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OSHA COVID-19 Vaccination and Testing Rules for Large Employers are Paused by Legal Challenges

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) published a new emergency temporary standard (the ETS) regarding COVID-19 on November 5, 2021. This Alert discusses the requirements of the ETS and some of the legal challenges that have led OSHA to pause implementation and enforcement in the near future.

Who is Covered

The ETS covers all private employers with 100 or more employees and is estimated to apply to more than 84 million workers. For purposes of the 100 or more employee calculation, part-time, temporary, or seasonal employees, and fully-remote employees count, but independent contractors and employees of a staffing agency do not. However, the ETS requirements will not apply to certain employees that count towards the 100 or more calculation, including employees working from home, employees who do not report to a workplace where others are present, and employees who work exclusively outdoors.

Key Takeaways

Under the ETS, covered employers must either (1) develop, implement, and enforce a mandatory COVID-19 vaccination policy or (2) adopt a policy requiring employees to choose to either be vaccinated or undergo regular COVID-19 testing and wear a face covering at work.

If the employer implements a mandatory vaccination policy, it still must allow certain exemptions for religious or medical reasons. Those exempted employees will be subject to the testing and masking requirements set forth in the ETS, unless an employee is also exempted from those requirements for religious or medical reasons.

The Bottom Line

Employers with 100 or more employees should become familiarized with the OSHA ETS in the event the ETS is upheld following the resolution of numerous legal challenges.

The ETS requires employers to implement and distribute a written policy to employees covering mandatory vaccination or compliance with regular COVID testing and face covering.

The rules also address collection of employee vaccination and testing information, paid sick leave, and informational materials that should be distributed to employees.

The ETS also requires employers to provide up to four hours of paid time off to workers for each of their primary vaccination doses, which cannot be offset by any other leave that the employee has accrued. Employers must also provide “reasonable time” and paid sick leave to recover from any side effects, which can be offset by accrued paid sick leave, but not other types of paid leave (if employers specify between different types of leave). While the ETS does not specify what “reasonable time” is for purposes of recovering from side effects of the vaccine, the associated FAQs provided by OSHA indicate that a cap of two days sick leave will generally be a reasonable amount of time in the absence of an uncommonly severe reaction.

The ETS also requires employers to do the following:

- >> Determine the vaccination status of each employee, obtain acceptable proof of vaccination status from vaccinated employees, and maintain records and a roster of each employee’s vaccination status in a confidential medical record separated from regular personnel files. Employers that have previously collected from employees a physical or digital copy of documentation showing vaccination status do not need to collect this information again.
- >> Require employees to provide prompt notice when they test positive for COVID-19 or receive a COVID-19 diagnosis. Employers must then remove the employee from the workplace, regardless of vaccination status, and cannot allow them to return to work until they meet the required criteria. While the ETS does not require employees to provide paid time off following removal as a result of a positive test result or diagnosis of COVID-19, paid time off may be required by other state and local laws. Following an employee’s positive test or diagnosis of COVID-19, employers must not require regular testing of that employee for 90 days.
- >> Ensure each worker who is not fully vaccinated is 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), obtain each documentation of the required test results from each employee, and maintain records of those test results. If an employee does not provide the required test results, the employee cannot return to the workplace.
- >> Ensure that each employee who has not been fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes, subject to certain limited exceptions.
- >> Inform OSHA of each work-related COVID-19 hospitalization within 24 hours of learning about it and each work-related COVID-19 fatality within 8 hours of learning about it.

The ETS does not require employers to pay for testing, though employers may be required to pay for testing to comply with other laws, regulations, collective bargaining agreements or other collectively negotiated agreements.



The ETS also requires that employers make available to employees for examination and copying each employee's own vaccine documentation and test results and to make available the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

The ETS also requires that employers inform each employee and new hire—in a language and at a literacy level the employee understands—about the requirements, the policies and procedures established to implement those requirements, as well as certain additional vaccine and OSHA information (discussed further below).

The ETS preempts states from adopting and enforcing workplace requirements relating to the occupational safety and health issues of vaccination, wearing face coverings, and testing, except under the authority of an OSHA-approved State Plan. However, the ETS makes clear that its purpose is only to establish minimum requirements that employers must implement. The New York Department of Labor has not yet advised on whether the ETS supersedes obligations under the HERO Act.

OSHA has provided additional resources regarding the ETS, including a [Fact Sheet](#) setting forth the rationale and scope of the ETS, [Summary](#) of key points about the binding rules, and [FAQs](#) that OSHA will update as it receives questions from employers.

Next Steps for Employers

Employers should be mindful that the following key dates and requirements may be delayed due to pending legal challenges:

By December 6, 2021

- >> Create, or review and revise as necessary, a written policy regarding vaccination and masking requirements. OSHA has provided two sample policies: (1) [requiring all workers to be vaccinated](#) and (2) [permitting workers the choice to remain unvaccinated, as long as they comply with testing and face covering rules](#);
- >> Provide employees with a copy of the written policy;
- >> To the extent that the employer has not already done so, collect and maintain as a confidential medical record information regarding employees' vaccination status;
- >> Provide employees with the following document about the vaccine: [Key Things to Know About COVID-19 Vaccines](#);
- >> Inform employees of OSHA's non-retaliation rules, summarized in the following Fact Sheet: [Workers' Rights under the COVID-19 Vaccination and Testing ETS](#).



- >> Inform employees of the penalties for non-compliance with the policies and procedures required by the ETS, summarized in the following Fact Sheet: [Information for Employees on Penalties for False Statements and Records](#).

By January 4, 2022

- >> Ensure that unvaccinated employees are complying with the testing requirements.

Uncertainty Surrounding Legal Challenges to OSHA's Rules

Legal challenges to the ETS have been brought in federal courts across the country. In one region of the country spanning Louisiana, Mississippi, and Texas, the United States Court of Appeals for the Fifth Circuit issued a temporary restraining order and, more recently, granted a motion to stay the ETS after briefing by the parties, which freezes enforcement of the ETS. Following the Fifth Circuit's ruling, OSHA issued a statement that it "has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation."

In light of the numerous challenges brought in various federal courts, the United States Judicial Panel on Multidistrict Litigation consolidated all cases for review by a single Court of Appeals to be determined by random selection lottery. On November 16, 2021, the Sixth Circuit (which sits in Cincinnati, Ohio and traditionally covers Kentucky, Michigan, Ohio, and Tennessee) was identified as the court that will conduct the consolidated review. Initially, a panel of judges from the Sixth Circuit will review the case and decide whether the panel agrees with the Fifth Circuit's decision, or whether that order should be modified or vacated. There remain several potential twists and turns before a definitive verdict on the constitutionality of the ETS is handed down, as a party may petition to have the full Sixth Circuit review the case sitting *en banc*, or appeal the case up to the U.S. Supreme Court following an unfavorable ruling. Ultimately, that ruling may not come for weeks or months. In light of this uncertainty, employers are encouraged to familiarize themselves with the requirements of the ETS so that they are prepared to implement the requirements in the event that the ETS is ultimately upheld.

For More Information

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