and Face Covering Rules.** If an employer decides to implement the policy that offers employees the option to elect weekly COVID-19 testing and wear face coverings as an alternative to vaccination, employees may self-select the approach they prefer.
- **Frequency of Testing.** With regard to employers who decide to permit employees to elect to be tested instead of undergoing mandatory vaccination, an employer must ensure that each such employee is tested for COVID-19 at least weekly. More frequent testing is not prohibited. If an unvaccinated employee has been away from the workplace for a week or longer, the employer must ensure that the employee has been tested within seven days before returning to work. Employers must maintain and preserve records of each test result required to be provided by each employee pursuant to the ETS while the ETS remains in effect.
- **Face Covering Requirement.** The ETS also imposes face covering requirements on employees who have not been fully vaccinated. Specifically, the ETS provides that, with limited exceptions, each employee who is not fully vaccinated must wear a face covering while they are indoors, including in the workplace, or in a vehicle with another person for work purposes. Notably, under the ETS, the face covering requirement applies only to employees who are not fully vaccinated; it does not apply to vaccinated employees (even if they are working at a worksite with unvaccinated workers)—though, as noted above, there may be state or local requirements that require all employees to wear face coverings regardless of vaccination status.

- **Types of COVID-19 Tests.** Under the ETS, both antigen and PCR COVID-19 diagnostic tests are permitted to be used by employers in order to satisfy the weekly testing requirement. However, if the employer elects to use/accept antigen tests, the antigen test may not be both self-administered and self-read by the employee unless observed by the employer or an authorized telehealth proctor. In addition, if an over-the-counter (OTC) antigen test is being used, it must be used in accordance with the authorized instructions. The employer can validate the test through the use of a proctored test that is supervised by an authorized telehealth provider. Alternatively, the employer can proctor the OTC test itself. Pool testing may be used to comply with the ETS, provided that it complies with CDC and FDA procedures and recommendations for implementing screening pooling tests. Under the ETS, antibody tests may not be used to satisfy the weekly testing option.
- **Testing With Respect to Employees Who Previously Had COVID-19.** With respect to employees who previously tested positive for COVID-19 (or were diagnosed by a licensed healthcare provider as having COVID-19), employers may not require employees to undergo COVID-19 testing for 90 days following the date of their positive test or diagnosis. However, when the employee returns to work, they must continue to wear a face covering.
- **Payment for Weekly COVID-19 Testing.** The ETS permits employers to require unvaccinated employees to pay for any of the costs associated with COVID-19 testing. Employers should be mindful, however, that payment for testing might be required by their collective bargaining agreements, by other employment agreements to which they may be party, or by state or local law. As a practical matter, some employers who offer employees the option of weekly testing might favor imposing the potential costs of such testing on unvaccinated employees because it could encourage a greater percentage of employees to get vaccinated. Conversely, some employers might conclude that placing the testing costs on employees will harm morale, especially in a tight labor market, and such employers may favor paying for the weekly testing.

Notice by Employees Testing Positive and Removal from Workplace

Employers must require employees to provide prompt notice if they test positive for COVID-19 or are diagnosed with COVID-19. The ETS requires employers to remove employees from the workplace if they test positive for COVID-19—even if the employee is fully vaccinated. In addition, for those employees who are unvaccinated, the ETS requires the employer to remove the employee from the workplace if the employee is unable to provide proof of a negative test based on the ETS prescribed procedures—even if the employee wears a face covering and is isolated while on site.

Preemption of State Laws

OSHA has stated that the ETS is intended to preempt states and their political subdivisions from adopting or enforcing workplace requirements relating to the same issues covered by the ETS, except requirements under the authority of a federally approved State Plan. One purpose of this broad preemptive sweep is to override any potentially inconsistent “State Plans,” i.e., OSHA-approved workplace health and safety programs operated by individual states. OSHA also intends to preempt state and local laws that conflict with the ETS. OSHA’s Summary of the ETS notes that “OSHA intends to preempt any state or local requirements that ban or limit an employer from requiring vaccination, face covering, or testing.” As has been widely publicized, several state attorneys general already have filed or announced their intention to file lawsuits contesting the enforceability of the ETS. Because the outcome of such litigation is uncertain, however, covered employers should proactively take steps to develop and implement their vaccination programs under the soon-approaching deadlines set

forth in the ETS. Note that the ETS’s provisions permitting employers to require employees to pay for the cost of testing do not have preemptive effect. The ETS also does not preempt generally applicable state or local requirements that mandate face coverings for all individuals in indoor spaces, regardless of vaccination status.

Notice and Reporting by Employers

The ETS includes several sets of notice requirements. For example, the ETS mandates that an employer provide each employee with the following: (1) information, in a language and at a literacy level that the employee understands, about the ETS’s requirements and the employer’s workplace policies and procedures implementing the ETS; (2) the CDC document titled “[Key Things to Know About COVID-19 Vaccines](#)”; (3) information about the protections for employees against retaliation and discrimination; and (4) information about laws that impose criminal penalties for knowingly supplying false statements or documentation.

Under the ETS, an employer must report a work-related COVID-19 fatality to OSHA within eight hours of learning about it. An employer must also report to OSHA a work-related COVID-19 in-patient hospitalization within 24 hours of learning about it.

Other Resources

The full text of the ETS is 154 pages and was [published](#) on November 5, 2021, in the *Federal Register*. In addition to the ETS, OSHA posted a detailed set of [Frequently Asked Questions](#) as well as a 28-minute [webinar](#) on its website to familiarize employers and employees with the requirements of the ETS. OSHA also made available for downloading by employers [two template policies](#): a “Mandatory Vaccination Policy Template” and a “COVID-19 Vaccination, Testing and Face Covering Policy Template” (in the “Policy Templates” section of the webpage). In its FAQs, OSHA included a table of various steps that employers must take, along with the two relevant deadlines: December 5, 2021 (i.e., 30 days after publication in the *Federal Register*) and January 4, 2022 (i.e., 60 days after publication). We have reproduced the table below, which includes parenthetical references to the corresponding paragraphs of the ETS, for ease of reference by employers:

TABLE OF EFFECTIVE DATES

Requirement	30 days after publication [i.e., Dec. 5, 2021]	60 days after publication [i.e., Jan. 4, 2022]
Establish policy on vaccination (paragraph (d))	X	
Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status (paragraph (e))	X	
Provide support for employee vaccination (paragraph (f))	X	
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))		X

Requirement	30 days after publication [i.e., Dec. 5, 2021]	60 days after publication [i.e., Jan. 4, 2022]
Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis (paragraph (h))	X	
Remove any employee who received positive COVID-19 test or COVID-19 diagnosis (paragraph (h))	X	
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))	X	
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))	X	
Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours (paragraph (k))	X	
Make certain records available (paragraph (l))	X	

Update Regarding Federal Contractor Vaccine Mandate

In a November 4, 2021, [Fact Sheet](#) regarding vaccination policies, the White House clarified two matters relevant to the vaccine mandate for federal government contractors introduced by the September 9, 2021, Executive Order. First, the compliance date has been pushed back from December 8, 2021, to January 4, 2022. In doing so, the Fact Sheet states that covered employees will need to have their final vaccine dose by January 4. This represents a significant extension from the timing set forth in the September 24, 2021, Safer Federal Workforce Task Force’s COVID-19 Guidance for Federal Contractors and Subcontractors mentioned above. The guidance required that employees be “fully vaccinated” by December 8, 2021, which meant that they had received their final dose two weeks prior to that date. The Fact Sheet thus extends the period for employees to obtain a final vaccination dose by roughly six weeks. Second, the Fact Sheet made clear that federal contractors shall follow the contractor vaccine mandate rather than the ETS rule. (For more information on mandatory vaccinations for federal contractors, including the guidance from the Safer Federal Workforce Task Force, please see our recent Legal Updates from [September 17, 2021](#); [September 27, 2021](#); [October 4, 2021](#); and [November 3, 2021](#).)

Summary

As discussed above, the ETS imposes a number of obligations on employers and employees alike regarding vaccination, testing, notices and reporting. Employers with 100 or more employees should promptly review the new requirements in detail and formulate plans to devise, implement and enforce their policies on vaccination and testing to comport with the ETS. Employers should also be sure to

educate and train their workforce so all employees fully understand company policies and requirements. Employers should also consult with their labor/employment counsel as questions arise.

Additional insights for employers navigating through COVID-19 developments are available in Employment Law articles on our [COVID-19 Portal](#).

If you wish to receive regular updates on the range of the complex issues confronting businesses in the face of the novel coronavirus, please subscribe to our [Coronavirus COVID-19 "Special Interest" mailing list](#).

And for any legal questions related to this pandemic, please contact the authors of this article or Mayer Brown's COVID-19 Core Response Team at FW-SIG-COVID-19-Core-Response-Team@mayerbrown.com.

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