

# OSHA Employer Vaccination Mandate ETS: What Your Company Needs to Know NOW

PUBLISHED ON

**November 4, 2021**

---

Today, the Occupational Health and Safety Commission (OSHA) issued its nervously anticipated COVID-19 Vaccination Emergency Temporary Standard (ETS) for employers of 100 or more employees.

The ETS will be published in the Federal Register on November 5, which will be its effective date. There are, however, separate compliance dates for certain provisions.

Here is what every company needs to know about the ETS:

**The ETS applies to employers in all workplaces that are subject to OSHA's jurisdiction that have at least 100-employees firm-wide or corporate-wide.** However, federal government contractors and subcontractors covered under the Safer Federal Workforce Test Force COVID-19 Workplace Safety Guidance, or employers in health care settings subject to the Health Care Emergency Temporary Standard (also issued today and covered under a separate Barley Snyder alert) are not covered by the ETS. In addition, employees who are fully remote, do not report to a workplace with other individuals present, or who work exclusively outdoors are not covered, but these employees would count toward meeting the 100-employee threshold for their employer (see below).

**The ETS is based on the size of the employer, in terms of number of employees, not on the type or number of workplaces.** Employers must include all employees across all their U.S. locations, regardless of vaccination status or where they perform their work. This includes part-time employees, but not independent contractors. Where a single company has multiple locations, all employees at all locations are covered for purposes of the 100-employee threshold. Where employees of a staffing agency are placed at an employer location, only the staffing agency would count these joint employees. The ETS provides [examples for purposes of determining coverage on pages 343-345](#).

**Covered employers must ensure that their employees receive the COVID-19 vaccine and are fully vaccinated by January 4, 2022.** Employers must require each vaccinated employee to provide acceptable proof of vaccination. Acceptable proof includes a record from a health care provider or pharmacy, vaccination record card, a record from a public health immunization information system, a copy of other official documentation that contains the type of vaccine given, dates of administration and name of health care provider who administered. If an employee has lost their vaccination card and is unable to provide written proof of their vaccination status, they may provide a written attestation under penalty of criminal perjury that their representation is true and accurate. Prior evidence of infection or claims of infection-induced immunity are not considered an acceptable substitute for vaccination.

**After January 4, 2022, any employee who is not fully vaccinated is required to be tested every seven days and provide a verified negative test to their employer or be removed from the workplace.**

COVID-19 testing means:

- A test for SARS-CoV-2 that is cleared and approved or authorized - including an emergency use authorization - by the Food and Drug Administration (FDA) to detect current infection with the SARS-CoV-2 virus (e.g., a viral test)
- Administered in accordance with authorized instructions and
- Is not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

Examples of acceptable tests provided in the ETS are tests with specimens processed in a laboratory (including self-administered or on-site collection specimens), proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer. Employees who test positive for COVID-19 or have been diagnosed with COVID-19 by a licensed health care provider are not required to test for COVID-19 for 90 days following their positive test or diagnosis.

**Employers are not required under the ETS to pay for testing unless state law would provide otherwise**

. Employers are required to provide up to four hours of paid time off for their employees to get vaccinated. If needed, the employer must also provide reasonable time and paid sick leave to recover from the side effects of the vaccine. Employers cannot require employees to use accrued sick leave or vacation time to offset the four hours of this paid vaccination time.

**Employers must develop, implement, and enforce a mandatory COVID-19 vaccination policy.**

Employers must also provide employees the following information:

- Information about the requirements of the ETS and workplace policies and procedures established to implement the ETS
- The CDC document "Key Things to Know About COVID-19 Vaccines"
- Information about protections against retaliation and discrimination
- Information about laws that provide for criminal penalties for knowingly supplying false statement or information or documents

**Employers must report work-related COVID-19 fatalities to OSHA within 8 hours of learning of the death.** They also must report work-related in-patient hospitalization within 24 hours of learning about the hospitalization.

**Employers must maintain a record of all vaccination records and test results, as well as a roster of employees' vaccinated status, to be maintained in a separate confidential medical file.** Employers must make available to employees or their authorized agents a copy of the employee's COVID-19 vaccine document and test results as well as information about the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at the workplace.

**Unvaccinated employees are required to wear a face mask while in the workplace.** Employees working

alone in a room with floor-to-ceiling walls and a closed door are not required to wear masks. This exception does not apply to cubicles in open workspaces.

Although the testing requirement for unvaccinated employees begins on January 4, 2022, employers must comply with all other requirements - including paid time off for employees to get the vaccine and masking for unvaccinated workers - on December 5, 2021.

Fines for an OSHA penalty could reach as high as nearly \$14,000 and OSHA could assess multiple penalties on a business.

If you have any questions about the [ETS and the mandates that it entails](#), please contact anyone in the [Barley Snyder Employment Practice Group](#). You can also attend our webinar to be held Monday, November 8, at 9 a.m., where our attorneys will break down and explain some of the finer points of the ETS. Information on the webinar is coming soon.

**DISCLAIMER:** The information in this alert should not be construed as legal advice to be relied upon nor to create an attorney/client relationship. Please note that the reader's or an industry's specific situation or circumstances will vary and, thus, for example, an approach that is advisable in one industry may not be appropriate in another industry. If you have questions about your situation or about how to apply information contained in this alert to your situation or industry, you should reach out to an attorney.

The views expressed in this alert are those of the individual author and do not necessarily reflect the views of the firm or the firm's clients. The response to the COVID-19 pandemic is particularly challenging, evolving and, in many cases, can be controversial. Any views expressed in this alert are not intended to advocate for or endorse a particular governmental response to the pandemic.