



FAQs on OSHA ETS on Employer Vaccination and Testing Mandate

On November 4, 2021, the DOL's Occupational Safety and Health Administration (OSHA), released details of its long-anticipated emergency temporary standard (ETS) requiring employers with a total of 100 or more employees to institute written mandatory vaccination policies for their employees. The mandate's effective date is November 5, 2021, although employees do not have to be fully vaccinated until January 5, 2022 (at which point, if unvaccinated, they'll have to submit themselves to weekly testing). The ETS provides guidance on many questions that employers have been contemplating, as outlined below. NFP will continue to monitor the issue and update this FAQ document as developments necessitate.

Because this mandate primarily involves employment law, employers should consult with legal counsel regarding employer compliance with the new requirements.

NOTE: The U.S. Court of Appeals for the Sixth Circuit is scheduled to hear legal challenges to the ETS. In connection with those legal challenges, OSHA recently suspended implementation and enforcement of the ETS and the vaccine mandate/testing, pending future development in the courts. This means employers do not have to comply with the ETS for now. Nevertheless, employers should educate themselves on the requirements and plan for compliance, in case the courts uphold the validity of the ETS.

Which employers are subject to the vaccine mandate and testing alternatives?

Employers with a total of 100 or more employees are subject to this mandate.

Which individuals are included in the 100-employee count? Will it include part-time, temporary or seasonal employees? Is it based on a particular worksite or across worksites? Does it include companies with common ownership? Is it current or prior calendar year count?

The employee count to determine applicability is done at the employer level, not the individual location level. The ETS FAQs provide an example, explaining that a single entity with multiple locations would include all employees at all locations in the count. Interestingly, while addressing franchisee/franchisor issues, the ETS does not specifically address companies under common ownership — employers under common ownership, particularly where one company falls below the 100-employee threshold, should work with outside counsel for advice on how to count employees. The more cautious approach would be to assume that employees of all companies under common ownership should be included in the count. Also, all employees (temporary, seasonal, part-time, full-time, remote workers) working in the US are counted. Workers employed by a temporary staffing agency are counted by the agency, not the host employer. Employer size is determined as of the total employee count on November 5, 2021. Once an employer is subject to the requirement due to size, they remain subject for the entire ETS period.

Must employers ensure remote workers are vaccinated, or is it only employees returning to an office, work or job site?

Neither the vaccine mandate nor the testing apply to employees who do not report to a worksite with customers or other coworkers. So, it does not apply to a fully remote employee. It also does not apply to employees working exclusively outdoors (e.g., landscape workers, golf course or outdoor pool maintenance employees, etc.).

What is the definition of “fully vaccinated”? Does it incorporate the CDC’s definition, or a new definition? What about booster shots? And when will employees need to be fully vaccinated?

The ETS defines “fully vaccinated” as an employee's status two weeks after completing primary vaccination. (Completing primary vaccination involves receiving the two doses of Moderna or Pfizer or one dose of the Johnson & Johnson vaccine.) The definition also requires that there is an appropriate interval between doses, as determined by other guidance. The ETS does not require booster shots in order for employees to be considered “fully vaccinated.” Employees must either be fully vaccinated or subject themselves to regular testing by January 4, 2022.

How will employers verify an employee’s vaccination status? Can an employer rely on employee attestation, or do they need to request vaccination cards as proof? How should employers confidentially store information relating to employee vaccination and testing?

Employers must determine each employee’s vaccination status, and maintain records of that status. Examples of acceptable proof of vaccination status include COVID-19 vaccination record cards, copies of records of immunization provided by a healthcare provider, and a signed attestation from the employee that they are vaccinated (if they cannot provide one of the other forms of proof). These vaccination records are considered confidential medical records and the employer must maintain them accordingly (and make them available upon OSHA request).

Must the employer provide the alternative testing option for all employees or just those with a medical condition, disability or religious objection to the vaccine?

The ETS requires employers to provide a reasonable accommodation for those who cannot be vaccinated or who cannot wear a face covering due to a disability (as defined by the ADA) or if doing so conflicts with an employee’s sincerely held religious belief, practice or observance.

How does an employer verify an employee’s medical condition, disability or religious objection?

The ETS refers employers to the EEOC for guidance on evaluating requests for reasonable accommodation. The EEOC’s FAQs on COVID-19 testing and vaccinations can be found [here](#). Employees with such objections do still need to be tested weekly, per the ETS.

Who pays for the alternative testing, and how often should testing be performed?

Employees who are not fully vaccinated must be tested for COVID-19 at least weekly (if the worker is in the workplace at least once a week) or within 7 days before returning to work (if the worker is away from the workplace for a week or longer). The ETS does NOT require employers to pay for testing, although other laws, regulations, collective bargaining agreements or other collectively negotiated agreements may require it. Employers are also not required to pay for face coverings.

What types of alternative testing will be required?

A “COVID-19 test” is defined as a test for SARS-CoV-2 that is cleared, approved or authorized, including in an Emergency Use Authorization (EUA), by the US Food and Drug Administration (FDA) to detect current infection with the SARS-CoV-2 virus (e.g., a viral test). It also must be administered in accordance with the authorized instructions; and it cannot be both self-administered and self-read, unless observed by the employer or an authorized telehealth proctor. Types of tests that would be allowed include tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled 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. That means it would include diagnostic tests (nucleic acid amplification tests (NAATs) and antigen tests). Antibody tests, however, will not meet the ETS standard or definition of a COVID-19 test.

How must employers treat a positive test?

Employers must remove employees who test positive for COVID-19 from the workplace, regardless of vaccination status. Employers must not allow those workers to return to work until they meet required criteria under the ETS, which includes a negative COVID-19 test and a recommendation from a licensed healthcare provider.

Is employer administration of an alternative test considered medical care and does it establish a group health plan for purposes of ERISA, COBRA and other benefits compliance rules?

The ETS does not speak to this subject; we are hopeful that the government will provide additional guidance on this topic.

What are the requirements relating to paid time off (PTO) for vaccination or testing? How much PTO must be provided? What is the rate of pay that would apply during PTO? Is the leave in addition to and/or concurrent with other leave? Are there any notice requirements?

Employers subject to the ETS must provide workers up to four hours paid time, including travel time, at the employee’s regular rate of pay to each employee for each of their primary vaccination doses received during normal work hours. Employers must provide reasonable time and paid sick leave to each employee who recovers from side effects following any primary vaccination dose. Two days of paid sick leave is considered reasonable. Further, if an employee tests positive for COVID-19 or receives a COVID-19 diagnosis, then they must provide prompt notice to their employer. Employers must then remove the employee from the workplace, regardless of vaccination status; employers must not allow them to return to work until they meet required criteria, which includes a negative COVID-19 test and a recommendation from a licensed healthcare provider.

How long will the vaccine and testing requirements last?

OSHA anticipates that the ETS will be in effect for six months, but it may last longer if the agency determines that the pandemic continues to pose a grave danger to employees after that time.

Are there any notice requirements for employers?

Yes. Employers must inform each employee, in a language and at a literacy level the employee understands, about the employer vaccine/testing requirements, and any policies and procedures the employer establishes to implement this ETS. That could potentially include the employer's vaccination policy, the process that will be used to determine employee vaccination status (including how to submit proof of vaccination), the time and pay/leave they are entitled to for vaccinations and any side effects experienced, the procedures they need to follow to provide notice of a positive COVID-19 test or diagnosis of COVID-19 by a licensed healthcare provider, and the procedures to be used for requesting records. Employers must provide additional information to unvaccinated employees, including information about the employer's policies and procedures for COVID-19 testing and face coverings. In addition, employers will have to provide details on the efficacy, safety and benefits of vaccination (by providing the document, "Key Things to Know About COVID-19 Vaccines," available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>) and information on the potential criminal penalties associated with an employee knowingly supplying false statements or documentation (fact sheet available in [English](#) and [Spanish](#)). Lastly, employers need to inform employees that the employer cannot discharge or otherwise discriminate against employees exercising rights relating to the OSHA ETS. Unfortunately, for now, there is not a model notice.

Employers can distribute the notice in a manner consistent with other employee communications, which could include paper copies by mail, email (if employees have access to work email), or through other employee meetings or communications. The notice must be distributed by December 5, 2021, and then again thereafter if the employer's policies or procedures relating to their vaccine mandate policy has changed.

What are the compliance dates that employers need to monitor?

- By December 5, 2021:
 - Establish a vaccination policy.
 - Determine vaccination status of each employee, obtain acceptable proof of vaccination, and begin maintaining records and roster of vaccination status.
 - Require employees to promptly provide notice of a positive COVID-19 test or COVID-19 diagnosis.
 - Remove any employee who received a positive COVID-19 test or diagnosis from the workplace.
 - Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes.
 - Provide each employee information regarding the employer's vaccination policy and other information per the above FAQ on employee notification.

- Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours.
- By January 5, 2022:
 - Ensure employees who are not fully vaccinated are tested for COVID-19 weekly (if the employee is in the workplace at least once per week) or within 7 days before returning to work (if away from the workplace for a week or longer).

What are the penalties for not complying with the requirements? Is the penalty determined on a per employee basis? Is there a cap on the penalty? Does the penalty vary for willful violations, and if so, how is “willfulness” determined?

Although the ETS does not list specific penalties for violations of its mandates, serious violations of OSHA regulations can result in a maximum fine of \$13,653. The cap for willful or repeat violations is \$136,532. A “serious” violation is one that could result in substantial harm or death. A “willful” violation is one where the employer either knowingly failed to comply with the mandate or acted with complete indifference to it. Employers should consult with employment law counsel concerning the application and enforcement of these penalties.

What about state laws that might prohibit employer vaccine mandates? Will there be any legal challenges to the new vaccine and alternative testing mandates?

Although the ETS states that it preempts state laws and regulations concerning COVID-19 vaccinations, testing and face coverings (unless the state has a plan that has been approved by the federal government), it is expected that there will be challenges by states that are already on record in their opposition to the mandate, as well as possible challenges from employers affected by the ETS. However, the ETS is effective as of November 5, 2021, with compliance obligations beginning 30 and 60 days after that date, and any legal challenge will likely take longer than that to be resolved. Thus, employers should consult with counsel about their obligation to comply as legal challenges work their way through the courts.

This information has been provided as an informational resource for NFP clients and business partners. It is intended to provide general guidance, and is not intended to address specific risk scenarios. Regarding insurance coverage questions, each specific policy must be reviewed in its entirety to determine the extent, if any, of coverage available for the impact of the Coronavirus. If you have questions, please reach out to your NFP contact.