



**OSHA ISSUES RULE  
MANDATING VACCINES OR TESTING  
FOR LARGER EMPLOYERS  
U.S. COURT OF APPEALS (5<sup>TH</sup> CIRCUIT) IMMEDIATELY ISSUES STAY**

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard (ETS) mandating large employers to require COVID-19 vaccination or weekly testing of employees. The federal ETS will automatically take effect in states such as Idaho that do not have their own federally approved programs addressing workplace safety. Oregon, Washington, and 19 other states have adopted federally approved workplace safety programs. These states must adopt their own rules that are either identical to or more stringent than those outlined in the ETS.

**1. Fifth Circuit Stay**

On Saturday, November 6, 2021, the U.S. Court of Appeals for the Fifth Circuit (covering the states of Mississippi, Louisiana, and Texas) issued an injunction staying the effectiveness of the ETS. The stay is not limited to the Fifth Circuit but covers the entire nation. This case is on a fast track for resolution. The federal government must file its brief by 5:00 pm November 8, 2021 and the petitioners must file their responsive brief by 5:00 pm the next day. The court may decide the case without oral argument, or it may schedule oral argument that would presumably occur later in the week of November 8, 2021. It is likely that whichever side loses will appeal to the U.S. Supreme Court, which would presumably also hear the case on a highly expedited schedule.

The ETS already provides a very short compliance timeline. If the ETS is ultimately upheld after appeals have been exhausted, the timeline will be even shorter. Covered employers would do well to have their compliance plans in place so that they can move quickly if the ETS is upheld. Actual implementation of those plans can await the outcome of the litigation.

**2. Effective Date, Compliance Deadlines, and Proposed Rule**

The ETS becomes effective immediately upon publication in the Federal Register on November 5, 2021. The ETS also serves as a Proposed Rule that would create a final standard under Section 6(b) of the OSH Act. Accordingly, OSHA seeks comment on all aspects of this ETS and how it would be adopted as a final standard. Oregon and Washington have 30 days from the date of publication to issue their independent regulations/rules.

Compliance deadlines for state rules must conform to those in the ETS. Thus, in all states, the compliance deadlines are:

- December 6, 2021: Employers are required to adopt policies and comply with all aspects of the ETS except for mandatory testing of unvaccinated employees
- January 4, 2022: Employers must implement mandatory testing for unvaccinated employees.



### 3. Coverage

a. **Covered Employers.** The ETS generally applies to employers in all workplaces that are under OSHA's authority and jurisdiction, including industries as diverse as financial services, manufacturing, retail, delivery services, warehouses, meatpacking, agriculture, construction, logging, maritime, and healthcare. Within these industries, all employers who have a total of at least 100 employees firm or corporate-wide, at any time the ETS is in effect, are covered.

Work locations that are subject to the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors are not covered by the ETS. This creates the possibility that credit unions who lease one or more branches from the federal government may be subject to one set of requirements for branches not leased from the federal government and another set of requirements for branches that are leased from the federal government (once those branch leases are amended to comply with the guidance). Remember that such locations are not covered by the Task Force contractor guidance until the contract (i.e. branch lease) is amended to add the compliance clause required by Executive Order. This would ordinarily come at the next renewal or extension of the agreement. Those locations would be subject to the OSHA ETS until they become covered by the Task Force contractor guidance.

b. **Covered Employees.** The ETS applies to employees of covered employers who report and work at an employer workplace. However, the ETS does not apply to:

- Employees who do not report to a workplace where other individuals such as coworkers or customers are present (i.e., an employee who is the sole employee in a particular location)
- Employees while they are working from home
- Employees who work exclusively outdoors.

### 4. Compliance Requirements.

a. **Required Employer Vaccination or Vaccination/Testing Policies.** The ETS requires covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy or vaccination/testing policy, with narrow exceptions. Employers who elect not to impose a vaccination only policy may establish a vaccine/testing policy which requires employees who are not fully vaccinated to undergo weekly COVID testing and wear masks while in the workplace.

b. **Mandatory Testing.** Employers must ensure that their employees who are not fully vaccinated against COVID-19 by January 4<sup>th</sup> test negative for COVID-19 at least once a week. Anyone that has not provided evidence of a negative test within the past seven days must be excluded from the workplace. Employees who have received both shots of Moderna or Pfizer or one shot of Johnson & Johnson by January 4<sup>th</sup> need not be tested even if they have not yet fulfilled the waiting period to qualify as "fully vaccinated."

c. **Workers Not Fully Vaccinated Must Wear Masks.** Covered employees who are not fully vaccinated must also wear face coverings while working or on a work location.



The ETS requires employers to ensure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances. Interestingly, the ETS states that only employees who are not fully vaccinated must wear a face covering at the workplace. Currently, Oregon and Washington state laws impose a more strict requirement regardless of vaccination status.

Of course, employees, regardless of vaccination status, may elect to voluntarily wear a face covering unless it creates a serious workplace hazard (e.g., interfering with the safe operation of equipment). Further, state laws may continue to impose face-covering requirements regardless of vaccination status.

**d. Employer Determination of Employee Vaccination Status.** The ETS requires employers to determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status.

**e. Employer Support for Employee Vaccination.** The ETS distinguishes between the type of paid time for obtaining the vaccine and recovery of the vaccine side effects. The ETS requires employers to support vaccination by providing employees reasonable time, including up to four hours of regular paid time during the regularly scheduled work day. Employers cannot require the use of PTO, sick leave or vacation for obtaining the vaccine during regular work hours. If an employee elects to obtain the vaccine on the weekend or other not regularly scheduled work hours, the employer does not need to provide regularly paid work hours. However, the employer may not require an employee to obtain the vaccine during non-work hours.

Then, if an employee experiences negative side-effects from the vaccine, the employee is entitled to take protected leave and an employer may require the use of sick hours or PTO hours, but not vacation hours, for this time for a reasonable period of time. OSHA has suggested up to two days will be viewed as a reasonable period and that employers may set a cap at that amount of time following each required dose. This does not apply to booster shots.

**f. Mandatory Testing for Unvaccinated Employees.** The ETS requires covered employers to ensure that each employee who is not fully vaccinated is tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer). While nothing prohibits employers from voluntarily assuming the costs associated with testing, the ETS is designed to push workers to choose vaccinations over testing, as the ETS does not require employers to pay for or provide testing to workers who decline the vaccine. However, it is critical to note that federal or state laws may require an employer to cover the cost of testing. Specifically, minimum wage laws may require the employer to cover the cost of test if such cost takes the employee below minimum wage on any day. We will be providing more guidance on this issue. In addition, the state OSHA agencies may also impose more strict requirements imposing coverage of the cost.



Another burden of testing unvaccinated employees is that while the OSHA approved tests include both the 1) NAAT and 2) antigen diagnostic tests (which can be over the counter), the test cannot be both “self-administered” and “self-read.” This imposes a burden on the employer to either administer and read or at least read the weekly tests. The tests can be validated through the use of a proctored test that is supervised by an authorized telehealth professional or the employer can proctor the test in house.

**g. Employee Notification of Positive Testing & Removal.** The ETS requires employers to implement notification protocols to monitor employee status and to require removal of employees testing positive from the workplace. These requirements include:

**h. Employee Notice.** Employees must promptly provide notice to the employer when they receive a positive COVID19 test or are diagnosed with COVID-19.

**i. Removal of Employee.** Employers must immediately remove any employee from the workplace, regardless of vaccination status, who received a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider. Employees who receive a negative NAAT test after a positive antigen test may return to work due to a “false positive.” Also employers must keep removed employees out of the workplace until they meet criteria for returning to work.

It is important to note that this ETS does not require employees who fit the definition of close contact with a COVID-19+ individual to be removed. Under this ETS, employees must only be removed if they have tested positive for or been diagnosed with COVID-19. Of course, the state OSHA requirements may impose more strict standards.

**j. Required ETS Information Disclosures to Employees/ Written Policy.** The ETS requires employers provide federal information disclosures to employees in a language and at a literacy level the employees understand. Typically, this information will be provided in a written policy requiring the vaccine or alternative testing. The required federal disclosures include:

- Information about the requirements of the ETS and workplace policies and procedures established to implement the ETS;
- A CDC document “*Key Things to Know About COVID-19 Vaccines*”;
- Information about protections against retaliation and discrimination; and
- Information about laws that provide for criminal penalties for knowingly supplying false statements or documentation. Employers should refrain from providing any information beyond the federal required disclosures to avoid risk of false information dissemination.

**k. Employer COVID Reporting to OSHA.** The ETS contains significant new employer reporting requirements. The ETS requires employers to 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 the employer learning about the hospitalization.



**I. Availability of Employer Records.** Certain employer records related to its policies, practices, and workplace conditions are now open to full availability to employees, setting up employers to the risk of lawsuits and de-facto enforcement of the federal mandates of the ETS.

The ETS requires employers to make available for examination and copying an employee's COVID-19 vaccine documentation and any COVID-19 test results to that employee and to anyone having written authorized consent of that employee. Availability of records are not limited to individual employee records, but extend to aggregate workplace information of an employer. Employers are also required to make available to an employee, or an employee representative (attorney or health care provider, power of attorney, etc.), the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

## 5. Federal Preemption

There are a number of states who have passed legislation in an attempt to prohibit vaccine mandates. There is also litigation targeted at dismantling this ETS. OSHA claims that (under the Supremacy Clause of the U.S. Constitution) its ETS preempts state laws that prohibit or limit employers' authority to require employees to be vaccinated.

## 6. Enforcement & Penalties

With only a couple thousand state and federal OSHA inspectors nationwide, compliance with the ETS may be largely a matter of self-enforcement. However, OSHA inspectors will respond to employee complaints. Employers who violate the rule can face fines of up to \$13,653 per violation for serious violations and 10 times that for willful or repeated violations.

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