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UPDATE: On December 17, 2021, in a 2-1 decision, the 6th Circuit Court of Appeals allowed the Occupational Safety and Health Administration's ("OSHA") Vaccination and Testing Emergency Temporary Standard ("ETS") to move forward by lifting an earlier court's stay that had put the ETS on hold. In response to the court's decision, OSHA has initiated an aggressive implementation and enforcement schedule.

While OSHA expects covered employers to begin complying immediately, the agency has said it will delay enforcement of the vaccination requirements of the ETS until January 10, 2022, and will wait until February 9, 2022, to start enforcing the optional testing component of the ETS. Both of those dates are quickly approaching.

Although the ETS is moving forward for now, the litigation process continues, as the parties challenging the ETS immediately appealed the court's decision to the U.S. Supreme Court. While the Supreme Court will ultimately determine the ETS' fate, in the interim, OSHA has made it clear that it intends to move forward with full enforcement. As a result, covered employers will have to decide how best to re-start their compliance efforts.

Background

On November 5, 2021, OSHA published its long-awaited Emergency Temporary Standard (ETS), which requires most U.S. employers with 100 or more employees to adopt a mandatory COVID-19 vaccination policy with an option to include an alternative weekly testing program.

While the ETS was effective immediately, legal challenges and a nationwide stay halted OSHA's implementation and enforcement efforts. On December 17, 2021, the 6th Circuit Court of Appeals dissolved the stay, allowing the ETS to take effect. The states and businesses challenging the requirement have appealed the court's decision to the U.S. Supreme Court, who may have the final word on whether the ETS remains in effect.

With the ETS now in effect, employers should consider their compliance efforts. To account for the uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates to provide employers with sufficient time to come into compliance.

OSHA will not issue citations for non-compliance with any of the requirements of the ETS before **January 10, 2022** and will not issue citations for non-compliance with the weekly testing requirements before **February 9, 2022** so long as the employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA plans to work closely with the regulated community to provide compliance assistance.

This is a rapidly changing environment, but if the ETS survives legal challenge, its current provisions provide employers with a detailed roadmap of what compliance should look like. Even with the legal uncertainty, employers should take steps to prepare for compliance and monitor developments out of the courts.

Below you will find a summary of the important aspects of the ETS. The summary is not exhaustive and is not a substitute for legal advice.

Covered Employers

Private Sector

Private employers with 100 or more employees at any time during the effective period of the ETS, which begins on November 5, 2021, must comply. The definition of “employee” includes all employees on an employer’s payroll, including temporary employees, part-time employees, remote employees, seasonal employees, etc. Independent contractors are not counted as employees. Staffing agency employees are considered employees of the staffing agency and are included in the staffing agency’s headcount, not the host employer’s headcount.

Employers with 100 or more employees on November 5, 2021 must continue to comply for the entire duration of the ETS even if their employee count subsequently drops below 100.

Employers with fewer than 100 employees on November 5, 2021 are not subject to the ETS; however, if headcount reaches the 100-employee threshold at any time while the ETS is in effect, then the employer must promptly comply.

State and Local Governments

State and local governmental employers with 100 or more employees in states that have state-approved OSHA programs must comply. State and local governmental employers are not

typically covered by federal OSHA requirements. However, a condition for a state receiving approval to adopt its own State Plan is that it extends federal OSHA requirements to state and local governmental employers.

Employers not Covered

The following employers are not covered under the ETS:

- Workplaces covered by other federal mandates, such as the previously issued Healthcare ETS, or federal contractor employers covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety Guidance
- State and local governmental employers in states without approved state OSHA programs
- Private employers with fewer than 100 employees, unless a state OSHA program requires them to comply

States must adopt programs that are “at least as effective as federal OSHA’s requirements;” however, OSHA allows states to adopt programs that are more expansive or stringent than the federal requirements, so it’s possible that some states may lower the compliance obligation below the 100-employee threshold.

Some states, like Montana and Texas, have laws or executive orders that may prevent vaccine or mask mandates. OSHA believes it has the authority to preempt or override any attempts by states or localities to prevent vaccination or mask mandates. According to the guidance: “OSHA intends for the ETS to preempt and invalidate any State or local requirements that ben or limit an employer’s authority to require vaccination, face covering, or testing.”

Exempt Employees

Employees who work exclusively from home, who work exclusively outdoors, or who come into the workplace only when other employees (or customers) are not present are not covered by the ETS. However, if any such worker will be entering a covered workplace during times when other employees (or customers) are present, they must either be vaccinated or be able to present a negative test result obtained within seven days of entering the workplace.

Employees with medical conditions or sincerely held religious beliefs that prevent them from 1) being vaccinated, 2)

undergoing weekly testing, and/or 3) wearing a mask may be entitled to accommodations under Title VII of the Civil Rights Act or the Americans with Disabilities Act.

Employees who have previously been diagnosed with COVID-19 are not exempt from compliance and must either be fully vaccinated or submit to weekly testing.

Full Vaccination

Employees are considered to be “fully vaccinated” two weeks after receiving a single Johnson & Johnson vaccine, or two weeks after receiving the second does of a two-dose vaccine series (i.e., Pfizer or Moderna). Booster shots and additional doses are not included in the definition of fully vaccinated under the ETS.

Testing

Employers do not have to offer a testing option. The ETS states that employers must adopt a mandatory vaccination program, but that employers may also choose to adopt a weekly testing option. As OSHA puts it, for an employer that decides to adopt a weekly testing option, “that simply means that employees themselves may choose not to get vaccinated, in which case they must get tested and wear face coverings per the requirements of the standard.”

According to the ETS, employers that choose to adopt a mandatory vaccination-only policy may suspend or terminate employees who refuse to get vaccinated, unless their refusal is due to a medical condition or sincerely held religious belief that prevents them from being vaccinated, in which case reasonable accommodations may have to be considered.

Covered employees who are not “fully vaccinated” must comply with the weekly testing requirements of the ETS. This includes unvaccinated employees, partially vaccinated employees and employees who are exempt from vaccination due to religious or disability-based restrictions.

Under the ETS, a COVID-19 test under the ETS is a test that is:

- cleared, approved or authorized, including in an Emergency Use Authorization (EUA), by the U.S. Food and Drug Administration (FDA) to detect current infection with the SARS-CoV-2 virus (e.g., a viral test);

- administered in accordance with the authorized instructions; and
- not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

Acceptable tests include tests processed by a laboratory (whether collected at home or at a testing facility), tests witnessed or overseen by the employers or professionals (including telehealth), and tests where specimen collection and processing is either done or observe by an employer. Both Nucleic Acid Amplification Tests (NAAT) and antigen tests are acceptable, so long as they are not self-administered and self-read. However, antibody tests do not meet the definition of COVID-19 test for the purposes of the ETS.

The ETS does not require employers to pay for any costs associated with testing, although employers can choose to do so. Individual state or local laws may influence whether employers must cover the costs of testing. Group health plans are not required to cover COVID-19 testing for employment purposes.

Employees who fail to provide a weekly test result must be removed from the workplace until they can provide a negative test result.

Mask Requirements

Fully vaccinated employees are not required to wear masks. Any employee who is not fully vaccinated must wear a mask while in the workplace and when occupying a vehicle with another person for work purposes except under the following circumstances:

- when the employee is alone in a room with floor to ceiling walls and a closed door.
- for a limited time while they are eating or drinking at the workplace, or for identification purposes in compliance with safety and security requirements.
- when the employee is wearing a respirator or facemask.
- where the employer can show that the use of face coverings in infeasible or creates a greater hazard that would excuse compliance (e.g., when it is important to see the employee’s mouth for reasons related to their job

duties, when the work require the use of the employee's uncovered mouth, or when the use of a face covering presents a risk of serious injury or death to the employee).

Employer Support for Vaccination

Employers are required to provide employees with up to four hours of paid time off (PTO) from work for each required dose for a primary vaccination. Booster shots are not considered part of the primary vaccination series. Employees cannot be required to use sick, vacation or PTO time to cover these four hours.

Employers are required to provide “reasonable time and paid sick leave” to employees who suffer side effects from receiving a vaccination and need time off to recover. Available PTO or paid sick time may be used to cover these absences, but if employees don't have enough accrued time to cover their absence, employers will have to pay for the remaining time off, and cannot advance PTO or sick leave which would result in the employee having a negative balance. The ETS does not require employers to provide PTO in connection with weekly testing, positive test results or quarantining or isolation. It should be noted that state or local laws may impose pay obligations under some of these scenarios.

Information to Provide to Employees

The ETS requires employers to adopt a robust compliance policy and inform employees, in a language and at a literacy level the employee understands, about the key components of their compliance plan including, but not limited to, the following:

- requirements for COVID-19 vaccination
- applicable exclusions from the written policy (e.g., reasonable accommodations for workers with disabilities or sincerely held religious beliefs)
- information on determining an employee's vaccination status and how this information will be collected
- paid time and sick leave for vaccination purposes and recovery from side effects
- employee obligations to provide prompt notification of positive COVID-19 tests and the employer's removal practices when notified of a positive test result of COVID-19-positive employees from the workplace
- testing and masking requirements
- disciplinary consequences for employees who do not abide by the policy
- vaccine efficacy, safety and the benefits of being vaccinated (by providing the Centers for Disease Control and Prevention (CDC) document “Key Things to Know About COVID-19 Vaccines”)
- protections against retaliation and discrimination
- OSHA's prohibitions that impose criminal penalties for knowingly supplying false statements or documentation

Recordkeeping Requirements

Employers are required to keep a list of employee vaccination status that clearly indicates for each employee whether they are:

- fully vaccinated
- partially vaccinated
- not fully vaccinated because of a medical or religious accommodation
- not fully vaccinated because they have not provided acceptable proof of their vaccination status (includes employees who have chosen not to get vaccinated and have opted for weekly testing instead)

The following documents are considered acceptable for proof of vaccination:

- the record immunization from a healthcare provider or pharmacy
- a copy of the U.S. COVID-19 Vaccination Record Card
- a copy of medical records documenting the vaccination
- a copy of immunization records from a public health, state, or tribal immunization information system

- a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the healthcare professional(s) or clinic site(s) administering the vaccine(s).

Employers who have adopted a weekly testing option must maintain a record of each weekly test result for every employee subject to testing for the duration of the ETS. Test results are considered medical records under both the ETS and the Americans with Disabilities Act.

Employers must provide employees access to and copies of their individual test records upon request. In addition, upon request, employers must provide employees or employee representatives (such as union representatives) with the aggregate number of fully vaccinated employees at the workplace by the end of the next business day after the request. There is no limit on the number of times these requests can be made. Employers are also required to respond to requests from OSHA for certain records.

Positive Test of Employee/Close Contact with Positive Case

An employee who has tested positive must immediately be removed from the workplace until they either:

- receive a negative result on a COVID-19 NAAT test following a positive result on a COVID-19 antigen test (NAAT tests are less likely to provide false positives);
- meet the return-to-work criteria in the CDC's isolation guidance; or
- receive a recommendation to return to work from a licensed healthcare provider.

Employees who have tested positive for COVID-19 and returned to the workplace should be not subjected to weekly testing for 90 days following the date of their positive test.

The ETS does not require employees who have been exposed to someone diagnosed with COVID-19 to be quarantined; however, the CDC continues to recommend that unvaccinated employees be quarantined after close, prolonged contact with a COVID-positive person, and OSHA encourages employers to consider a quarantine protocol.

The ETS does not require contract tracing. However, the CDC continues to recommend contact tracing. Some state/local laws may also require contact tracing.

Employers must report each work-related COVID-19 fatality to OSHA within eight hours of learning of the fatality and each work-related COVID-19 in-patient hospitalization within 24 hours.

Penalties

Employers that do not timely comply with the OSHA ETS may face penalties of \$13,653 per violation for 2021 (2022 amounts not yet available). Willful or repeated violations can result in penalties of \$136,532 per violation. States that operate their own OSHA plans must adopt maximum penalty levels that are at least as effective as federal OSHA.

Employer Action

Though the outcome of the legal challenges remains uncertain, employers should prepare for compliance with the ETS. Employers should review their preparedness using the checklist below:

By January 10, 2022, covered employers must have the following in place:

- Determine whether you will adopt a vaccination only policy, or a vaccination plus testing policy.
- Establish a vaccination policy. OSHA provides a sample mandatory vaccination policy and a sample vaccination or testing/facing coverage policy at <https://www.osha.gov/coronavirus/ets2>
- Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and a roster of vaccination status.
- Provide support for employee vaccination.
- Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis.
- Remove any employee from the workplace who received positive COVID-19 test or COVID-19 diagnosis.

- ❑ 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 about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation.
- ❑ Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours.

By February 9, 2022:

- ❑ Ensure employees who are not fully vaccinated and who have indoor contact with others as part of their jobs are tested for COVID-19 at least weekly or within 7 days before returning to work if away from the workplace for a week or longer.