

On November 5, 2021, OSHA 100 + Employee Vaccine and Testing Emergency Temporary Standard (ETS) was published in the Federal Register. Clarifying details and links to OSHA materials can be found below.

ADDITIONAL RESOURCES—

- [Full Vaccination and Testing ETS text](#)
- [Vaccination and Testing ETS fact sheet](#)
- [Vaccination and Testing ETS FAQs](#)
- [Vaccination and Testing ETS landing page](#)

HOW DOES THIS ETS PLAY WITHIN THE STATES?—

- **According to OSHA, this ETS pre-empts state laws—** OSHA intends to preempt any state or local requirements that ban or attempt to limit an employer from requiring vaccination, face covering, or testing.
- **State level housekeeping—**
 - 22 states operate under federally approved OSHA state plans. State plans generally must be “at least as effective as” the standard set by OSHA.
 - In those states, the federal OSHA ETS will not apply immediately. They have 30 days to adopt the federal standard (in theory with the same deadlines or something stricter).
 - The 22 states operating under state plans are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Tennessee, South Carolina, Utah, Vermont, Virginia, Washington, Wyoming, and Puerto Rico.
 - So, topline, states operating under state plans will still be forced to comply or OSHA on the federal level can pull their state plan.

TERMS OF THE RULE—

- **Required Policy (some ability to mix and match)—** OSHA’s ETS requires employers who have at least 100 employees (company-wide, not just at one facility) to institute either a mandatory vaccine policy or a weekly testing and mask policy.
- **How is 100 employees defined in the rule?—**The count should be done at the employer level (firm- or corporate-wide), not the individual location level. Therefore, for a single corporate entity with multiple locations, all employees at all locations are counted. For example, if a single corporation has 50 small locations (e.g., kiosks, concession stands) with at least 100 total employees in its combined locations, that employer would be covered even if some of the locations have no more than one or two employees.
- **Can employers require some workers to be vaccinated while allowing others to be tested?—** Yes, employers can require vaccination for only a subset of their employees and implement testing requirements for others.
 - “OSHA recognizes there may be employers who develop and implement partial mandatory vaccination policies, i.e., that apply to only a portion of their workforce. An example might be a retail corporation employer who has a mixture of staff working at the corporate headquarters, performing intermittent telework from home, and working in stores serving customers. In this type of situation, the employer may choose to

require vaccination of only some subset of its employees (e.g., those working in stores), and to treat vaccination as optional for others (e.g., those who work from headquarters or who perform intermittent telework.” [COVID-19 Vaccination and Testing ETS - Frequently Asked Questions | Occupational Safety and Health Administration \(osha.gov\)](#)

- **Do I have to submit my company’s written policy plan to comply with the ETS to OSHA?**— No, but plans should be made readily accessible to all employees through the employer’s normal methods of distributing information to employees. Employers are not required to submit their written policy to OSHA, unless requested.
- **What types of tests are acceptable?**— All approved tests by FDA, including PCR and antigen.
- **On administering testing requirements, more detailed language was included in the rule here—**
 - *Employers have the flexibility to select the testing scenario that is most appropriate for their workplace. Some employees and employers may rely on testing that is conducted by a healthcare provider (e.g., doctor or nurse) who arranges for the specimen to be analyzed at a laboratory or at a point-of-care testing location (e.g., a pharmacy). The involvement of licensed or accredited healthcare providers allows employers to have a high degree of confidence in the suitability of the test and the test results. Some large employers who set up their own on-site testing program may partner with a healthcare organization (e.g., a local hospital or clinic) or rely on a licensed healthcare provider to help obtain a CLIA certificate of waiver. Other employers may simply require that employees perform and read their own OTC test while an authorized employee observes the administration and reading of the test to ensure that a new test kit was used and that the test was administered properly (e.g., nostrils were swabbed), and to witness the test result.*
- **Required masking for unvaccinated**—Employers are required to enforce the wearing of masks for those who are unvaccinated when indoors and when occupying a vehicle with another person for work purposes. Like testing costs, the ETS does not mandate employers to pay for face coverings.
- **For those companies providing a testing option to employees, they will not be required to pay for testing**—However, employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements.
- **Which vaccines count toward the vaccination requirement?**—Workers can get any vaccine listed for emergency use by the World Health Organization, including two doses of Moderna or Pfizer-BioNTech and one dose of Johnson & Johnson.
- **Employers must provide paid time off for vaccinations**— The ETS requires employers to support vaccination by providing employees reasonable time, **including up to four hours of paid time**, to receive each vaccination dose, and reasonable time and paid sick leave to recover from side effects experienced **for each dose**.

- **What about booster shots?**— Booster shots are not currently required under the rule, so employers likely don't have to provide paid time for workers to receive them.

WHO DOES THIS RULE APPLY TO?—

- **Employers covered by the ETS**—Employers of 100 plus employees in all workplaces that are under OSHA's authority and jurisdiction, including industries as diverse as manufacturing, retail, delivery services, warehouses, meatpacking, agriculture, construction, logging, maritime, and healthcare.

WHO DOES NOT FALL UNDER THIS RULE—

Employees of covered employers:

- Who do not report to a workplace where other individuals, i.e. coworkers or customers, are present
- Working from home
- Who work exclusively outdoors
- Workplaces covered as Federal Contractors and Subcontractors (subject to mandatory vaccinations with no testing options)
- Employers with employees providing healthcare services subject to the separate June 2021 OSHA Healthcare ETS

RECORD KEEPING REQUIREMENTS—

What records must be maintained?—The employer must maintain a record of each employee's vaccination status and/or test result provided by the employee.

Are there religious and medical exceptions in the rule?— Yes. There are medical and religious exemptions provided in the ETS. It is up to employers to determine who qualifies for a religious exemption, and many will request doctor's notes for medical exemptions. Records requirements of the ETS do not apply to those falling under those exemptions.

Information provided to employees— The ETS requires employers to provide employees the following in a language and at a literacy level the employees understand: (1) information about the requirements of the ETS and workplace policies and procedures established to implement the ETS; (2) the CDC document "Key Things to Know About COVID-19 Vaccines"; (3) information about protections against retaliation and discrimination; and (4) information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.

Reporting COVID-19 fatalities and hospitalizations to OSHA— 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.

Availability of records to employees— 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. Employers are also required to make available to an employee, or an employee representative, the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

EFFECTIVE DATES—

- **December 4, 2021**— Employers must enforce masking, information sharing, and all other aspects of the rule except for testing.
- **January 4, 2022**— Testing requirements must be in effect for employees who have not received **all doses** of the vaccine (except boosters).

FINES?—

- OSHA can fine up to \$13,653 per serious violation. OSHA has adopted its “egregious violation” policy to impose sufficiently large penalties that achieve appropriate deterrence against bad actor employers who willfully disregard their obligation to protect their employees when certain aggravating circumstances are present, such as a large number of injuries or illnesses, bad faith, or an extensive history of noncompliance (OSHA Directive CPL 02-00-080 (October 21, 1990)). Its purpose is to increase the deterrent impact of OSHA's enforcement activity.