

COVID-19 & Vaccinations

What Employers Need to Know

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OSHA Issues Emergency Temporary Standard Regarding COVID-19 Vaccination and/or Testing

- On Friday, November 5, 2021, the OSHA Vaccination, Masking and Testing Emergency Temporary Standard (“ETS”) was published and made effective. The ETS covers employers with 100 or more employees. The calculation is for the entity’s total number of employees; and not based on the number of employees at a single location for an entity that has multiple locations. Employees of separate entities are counted separate from any other related entity unless they share safety guidance and governance amongst two or more entities.
- By December 5, 2021, covered employers must have a policy in place, disseminate certain information to its employees; require proof of vaccination; and require masking of individuals who cannot provide proof of vaccination. Effective January 4, 2022, employees must be fully vaccinated or, in the alternative, provide testing results showing a negative test for COVID-19 on a weekly basis.

Employer Requirements

- Employers must choose either to mandate vaccination of every employee or, in the alternative, require masking and testing for unvaccinated employees. The testing must take place on a weekly basis.
- Under each option, employers must determine the vaccination status of each of its employees. To confirm vaccination, the employer must require acceptable proof of the employee's vaccination status. The employer must maintain records verifying vaccination status, along with a list of each employee's vaccination status under the ETS. The information gathered for vaccination status are considered medical records and should be kept confidential and shared with only those with a need to know.

Proof of vaccination can be any one of the following:

- a record of vaccination from the employee's health care provider or pharmacy;
- a copy of a medical record documenting the vaccination;
- a COVID-19 vaccination record card;
- a copy of the vaccination record from a public health, state, or tribal immunization information system;
- a copy of any other official documentation that contains the type of vaccine administered, the dates of the vaccination(s), and the name of the health care provider administering the vaccine(s).

If an employee is unable to produce one of the above records, the Employer may allow the employee to fill out a written confirmation that the employee has lost or is unable to produce proof of vaccination as set forth above. The document must be dated and signed by the employee. The exact language dictated by the ETS is as follows:

- “I declare that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.”

- The ETS also requires that employees be provided reasonable time off to receive each necessary vaccination dose to be fully vaccinated. The ETS indicates that up to four hours of paid time should be made available for each such dose. The ETS requires additional reasonable paid time off to recover from the side effects that the employee is experiencing, if any, following each dose.
- However, employers may require employees to use available paid sick leave already available under the employer's policies for the additional covered time off for suffering from side effects from the vaccination dose.

- The ETS requires employers implement a policy that requires employees to provide prompt notice to the employer should they test positive for COVID-19. Once the employer receives such notice, the ETS requires that the employee be removed from the workplace no matter the vaccination status of the employee. The ETS sets forth the requirements for any employee that tests positive for their return to the workplace. The requirements are dictated by whether the employee has been vaccinated or has not been vaccinated.
- The ETS requires each employee who has not been fully vaccinated to be tested for COVID-19 at least every seven (7) days. If the employee has not been in the workplace for over 7 days, the employer must require a negative COVID-19 test before allowing the employee to return to the workplace.

- The ETS requires the employer to have a policy in force that each employee that has not been fully vaccinated wear a face mask while indoors and/or while occupying a vehicle with one or more additional persons. The ETS requires each employer to provide its employees with the following information:
 1. the employer's policy, to be in compliance with the ETS, must include a summary of the requirements of the ETS itself;
 2. the CDC publication "Key Things to Know About COVID-19 Vaccines";
 3. the protections for employees making it illegal to retaliate or discriminate against an employee in connection with the COVID-19 vaccination and/or the ETS; and
 4. explanation of the laws that provide for criminal penalties for an employee knowingly supplying false statements, or documentation including the form referenced above.

- The ETS requires that any work-related COVID-19 fatality be reported to OSHA within eight (8) hours of the employer learning of the fatality. The ETS requires that the employer report with twenty-four (24) hours to OSHA any work-related COVID-19 diagnosis that results in in-patient hospitalization.

Employers that Elect Mandatory Vaccination

Employers that adopt the mandatory vaccination policy (meaning you require every employee to become vaccinated or lose their employment) must require that all current and new employees are vaccinated. The only exceptions to the vaccination requirement are employees 1) who have a medical basis to refrain from vaccination; 2) who qualify for exemption due to an existing disability; and/or 3) who have a religious based exemption due to a sincerely held religious belief, practice or observance. The mandatory vaccination does not need to be required for employees that do not report to the physical workplace where others are present. This includes individuals who work from home; report to a workplace where there are no others present; or work exclusively outdoors.

Penalties for Non-Compliance

Employers can be fined for citations by OSHA for failing to comply with the ETS in an amount up to \$13,600 for each violation.

Legal Update

- The Fifth Circuit Federal Court of Appeals has already, as of Friday, November 5, 2021 issued an order enjoining enforcement of the ETS. That court ordered the government to file certain documentation in support of the ETS by Monday, November 8, 2021. The Order staying enforcement purports to cover the entire United States.
- Numerous other courts will likely move forward with litigation addressing the enforcement of the regulation as well. However, employers should proceed down the path of compliance until such time as it is known definitively that OSHA will not be able to enforce the ETS on a go forward basis.