



## UPDATE: OSHA's COVID-19 Vaccination Emergency Temporary Standard

● *January 21, 2022* ●

On January 13, 2022 the U.S. Supreme Court (Supreme Court) **issued a stay** on the enforcement of the Occupational Safety and Health Administration's (OSHA) 100+ Employee Vaccination and Testing Emergency Temporary Standard (ETS).

The Supreme Court's stay follows oral arguments that were held Friday, *January 7, 2022* to determine if the ETS as well as the separate CMS vaccine mandate should again be stayed pending full review of the merits of the respective litigation.

The Supreme Court's stay effectively **blocks** the OSHA ETS by **making it currently unenforceable** until a final legal decision is made by the U.S. Sixth Circuit Court of Appeals.

A review of the prior communications and key components of OSHA's 100+ Employee Vaccination and Testing ETS is contained in this publication and can be reviewed as a refresher for employers.

### Next Steps in Litigation of the Legal Challenges to the OSHA ETS

OSHA's ETS will now return for further litigation before the U.S. Sixth Circuit Court of Appeals. The Supreme Court did not rule on the validity of the OSHA ETS, as the scope of their review was to determine whether the previous temporary injunction of the ETS had been appropriately put into place.

It is likely that the OSHA ETS, in its current form, will ultimately not be upheld and enforceable since the Supreme Court's opinion made clear that the Court did not believe OSHA had the authority from Congress to impose the broad requirements of the ETS on employers. In deciding to grant the stay, the Supreme Court posted that the challenges to the ETS

*"The question before us is not how to respond to the pandemic, but who holds the power to do so. The answer is clear: Under the law as it stands today, that power rests with the States and Congress, not OSHA."*

Justice Gorsuch, concurring

were likely to succeed on the merits because OSHA lacks the authority to impose such a broad mandate.

## **What the Supreme Court's Ruling Means for Large Employers**

Employers of 100+ employees do not currently need to follow the OSHA ETS but should continue to monitor the litigation in the Sixth Circuit Court of Appeals. Employers will also need to make sure they are complying with any applicable **state** and **local** COVID-19 vaccination rules.

Employers that want to have a policy requiring employee vaccination, including a vaccination and testing policy, can still take this action provided they are not subject to any applicable state or local laws which prohibit such requirements.

## **Status of the CMS Vaccination Mandate**

Although the primary focus of this bulletin is the 100+ employee OSHA Vaccination or Test ETS mandate, this publication presents an opportunity to communicate the Supreme Court's ruling on the Centers for Medicaid and Medicare Services (CMS) Vaccination Mandate (issued through a CMS interim final rule) requiring Medicaid and Medicare certified healthcare providers to require COVID-19 vaccination for their covered staff.

Litigation on the CMS Vaccination Mandate led to an injunction of the CMS vaccination requirements for around half of the states in the U.S. and a CMS decision to enforce the rule in the states where it was not enjoined by the courts.

The Supreme Court ruled on January 13, 2022 that the ***CMS Vaccination Mandate is now enforceable in all states*** pending the Sixth Circuit Court of Appeals final decision on the merits of the current litigation.

## **Additional Development: Government Agencies Require Employer Health Plans to Cover Over-The-Counter (OTC) COVID-19 Diagnostic Tests**

Another important development for employers is the recently announced guidance issued from the Departments of Labor, Health and Human Services, and the Treasury requiring employer health plans to cover OTC COVID-19 diagnostic tests for their plan participants. The guidance, requiring health plan and health insurance provider coverage of these tests, was issued on ***January 10, 2022 and coverage was required by January 15<sup>th</sup>***.

Health plans and insurers may set limits on the number and frequency of covered OTC COVID-19 tests but must cover at least 8 tests per month or 30-day period. Notably, there is no requirement that any health care provider order or be involved with the OTC COVID-19 test. There is, however, a requirement that the tests be used for diagnostic purposes. Accordingly,

health plans and insurers are not required to cover COVID-19 tests for the purpose of meeting employment requirements.

Health plans and insurers do have options for how they implement the requirement to provide OTC COVID-19 tests including providing direct coverage through pharmacy networks, direct-to-consumer programs or requiring individuals to purchase the tests and submit claims for reimbursement. The specific guidance related to coverage for OTC COVID-19 diagnostic tests can be found on the government’s websites (links provided below in the resources section of this bulletin). The Centers for Medicaid and Medicare Services announcement can be found linked below as well.

Employers are strongly encouraged to familiarize themselves with the specific requirements and guidance before choosing the best options to comply with the government’s requirements.

### Information From Our December 29, 2021 Publication:

On **December 17, 2021**, the Sixth Circuit Court of Appeals **lifted the stay** on OSHA’s 100+ Employee Vaccination and Testing Emergency Temporary Standard (ETS). The court determined that the injuries claimed by the parties in opposition to the ETS were too speculative and the costs associated with delaying implementation of the ETS were too significant to uphold the stay.

As a result of the stay being lifted, OSHA made changes to the compliance deadlines previously in force. Specifically, as long as an employer is exercising reasonable, good faith efforts to come into compliance with the ETS, OSHA will not issue citations for noncompliance with any requirements before **January 10, 2022**. Further, they will not issue citations for noncompliance with the testing requirements before **February 9, 2022**.

The January 10, 2022 date is significant because the United States Supreme Court scheduled oral arguments for Friday, **January 7, 2022** to determine if the ETS as well as the CMS Vaccine mandate should again be stayed pending full review of the merits of the litigation. It is expected that due to the pressing nature of the issues, a decision by the Supreme Court will be issued shortly after oral arguments are complete, hopefully prior to the January 10, 2022 date set by OSHA for partial compliance with the ETS.

Employers that are covered by the ETS or the CMS Vaccine mandate should begin good faith compliance efforts in preparation for the upcoming decision by the Supreme Court. A review of the key components of the ETS standards are contained in this publication and should be reviewed as a refresher for employers.



#### Occupational Safety and Health Administration COVID-19 Vaccination Emergency Temporary Standard

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• November 9, 2021 •

The Occupational Safety and Health Administration (OSHA) has released the long-awaited emergency temporary standard (ETS) addressing mandatory vaccinations in the workplace.

This Benefits Brief is not intended to be exhaustive. It is for informational purposes only and should not be considered legal or tax advice. A qualified attorney or other appropriate professional should be consulted on all legal compliance matters.

Simplify Compliance

## Background

The Occupational Safety and Health Administration (OSHA) has released the long-awaited emergency temporary standard (ETS) addressing mandatory vaccinations in the workplace. The issuance of the ETS resulted from President Biden's Path Out of the Pandemic Covid Action Plan which directed OSHA to develop the ETS.

The COVID Action Plan was designed and intended to cover an extensive segment of the American workforce to reduce the spread of COVID-19 and the negative impact of the disease on the American workforce and economy. In carrying out this goal, the presidential administration determined that employers employing 100 or more workers would have the administrative ability and resources to comply with the requirements of the ETS.

This bulletin will highlight key provisions and the timelines that covered employers of 100 or more employees need to know to comply with the requirements of the ETS.

The effective date of the ETS is **November 5, 2021** and employers must comply with most of the requirements of the ETS by December 5, 2021. Employers have until **January 4, 2022** to comply with the testing requirements for any unvaccinated workers, but workplace masking requirements for unvaccinated workers are effective on **December 5, 2021**.

OSHA has provided resource documents to help employers understand and meet their obligations under the ETS. These documents include sample policies, sample communications and answers to frequently asked questions. Links to these materials are included at the end of this bulletin. Even with the extensive materials provided, there are questions that remain and nuances that employers will need to navigate.

## Determining Whether an Employer is Covered Under the ETS

***OSHA's ETS applies to employers with 100 or more employees. In determining the employee headcount for the 100 employee threshold requirement:***

- The employee counts are based on the company's total number of employees, across all sites and locations. All employees are counted. This ***includes full-time, part-time, temporary and seasonal employees***. Even employees who are otherwise not required to be vaccinated or tested because they work completely remotely or exclusively outdoors are to be counted for determining the employee threshold for employer coverage purposes.
- The date the employee count is to be made is the effective date of the ETS, November 5, 2021.
- OSHA did not provide specific guidance on how employees of ***related and affiliated companies*** are to be counted in determining the 100 employee threshold. It is likely

the classic single-employer analysis would be important in the determination. Factors such as common management, common ownership, and the interrelation of the human resources/labor relations functions of the businesses would be important under this analysis.

- If an employer **increases its employee count** from below 100 to 100 or more while the ETS is in effect, the employer will need to comply with the ETS immediately upon reaching the 100 employee threshold. If an employer falls below the 100 employee threshold while the ETS is in effect, it will still need to comply through the entire period the ETS remains in effect.
- The ETS **does not apply** to workplaces covered by the vaccination executive orders for government contractors or the specific ETS that applies to healthcare employers. These workplaces are already held to higher standards.

## Employer Requirements Under the ETS

### *OSHA's ETS requires covered employers to:*

- **Develop, implement and enforce a mandatory COVID-19 vaccination policy.** Alternatively, employers can comply with the ETS if they establish, implement and enforce a policy allowing employees to elect whether to get vaccinated **or** to undergo weekly COVID-19 Testing and wear a face covering at the workplace.
- Determine the **vaccination status** of each employee, obtain acceptable **proof of vaccination** from vaccinated employees, **maintain records** of each employee's vaccination status, and **maintain a roster** of each employee's vaccination status.
- Support vaccination by providing employees reasonable time, including up to **four hours of paid time off**, to receive each primary vaccination dose, and reasonable time and paid sick leave to recover from any side effects following vaccination. The ETS indicates that up to two days of paid leave would generally be reasonable based on the commonly reported side effects from the vaccination.
- Ensure that each employee who is not fully vaccinated is tested for COVID-19 **at least weekly** and **provide proof of a negative test**. Employers also must ensure that unvaccinated employees wear acceptable masks while working indoors.
- Make records relating to vaccinations and testing available to employees and their representatives within 24 hours of a request.
- Employers **must inform employees** that they (the employees) are required to immediately report a positive COVID-19 test or diagnosis. Employers are required to **immediately remove employees from the workplace with a positive test**



**or diagnosis**, regardless of vaccination status.

- Employers are required to **provide employees** information about the **requirements of the ETS**, the **policies and procedures the employer is enacting** to implement the ETS, and information about the safety and benefits of being vaccinated by providing each employee with a copy of the CDC publication "*Key Things to Know About the COVID-19 Vaccine*" (link included in the resource materials below). This information should be included in the employer's required written policy.

## Employees Not Covered by the ETS

The OSHA ETS allows for employees working under some limited specific conditions to avoid the mandatory vaccination or testing and masking requirements.

***This exclusion is limited to the following categories of employees:***

- Employees that work completely remotely.
- Employees that do not report to a workplace where other employees are present.
- Employees that work exclusively outdoors.

It is important for employers to make sure to continually monitor the working circumstances of employees and their locations since these conditions can change and impact whether the exclusion would continue to apply.

## Effect of Conflicting State and Local Laws and Orders

The ETS clearly states that it preempts all state and local laws or orders that are inconsistent with the requirements of the ETS. This will likely be tested in the courts.

## What Does the ETS Mean for Employers Under 100 Employees?

Employers under the threshold of 100 employees are not subject to the OSHA ETS. Employers under 100 employees may continue to choose to mandate vaccinations unless state or local laws specify otherwise.

## Definition of Fully Vaccinated

An employee is deemed fully vaccinated for purposes of the ETS' requirements two weeks after a second dose in a two-dose vaccination series or two weeks after a single-dose vaccine. Vaccines must be approved by the U.S. Food and Drug Administration (FDA) or the World

Health Organization (WHO). Booster shots are not currently considered in the definition of fully vaccinated for purposes of the ETS.

### **Who is Responsible for the Cost of Required Testing?**

The ETS does not require employers to pay the costs of the FDA approved COVID testing. Employers need to be aware that payment for testing may be required by **other** laws, regulations and collective bargaining agreements where applicable. This includes state specific laws.

### **Employee Accommodations**

The OSHA ETS does not alter the requirement of employers to accommodate employees with a medical condition, disability or a sincerely held religious belief that prevents them from being vaccinated. Employees that are accommodated for these protected reasons **will** still be subject to the **weekly testing** requirement **and masking** requirement as unvaccinated employees.

### **Proof of Vaccination Status**

OSHA's ETS requires employers to maintain records of each employee's vaccination status and a roster of all employees with their respective vaccination status.

#### ***Proof of vaccination can include the following per OSHA:***

- The record of immunization from a health care provider or pharmacy;
- A copy of the U.S. 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;
- A copy of any other official documentation that includes 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). This information should also be part of the above-listed forms of proof.

### **Employer Responsibilities Related to Employee Vaccine Documentation**

Employers must keep a physical or digital copy of the vaccine documentation employees provide to them. Employers also must notify employees that there are criminal penalties under the OSHA Act for knowingly providing false statements or documentation.

It is important that employers understand that the **proof of vaccination** and the **roster** required by the ETS are **confidential medical records** and must be maintained as such. This would include maintaining these records in a secure file, separate from the employee

personnel files, and accessible only to those authorized employees with a legitimate need to know the information.

## **OSHA ETS' Impact on States with OSHA Approved State Run Plans**

States with OSHA approved state plans are required to enact rules at least as effective as those included in the ETS within 30 days. There are currently more than 20 states that run separate state plans covering private sector and state and local government employees. These states will have 30 days to adopt the OSHA ETS or implement a regulation that is at least as effective as the ETS.

## **OSHA Penalties for Non-Compliance**

OSHA has enforcement authority and can assess penalties for non-compliance with the requirements of the ETS. This can include citing employers for each instance of non-compliance and each affected employee. The current penalty for serious and other-than-serious violations is **\$13,653 per violation**. Willful or repeated violations can result in significantly higher fines.

## **Legal Challenges to ETS Requirements**

The U.S. Federal Fifth Circuit Court of Appeals has issued an order that prevents enforcement of the OSHA COVID-19 ETS until a final decision regarding its legality is determined. It is important to note that the ETS has not been officially delayed nor vacated and employers should continue to prepare for compliance with its provisions.

## **Next Steps**

Now that the details and specific requirements of the ETS have been established and communicated employers can and should immediately begin planning for and taking specific actions to meet the compliance requirements of the ETS.

Employers will need to make sure the required policies they develop and implement include paid time off for employees to get vaccinated and, if needed, reasonable time to recover from side effects experienced that keep them from working. Employers also need to make sure they are monitoring and enforcing the requirement that unvaccinated employees wear appropriate masks in the workplace beginning December 5<sup>th</sup>.

Employers must make sure to follow all of the communication, recordkeeping, and accommodation policies and practices. Some third party service offerings are available to ease the burden of the ongoing vaccine tracking, testing, and recordkeeping required of employees.



Employers concerned about their ability to comply with the recordkeeping requirements may want to consider these services.

Employers will have decisions to make including determining which of the two methods of compliance, mandatory vaccination or allowing employees the option to undergo weekly testing and ongoing mask use, is best for their businesses. There are certainly added costs, administrative commitments and greater risks of non-compliance with the weekly testing option. Employers do, however, have the choice under the ETS.

## ADDITIONAL RESOURCES

- [OSHA COVID-19 Vaccination and Testing; ETS](#)
- [CDC - Key Things to Know About the COVID-19 Vaccine](#)
- [Department Of Labor ETS FAQs](#)
- [Department Of Labor ETS Social Media Toolkit](#)
- [Updated Department of Labor FAQs Regarding OTC COVID-19 Tests](#)
- [CMS FAQs Related to Over-The-Counter COVID-19 Tests](#)
- [CMS Press Release - At-Home COVID-19 Testing Coverage Requirement for Insurance Companies and Group Health Plans](#)