

Publications

OSHA Issues New COVID-19 Emergency Temporary Standard for Large Employers

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On November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued a long awaited emergency temporary standard (the ETS) on COVID-19. Broadly speaking, the ETS requires employers with 100 or more employees to ensure their workforce is fully vaccinated or require any unvaccinated employees to produce a weekly negative test and wear a mask in order to work.

Here are the details:

Who is Covered by the ETS?

The ETS applies to private employers with 100 or more employees company-wide. Part-time employees and employees who work at home or in the field must be included in the count. Employers are not required to count workers from staffing agencies who work at their site. In states with OSHA-approved State Plans, state and local government employers with 100 or more employees will also be covered by the ETS through state OSHA requirements.

The following workplaces are **not** covered by the ETS: (1) workplaces covered under the September 2021 COVID-19 Executive Order for Federal Contractors and Subcontractors; (2) health care settings where any employee provides health care services or health care support services when subject to the requirements of 29 C.F.R. § 1910.502 (OSHA's Health Care COVID-19 Emergency Temporary Standard); (3) workplaces of employers who have less than 100 employees company-wide; and (4) public employers in states without State Plans.

Even if the ETS applies to an employer, it does not apply to employees: (1) while working from home; (2) who work exclusively outdoors; or (3) who do not report to a workplace where other persons are present.

What Does the ETS Require?

The ETS requires employers to comply with the following requirements:

- Implement either: (1) a mandatory COVID-19 vaccination policy; or (2) a policy that requires unvaccinated employees to undergo weekly testing and wear a face covering at work in most circumstances. If an employer has workers who are exempt from a mandatory vaccine policy due to medical restrictions, disability, or religious beliefs, the employer must maintain a testing/face covering policy applicable to such persons.
- Obtain proof of vaccination from vaccinated employees and maintain a record of each employee's vaccination status.
- Provide employees with a reasonable amount of paid time off (up to 4 hours) to receive each primary vaccination dose.
- Provide employees with a reasonable amount of time and paid sick leave (up to 2 days) to recover from side effects experienced from each primary vaccination dose.
- Ensure each employee who is not fully vaccinated is tested for COVID-19 weekly or, if away from a work location for a week or more, within 7 days before returning to the work location. Employers must retain a record of each employee test result.
- Require employees to promptly provide notice when they test positive for or are diagnosed with COVID-19, and keep such employees out of the workplace until specified return-to-work criteria are met.
- Require employees who are not fully vaccinated to wear a face covering when indoors or in a vehicle with another person for work purposes (with limited exceptions). Employers are not required to pay for any costs associated with face coverings.
- Provide employees with information regarding the following (in a language and at a literacy level the employee understands):
 - The ETS and related employer policies (OSHA has provided sample policy templates for this purpose; see <https://www.osha.gov/coronavirus/ets2>);
 - OSHA's anti-retaliation provisions; and
 - OSHA's criminal penalties for knowingly supplying false statements or documentation.
- Provide employees with a copy of the CDC document, "Key Things to Know about COVID-19 Vaccines," available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
- Report work-related COVID-19 fatalities to OSHA within 8 hours of learning about them and work-related COVID-19 in-patient hospitalizations within 24 hours of learning about them.
- Make certain records available for examination and copying by employees (or others having written consent of the employee) or an employee representative, including the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

Who Pays For COVID-19 Tests for Unvaccinated Employees?

The ETS provides that employers are not required to pay for any costs associated with COVID-19 testing required by the ETS. However, the ETS also notes that employer payment for such testing may be required by other laws, regulations, or collective bargaining agreements. This is an area of significant legal uncertainty, particularly for employers with operations in California and other states with employee-friendly wage and hour laws.

What Type of COVID-19 Tests are Accepted?

The ETS allows for the use of any COVID-19 diagnostic test cleared, approved, or authorized, including in an Emergency Use Authorization, by the FDA. However, an employee cannot both self-administer and self-read the test unless the process is observed by the employer or by an authorized telehealth proctor. Antibody tests do not satisfy the testing requirement of the ETS.

What about Accommodation Requests?

The ETS notes that employees may be entitled to a reasonable accommodation for disability or a sincerely held religious belief, observance, or practice. Employers are instructed to consult EEOC regulations and guidance for additional information.

When Does the ETS Take Effect?

By December 5, 2021, employers must comply with all of the ETS provisions, except for the unvaccinated worker testing requirement. The testing requirement goes into effect on January 4, 2022. Numerous legal challenges to the ETS are expected before the requirements take effect.

Vorys attorneys will be providing a free webinar regarding the OSHA ETS on November 8, 2021 at 12pm (ET). You can register here. The webinar will also address the rule issued by the Centers for Medicare & Medicaid Services (CMS) requiring workers at Medicare and Medicaid participating facilities to be vaccinated.

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VORYS COVID-19 TASK FORCE

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](https://www.vorys.com/coronavirus).