

OSHA VACCINE MANDATE

This memorandum contains information known as of November 5, 2021 concerning the OSHA Emergency Temporary Standard (ETS) that was published on November 4, 2021. To the extent additional information or guidance becomes available, Lewis Thomason will work to update this information accordingly.

The OSHA Emergency Temporary Standard (ETS) applies to employers with 100 or more employees. To determine whether your workplace is covered, consider that the number of employees includes:

- Full-time *and* part-time employees
- Employees who work from home
 - Employees who **exclusively** work from home are not subject to the requirement that employees get vaccinated or submit to weekly tests but are counted in the number of employees.
- Employees who work outdoors
 - Employees who **exclusively** work outdoors are not subject to the requirement that employees get vaccinated or submit to weekly tests but are counted in the number of employees.
- Employees at different locations
 - In other words, it is the company-wide number of employees that counts, not the number of employees at each individual location.
- **EXCEPTION:** Employees staffed by a temporary staffing agency do not count toward the 100-employee threshold

Deadlines for covered employers:

- By **December 5, 2021**, employers must be in compliance with all ETS rules, except for the testing requirement, including the following:
 - Employers must provide employees with a reasonable amount of paid time off, up to a total of four (4) paid hours to get vaccinated, including the time to register for the vaccine, the time to travel to and from the vaccination site, and the time spent at the vaccination site.
 - Additionally, employers must provide a reasonable amount of time and paid sick leave to recover from any negative side effects.
 - Employers must require employees who are not fully vaccinated to wear face-coverings while in the workplace.
- By **January 4, 2022**, employers must adopt a written policy that mandates COVID-19 vaccinations and requires unvaccinated employees to comply with the policy by wearing a face covering in the workplace *and* show proof of a negative COVID-19 test once per week.

- This regulation does not preempt the requirement that **federal contractors** require their employees to be vaccinated by **December 8, 2021**. There is no negative test alternative for federal contractors.

Vaccine Exemptions

- Employers may adopt a policy that provides exemptions to employees who fall into one of three categories:
 1. those for whom a vaccine is medically contraindicated,
 2. those for whom medical necessity requires a delay in vaccination, or
 3. those who are 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.
- Employees who fall under one of these three exemptions must still comply with the testing and masking requirements applicable to all unvaccinated employees.

Verifying Employee Vaccination Status

- Employers may adopt a policy that allows verification of employee vaccination status by any of five ways:
 1. the record of immunization from a health care provider or pharmacy;
 2. a copy of the COVID-19 Vaccination Record Card;
 3. a copy of medical records documenting the vaccination;
 4. a copy of immunization records from a public health, state, or tribal immunization information system; or
 5. 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).
 6. Where an employee is unable to produce proof of vaccination, the employer may verify the employee's vaccination status by an employee's signed and dated statement (1) attesting to their vaccination status; (2) attesting that they have lost or are otherwise unable to produce proof required by the standard; and (3) including the following language: *"I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties."*
- Employers who have determined an employee's vaccination status prior to enactment of this OSHA regulation do not have to re-verify the employee's vaccination status unless the previous verification was through oral conversation only.

Employer Record-keeping Obligations

- Employers must maintain and update employee vaccination records and keep those records confidential, consistent with other applicable laws.

- Employers must also maintain a roster of employees' vaccination status consistent with confidentiality laws.
- Additionally, employers must maintain the records of test results for unvaccinated employees in a confidential manner.
- Employers do not have to document employee COVID-19 cases unless they are work-related.

When an Employee is Fully Vaccinated

- An employee is considered "fully vaccinated" once two weeks have passed after the employee has completed the entire vaccine course which means one shot of the Johnson & Johnson vaccine, or both shots of the Pfizer-Biontech vaccine or the Moderna vaccine.
- However, an employee is exempt from the two-week waiting period if the employee completes the entire primary vaccination by January 4, 2022.

Testing Requirements for Employees Who Are Not Fully Vaccinated

- Employers are not required to bear the costs of testing for those who choose not to be vaccinated.
- Employees who are not fully vaccinated may meet the mandatory vaccination policy's testing requirement by submitting to COVID-19 tests. The employee must submit a negative test at least once a week for each week in which the employee is in the workplace at least once.
- Where such an employee returns to the workplace following an absence for seven (7) or more days, the employer must require the employee to submit a negative test administered within the prior seven (7) days before or upon their arrival to the workplace.
- Any FDA-authorized test will meet this requirement, provided that it is not both self-administered and self-read by the employee unless observed by the employer or an authorized telehealth proctor.
- If an employee fails to provide the result of a COVID-19 test, the employer must keep the employee removed from the workplace.

When an Employee Receives a Positive COVID-19 Test

- Employees are required to promptly notify their employer of a positive COVID-19 test or a COVID-19 diagnosis.
- Where an employer learns that an employee (regardless of vaccination status) has received a positive test or diagnosis, the employer must remove the employee from the workplace.
- The employer may not allow the employee to return to the workplace until the employee meets one of three criteria:
 1. The employee receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test (the most common screening test).
 2. The employee meets the CDC's three return-to-work criteria:

- a) at least ten (10) days have passed since the first appearance of the person's symptoms;
 - b) the person has gone at least 24 hours without a fever (without the use of fever-reducing medication); and
 - c) the person's other symptoms of COVID-19 are improving (excluding loss of taste and smell); or
3. The employee receives a return-to-work recommendation from a licensed healthcare provider.

Face Covering Requirements for Employees Who Are Not Fully Vaccinated

- Employees who are **not** fully vaccinated are required to wear face coverings in the workplace when indoors or occupying a vehicle with another person for work purposes, except:
 - when an employee is alone in a room with floor to ceiling windows and a closed door;
 - for a limited time while an employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements;
 - when an employee is wearing a respiratory or facemask in accordance with other OSHA standards;
 - where employers can show that the use of the face covering is infeasible or creates a greater hazard; or
 - where employees cannot wear a face covering due to a disability or sincerely held religious belief, entitling them to an accommodation.
- Where an employee is required to wear a face covering, the face covering must:
 - fully cover the employee's nose and mouth; and
 - be replaced when wet, soiled, or damaged.
- Employers are not required to bear the costs of providing face coverings for employees who choose to remain unvaccinated.

Other Employer Responsibilities

- Employers must inform employees of their rights and obligations under the OSHA regulation in a manner in which the employees will understand.
- Employers must also provide information to each employee about COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated by providing each employee the CDC's document available at [Key Things to Know About COVID-19 Vaccines \(cdc.gov\)](https://www.cdc.gov/media/releases/2021/s0615-covid-vaccine-factsheet.html).
- Employers must also report work-related COVID-19 fatalities to OSHA within eight (8) hours of the employer learning of the fatality and that the fatality was a result of a work-related exposure to COVID-19.
- Employers must also report each work-related COVID-19 in-patient hospitalization to OSHA within 24 hours of the employer learning about the in-patient hospitalization.
- Employers must make available for examination and copying the individual COVID-19 vaccine documentation and any COVID-19 test results required by the regulation for a

particular employee to that employee or to anyone having the employee's written authorized consent by the end of the next business day.

- Employers must make the number of vaccinated employees and the total number of employees available by the end of the next business day after an employee request.

IMPORTANT: *The Tennessee Legislature recently passed Senate Bill 9014, which contradicts a lot of the ETS as described above. This legal conflict certainly creates a confusing and troublesome dilemma for many employers, especially public employers, here in the State of Tennessee. Lewis Thomason fully expects that these issues between the ETS and Tennessee Senate Bill 9014 will be litigated and litigated soon. We will keep our clients updated as courts weigh into this developing conflict.*