

OSHA Issues COVID-19 Vaccination And Testing ETS For Certain Employers

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Highlights

- New OSHA ETS regarding the COVID-19 vaccine requires employers of 100 or more to establish written policies to implement mandate-or-test requirements (with exceptions for religion and disability) by Dec. 5, 2021
- Employees who are not fully vaccinated must submit negative COVID-19 test results to their employer on a weekly basis starting Jan. 4, 2022
- Employees must be paid for time away from work for getting vaccinated and for recovery from any vaccination side effects

The Occupational Safety and Health Administration (OSHA) issued its [much anticipated Emergency Temporary Standard \(ETS\)](#) for employers of 100 or more employees to implement a COVID-19 vaccine mandate or testing alternative. Not surprisingly, the ETS requires employers to establish written policies to implement mandate-or-test requirements, which also must provide for exemptions for sincerely held religious beliefs and covered disabilities under the Americans with Disabilities Act (ADA).

The ETS is effective upon publication (Nov. 5, 2021), with the following compliance deadlines:

1. Thirty days after publication (Dec. 5, 2021) – for all requirements other than testing for employee who have not been fully vaccinated
2. Sixty days after publication (Jan. 4, 2022) – testing for employees who have not been fully

vaccinated

Employers that choose to allow for a testing alternative in lieu of mandatory vaccination must also require unvaccinated workers to wear face coverings. Interestingly, there is no reference to a requirement for masking of fully vaccinated workers in the presence of unvaccinated workers as has been the Center for Disease Control's (CDC) recommendation since August 2021.

The ETS is clearly intended to make it so that full vaccine mandates – without a testing alternative – is the simpler option from an administrative perspective. While the rule does provide guidance about what is sufficient proof of vaccination status (which can include an attestation), unvaccinated employees will need to submit to weekly testing, provide proof of a negative test, and continue to wear masks in the workplace.

OSHA is intending this rule to be broadly applied, as the 100-employee trigger is firm- or corporate-wide. [OSHA's FAQs](#) explain that this is a business-based count, not a location-based count, though it did build in some limited coverage exceptions. For example, remote workers and those who work exclusively outdoors are not required to comply.

Employers must also provide paid leave for getting vaccinated (up to four hours, including travel time), as well as time for recovery from any associated side effects from the vaccination. However, there is no requirement to provide paid time to employees who test positive for COVID-19.

A big question for employers has been: Who will be required to pay for the testing? The federal OSHA ETS does not require the employer to pay for testing. However, this may be required under applicable state laws and/or collective bargaining obligations in a union setting. Given the difficulty in finding tests that could be a result of this mandate – and the relatively high cost for non-diagnostic tests – employers should carefully consider whether they might run afoul of expense reimbursements requirements or minimum wage laws. According to the ETS, self-administered COVID-19 tests may only be used if observed by the employer or a telehealth proctor.

It is important to note that this ETS does not replace other more protective guidelines applicable to federal contractors and healthcare workers, or those issued by state OSHA partners.

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