

## INSIGHTS

## OSHA Issues COVID-19 Emergency Temporary Standard Requiring Employee Vaccination or Weekly Testing

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Today the Occupational Safety and Health Administration (“OSHA”) published its “COVID-19 Vaccination and Testing; Emergency Temporary Standard” (the “ETS”) in the [Federal Register](#). The ETS applies to employers with a total of 100 employees or more, based on OSHA’s rationale that employers of at least that size “have the administrative capability to implement the standard’s requirements promptly” and have the largest facilities, where the “most deadly outbreaks of COVID-19 can occur.” Counting employees for purposes of the 100-employee threshold includes all of an employer’s employees located in the United States, regardless of full-time/part-time status, and regardless of whether the employee works on-site or remotely.<sup>1</sup>

The ETS is temporary – lasting for a maximum of 6 months – but also serves as a proposal for a permanent standard under Section 6(b) of the Occupational Safety and Health Act of 1970 (“OSH Act”). Accordingly, OSHA is requesting comments on a variety of topics, including the ability of employers with fewer than 100 employees to implement the ETS, scientific information on natural immunity from a prior COVID-19 infection, employer experience with COVID-19 vaccination and testing policies, and other measures taken by employers to protect employees against COVID-19 in the workplace.

### Requirements for Covered Employers

Identifying vaccination as “the most effective and efficient workplace control available,” the ETS requires that covered employers:

- Implement a mandatory vaccination policy, with an exception for employers that instead implement a policy allowing employees to elect either to be vaccinated **or** to undergo weekly COVID-19 testing and wear a face covering at the workplace
  - A “mandatory vaccination policy” is an employer policy requiring each employee to be fully vaccinated, including newly hired employees, “other than those employees (1) for whom a vaccine is medically contraindicated, (2) for whom medical necessity requires a delay in vaccination, or (3) those legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely-held religious beliefs, practices, or observances that conflict

with the vaccination requirement.”

- For employers that implement a policy with a testing option, each employee who is not fully vaccinated<sup>2</sup> and who reports at least once every seven days to a workplace where other individuals such as coworkers or customers are present, must (1) be tested for COVID-19 at least once every seven days; and (2) provide documentation of the most recent COVID-19 test result to the employer no later than the seventh day following the date on which the employee last provided a test result
  - Testing must be completed using an FDA approved or authorized test, administered in accordance with its instructions, and cannot be self-administered and self-read unless observed by the employer or authorized telehealth proctor
  - All test results must be maintained by the employer, as a confidential medical record, for as long as the ETS is in effect
  - Employees who do not provide documentation of a COVID-19 test result on time must be removed from the workplace until a negative test result is provided
  - Employees who test positive for, or are diagnosed with, COVID-19 are not required to undergo testing for 90 days following the date of the positive test or diagnosis
  - Employees who during a period of seven or more days, do not report to a workplace where other individuals such as coworkers or customers are present (e.g., teleworking for two weeks prior to reporting to a workplace with others) must (1) be tested for COVID-19 within seven days prior to returning to the workplace; and (2) provide documentation of that test result to the employer upon return to the workplace
- Implement a comprehensive written policy setting out the ETS requirements (regardless of whether the policy mandates vaccination or allows testing), including evaluating current policies for compliance with the ETS requirements
- Immediately remove from the workplace any employee who receives a positive COVID-19 test or a COVID-19 diagnosis
- Require employees who are not fully vaccinated to wear face coverings when they are working near others, including any time the employee is indoors (or in a vehicle with another person for work purposes) except:
  - When alone in a room with a closed door

- For a limited time while the employee is eating or drinking
  - For a limited time for identification purposes in compliance with safety and security requirements
  - When wearing a respirator or face mask (a “medical procedure mask” such as surgical mask)
  - When the use of the face covering is not feasible or creates a greater hazard
- Provide reasonable time off during working hours for employees to be vaccinated, including up to four hours of paid time
  - Provide reasonable time and paid sick leave needed for an employee to recover from side effects of vaccination dose(s), which may include requiring the employee to use available paid time off
    - If no paid time is available, an employer cannot require the employee to “go negative” on sick or paid time off balances
    - The ETS does not provide a limit on recovery time, but employers may implement a “reasonable” cap, and OSHA will presume that up to two days is reasonable
  - Timely report to OSHA work-related COVID-19 fatalities (within 8 hours) or hospitalizations (within 24 hours) after learning about the fatality or hospitalization (notably these requirements effectively already exist under OSHA’s general workplace fatality/hospitalization reporting regulations).
  - Provide employees with specific information about their rights and responsibilities in a language and at a literacy level that the employee can understand, including:
    - The requirements of the ETS and the employer’s policies implementing the ETS
    - COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated (using a specific CDC-published document)
    - Information about the OSH Act’s prohibitions on retaliation
    - Information regarding criminal penalties for knowingly providing false statements or documentation
  - Upon request, timely provide:
    - An employee—or an individual with written consent from such employee—with the employee’s COVID-19 vaccination documentation and any test results (by the end of the next business day)

- Aggregate number of fully vaccinated individuals at the workplace and total number of employees at the workplace to any requestor (by the end of the next business day)
- To OSHA the documents required to be prepared or maintained under the ETS
  - The employer’s policy and information on the aggregate number of fully vaccinated individuals at the workplace and total number of employees at the workplace within 4 hours of the request
  - All other requested records or documents by the end of the next business day

OSHA emphasizes that “a vaccination mandate [i]s the preferred compliance option.”<sup>3</sup>

All covered employers must require each employee to provide proof of vaccination status and “maintain a record and roster of each employee’s vaccination status,” which is subject to legal requirements for confidentiality and medical information. A variety of documents would constitute “acceptable proof of vaccination status.”<sup>4</sup> Further, a signed and dated employee attestation is acceptable in instances when an employee is unable to produce proof of vaccination, provided that the attestation includes specific language about providing false information subjecting the employee to criminal penalties. Notably, employers must “preserve acceptable proof of vaccination for each employee” in addition to a roster of employee vaccination status.

Noting that the circumstances required OSHA to quickly issue the ETS, OSHA “has not required employers to implement a comprehensive and multilayered set of COVID-19 exposure controls in this ETS.”

#### **Employees and Workplaces Excluded from Coverage**

Importantly, ETS requirements do not apply to employees (1) who do not report to a workplace where other people are present, (2) while working from home, or (3) who work exclusively outdoors. OSHA states that employers who choose not to implement a mandatory vaccination policy may consider “alternative feasible measures that would remove employees who remain unvaccinated from the scope of this ETS, such as increasing telework.”

In addition to employers with fewer than 100 employees, the ETS does not apply to (1) federal contractor workplaces covered by Executive Order 14042, or (2) settings where employees provide healthcare services or healthcare support services subject to OSHA’s June 2021 Healthcare ETS.

#### **Timing for Compliance**

The ETS provides a 30-day period for compliance with all provisions other than the testing requirement; accordingly, employers must meet the majority of their ETS obligations by **December 6, 2021**. The requirement for testing for employees who are not fully vaccinated begins on **January 4, 2022**, which is 60 days after the effective date.

### **Paying for Testing**

Regarding paying for testing, “the ETS does not require employers to pay for the costs associated with regular COVID-19 testing or the use of face coverings.” However, employers must be mindful of other legal obligations that could require that they employer pay for testing or time spent testing, such as state law wage-and-hour or medical examination obligations or collective bargaining agreements.

### **Contrary State Legal Authority**

Some states have issued Executive Orders that prohibit or limit private workplace vaccination requirements, including – as cited by the ETS – Texas, Montana, and Arkansas. The ETS directs that it “preempt[s] inconsistent state and local requirements, including requirements that ban or limit employers’ authority to require vaccination . . . and will therefore provide the necessary legal authorization to covered employers to implement mandatory vaccination policies, if they choose to comply in this preferred manner.”

Employers will need to review the language of any state-issued orders to determine whether compliance with both the order and the ETS can be achieved. Also, creative solutions may be available to comply with both the ETS and state obligations, such as allowing certain employees to telework. However, again, the ETS expressly directs state restrictions on mandatory vaccination programs by employers are preempted by the ETS.

### **Potential Challenges to the ETS**

There is no doubt there will be lawsuits challenging the ETS and the outcome of such litigation is uncertain.

### **Going Forward**

Bracewell is available to assist you with analyzing your obligations under the ETS, drafting and implementing the required written policies and procedures, and responding to employee questions and concerns about COVID-19 and the vaccination/testing requirement.

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1. The ETS does not specifically address how to count employees of related or affiliated companies. It would seem likely that a traditional integrated or single employer analysis would apply. Such analysis evaluates the inter-relatedness of the companies, such as common management, interrelation between operations, centralized control of labor relations, and degree of common ownership or financial control.
  2. Employees who are partially vaccinated are treated as not fully vaccinated for purposes of the testing requirement.
  3. OSHA notes that regular testing and wearing face coverings are “less protective” than vaccination, but chose not to impose a strict vaccination mandate “given that [OSHA] has never previously used its authority to strictly mandate vaccination.”
  4. Acceptable proof of vaccination can include: the record of immunization from a health care provider or pharmacy; a copy of the 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; or a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the

health care professional(s) or clinic site(s) administering the vaccine(s).