

What You Need to Know - OSHA's COVID-19 Vaccination and Testing Standard

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OSHA issued its Emergency Temporary Standard (ETS) on November 5, 2021, creating important obligations for businesses. This overview answers common questions about the new regulation.

Who is covered?

Most private employers with 100 or more workers are covered, with some exceptions for businesses complying with other COVID-19 regulations. Some employees of covered employers will not have to comply if they only work from home, exclusively outdoors, or where the employee goes to a workplace where there are no other people.

What must employers do?

While there are many nuances to the ETS, its main requirements include:

1. Have either a written mandatory vaccination policy, or a written vaccination and testing policy, requiring those who are unvaccinated to be tested every 7 days and wear a face covering.
2. Provide paid time off to get vaccinated, as well as sick leave for any side effects.
3. The ETS does not require employers to pay for testing, but many states do. An employer must check the law in each state where it operates to determine who must pay.
4. Implement requirements regarding the removal and return of workers affected by COVID-19.
5. Have COVID-19 policies and information readily available.

If the employer has existing COVID-19 policies that conflict with the ETS, they will need to be updated.

When must employers comply?

The ETS sets a deadline for implementation of December 5, 2021, with the exception of the testing requirements effective January 4, 2022. The ETS has been challenged in court, however, and its implementation and enforcement are now stayed. Whether the stay will continue is difficult to predict. Employers should prepare to comply with the ETS, while monitoring the litigation.

What happens if an employer fails to comply?

If the ETS is enforced, OSHA can issue citations and assess fines on a per violation basis. Fines are based on how a violation is classified. Most violations will be issued as “other-than-serious” or “serious” and carry fines of up to \$13,653 each. In circumstances where OSHA characterizes the violations as “willful” or “repeat,” fines can be up to \$136,532 per violation.

What if my state has a conflicting state law?

The ETS is written to override conflicting state laws. If a state law addresses COVID-19 but does not conflict with the statute, it will apply along with the ETS. Whether a state law conflicts or can be read to coexist with the ETS raises difficult legal questions.

What if my state has its own state OSHA plan?

Twenty-two states and territories have their own OSHA approved state plans. Under the ETS, states are required to amend their plans to include either an identical version of the ETS or one that is “at least as effective.” While the ETS has been stayed on the federal level, at least one state plan has adopted the standard and indicated its intent to proceed with enforcement. An employer with operations in a state with a “state plan” must determine its obligations for that jurisdiction.

How long will the ETS last?

The ETS lasts for 180 days. To remain in effect afterward, OSHA must promulgate it as a final rule.

Does an employer have to permit exemptions?

Employers must consider requests for exemptions for religious reasons and also under the Americans with Disabilities Act. Exemption requests could relate to a vaccine mandate, facial coverings, or other aspects of the ETS. Employers must also consider any state law modifications to the exemption processes, to the extent they do not conflict with the ETS.

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