



OSHA PUBLISHES

Vaccine-or-Testing ETS for Employers 100+



On September 10, 2021, President Biden had [issued](#) a 6-step COVID Action Plan. One step ordered the Department of Labor’s Occupational Safety and Health Administration (OSHA) to issue an Emergency Temporary Standard (ETS) requiring all employers with 100 or more employees to pay time off to get vaccinated and recover from side effects and to require employees provide proof of vaccination or submit to weekly testing, mask wearing, and other measures.

On Thursday, November 4, OSHA released the 490-page [ETS](#) which will be officially published in the federal register on Friday, November 5, making that the official ETS start date. We encourage employers with 100+ employees company-wide to read it and the news release and FAQs [here](#), but below is a summary.

Effective Date (Section M) and Future Rulemaking

Employers have **30 days** from November 5, 2021, (since that falls on a Sunday, the requirements begin Monday, December 6, 2021) to implement this, and **60 days to begin testing (i.e., Tuesday, January 4, 2022)** but are strongly advised to provide the paid leave component to encourage vaccination as soon as possible.

The ETS “also serves as a **proposal...for a final standard**. Accordingly, OSHA seeks comment on all aspects of this ETS and whether it should be adopted as a final standard.” They specifically seek public comment on things like:

- + What about employers <100?
- + What about natural immunity? OSHA states: “This is an area of ongoing scientific inquiry. Given scientific uncertainty and limitations in testing for infection and immunity, OSHA is concerned that it would be infeasible for employers to operationalize a standard that would permit or require an exception from vaccination or testing and face covering based on prior infection with COVID-19.”
- + Should OSHA make the final standard mandatory vaccinations without a weekly testing alternative?
- + If the weekly testing option should remain, is weekly testing sufficient or should they mandate more frequent testing?



- + How administratively realistic/burdensome would it be for the requirements here to become the new normal long-term?

These requirements apply to employers under federal OSHA's jurisdiction. States with their own **state-OSHA program will have 30 days** to adopt this ETS or create their own that's at least as comprehensive as this one (and will have 15 days to notify the federal OSHA of their plan).

"OSHA intends to **preempt any State or local requirements that ban or limit** an employer's authority to require vaccination, face covering, or testing."

Penalties this year are \$13,653 per violation, but employers with a "willful" and "egregious" disregard for implementing these requirements could face ten times that at \$136,532 per violation.



The 100-Employee Threshold

"This ETS applies to employers with a total of 100 or more employees **at any time the standard is in effect**...OSHA is confident that employers with 100 or more employees have the administrative capacity to implement the standard's requirements promptly, but is less confident that smaller employers can do so without undue disruption."

- + "Employers must include **all employees across all of their U.S. locations**, regardless of employees' vaccination status or where they perform their work."
- + "**Part-time employees do count** towards the company total, but independent contractors do not." Note that part time fully count with no pro-rating.
- + "In a traditional franchisor-franchisee relationship in which each franchise location is independently owned and operated, the franchisor and franchisees would be separate entities for coverage purposes, such that the franchisor would only count "corporate" employees, and each franchisee would only count employees of that individual franchise."
- + "In other situations, two or more related entities may be regarded as a single employer for OSH Act purposes if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted."
- + "In scenarios in which employees of a staffing agency are placed at a host employer location, only the staffing agency would count these jointly employed workers for purposes of the 100-employee threshold for coverage under this ETS."



- + “On a typical multi-employer worksite such as a construction site, each company represented – the host employer, the general contractor, and each subcontractor – would only need to count its own employees, and the host employer and general contractor would not need to count the total number of workers at each site. That said, each employer must count the total number of workers it employs regardless of where they report for work on a particular day.”
- + Whether an employer has 100 employees on November 5, 2021 (the first day of the ETS), or increases to have 100 employees within the 6 months the ETS is in effect, that employer will be subject to the ETS from the first date of the ETS timeframe in which it has 100 employees through the duration of the ETS regardless of fluctuations in size.
- + Employers subject to the federal contractor/subcontractor orders are not subject to this ETS.
- + Employers in health care are addressed starting on page 348 of the ETS to clarify whether and to what extent they are subject to this ETS, since many employers in health care are already under an ETS issued back in June. When that expires in December, those with 100+ employees may be subject to the remaining time left under this ETS.
 - Note an entity accepting Medicare/Medicaid is subject to the **interim final** rule which was also announced November 4. There might be some overlap, explained in that rule as follows:
 - “Providers and suppliers may be covered by both the OSHA ETS and our interim final rule. Although the requirements and purpose of each regulation text are different, they are complementary.”

Excepted Employees (Section B)

- + The ETS does not apply to employees “**working alone, or when they are working from home.**”
- + The ETS also does “**not apply to employees who work exclusively outdoors.**”
 - “An employee who works indoors on some days and outdoors on other days would not be exempt from the requirements of this ETS.
 - “Likewise, if an employee works primarily outdoors but routinely occupies vehicles with other employees as part of work duties, that employee is not covered by the exemption in paragraph (b) (3)(iii).”
 - “However, if an employee works outdoors for the duration of every workday except for de minimis use of indoor spaces where other individuals may be present – such as a multi-stall bathroom or an administrative office – that employee would be considered to work exclusively outdoors and covered by the exemption under paragraph (b)(3)(iii) as long as time spent indoors is brief, or occurs exclusively in the employee’s home (e.g., a lunch break at home). Extremely brief periods of indoor work would not normally expose employees to a high risk of contracting COVID-19; however, OSHA will look at cumulative time spent indoors to determine whether that time is de minimis.”
 - Working outdoors “would not include buildings under construction where substantial portions of the structure are in place, such as walls and ceiling elements that would impede the natural flow of fresh air at the worksite.”



- + The ETS also included “recognition that, under federal law, some employees may be entitled to a reasonable accommodation from their employer, absent undue hardship.” They estimate on average no more than 5% of employees would be granted accommodations.
 - “If the worker requesting a reasonable accommodation cannot be vaccinated and/or wear a face covering because of a disability, as defined by the Americans with Disabilities Act (ADA), that worker may be entitled to a reasonable accommodation.
 - In addition, if the vaccination, and/or testing for COVID-19, and/or wearing a face covering conflicts with a sincerely held religious belief, practice or observance, a worker may be entitled to a reasonable accommodation.
 - Such accommodations exist independently of the Occupational Safety and Health Act and, therefore, OSHA does not administer or enforce these laws.”

Written Policy (Section D)

“This ETS requires employers to implement a mandatory vaccination policy unless they adopt a policy in which employees may either be fully vaccinated or regularly tested for COVID-19 and wear a face covering in most situations when they work near other individuals.”The ETS also does **“not apply to employees who work exclusively outdoors.”**

- + “To ensure that employers’ vaccination policies under paragraph (d) are comprehensive and effective, the policies should address all of the applicable requirements in paragraphs (e)-(j) of this standard, including:
 - requirements for COVID19 vaccination;
 - applicable exclusions from the written policy (e.g., medical contraindications, medical necessity requiring delay in vaccination, or reasonable accommodations for workers with disabilities or sincerely held religious beliefs);
 - information on determining an employee’s vaccination status and how this information will be collected (as described in paragraph (e));
 - paid time and sick leave for vaccination purposes (as described in paragraph (f));
 - notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace (as described in paragraph (h));
 - information to be provided to employees (pursuant to paragraph (j) – e.g., how the employer is making that information available to employees); and disciplinary action for employees who do not abide by the policy.”
- + “In addition to addressing the requirements of paragraphs (e)-(j) of this standard, the employer should include all relevant information regarding the policy’s effective date, who the policy applies to, deadlines (e.g., for submitting vaccination information, for getting vaccinated), and procedures for compliance and enforcement, all of which are necessary components of an effective plan.”



- + “An employer who has both vaccinated and unvaccinated employees will have to develop and include the relevant procedures for two sets of employees in the written policy.”
 - “The procedures applicable to employees who are not fully vaccinated (i.e., those who decline vaccination, those who are unable to receive vaccination and are, absent undue hardship to their employers, entitled to reasonable accommodation) and those who are unable to provide proof of vaccination as required by paragraph (e) (who must be treated as not fully vaccinated), must include COVID-19 testing and face covering use as required by paragraphs (g) and (i), respectively, unless the reasonable accommodation from vaccination removes the employee from the scope of § 1910.501 (e.g., full time telework consistent with one of the exceptions in § 1910.501(b)(3)).”
 - “OSHA intends that such an employer will develop one written plan that includes different policies and procedures for vaccinated and unvaccinated employees. The requirements of paragraphs (e), (f), (h), and (j) should be addressed in the policy regardless of the vaccination requirements adopted by the employer.”
- + “As an employer develops their written policy, they must address how the policy will apply to new employees.”
 - “All new hires should be treated similarly to any employee who has not entered the workplace in the last seven days and will need to be fully vaccinated or provide proof of a negative COVID-19 test within the last seven days prior to entering the workplace for the first time.”
- + “Employers with existing policies must modify and/or update their current policies to incorporate any missing required elements, and must provide information on these new updates or modifications to all employees.”





Proof of Vaccination (Section E)

The employer must request proof of vaccination in order to avoid a weekly testing requirement from non-excepted employees.

- + “The employer must maintain a record and a roster of each employee’s vaccination status. This information is subject to applicable legal requirements for confidentiality of medical information. These records must be preserved while the ETS is in effect.”
- + “A worker is considered fully vaccinated after completing primary vaccination with a COVID-19 vaccine, or the second dose of any combination of two doses of a COVID-19 vaccine that is approved, authorized, or listed as a two-dose primary vaccination by the FDA or WHO.”
 - There is also language on page 361 allowing for some clinical trial participants to be able to be considered fully vaccinated.
- + “Acceptable proof of vaccination status is:
 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).”
- + “A signed and dated **employee attestation is acceptable** in instances when an employee is unable to produce proof of vaccination.”
 - This requires the employee attest, “subject to criminal penalties for knowingly providing false information,” to being fully or partially vaccinated and “that they have lost and are otherwise unable to produce proof”
 - “Before an employee statement will be acceptable for proof of vaccination under paragraph (e) (2)(vi), the employee **must have attempted** to secure alternate forms of documentation via other means (e.g., from the vaccine administrator or their state health department) and been unsuccessful in doing so.”
- + An employee is fully vaccinated two weeks after completing the full regimen of an authorized COVID-19 vaccine.
- + “While employers may not invite or facilitate fraud, the ETS **does not require employers to monitor for or detect fraud.**”



Mandatory Paid Time Off (Section F)

During the 6-month ETS timeframe, the ETS requires:

- + **“Time for vaccination.”**
 - “The employer must:
 - » provide a reasonable amount of time to each employee for each of their primary vaccination series dose(s); and
 - » provide up to 4 hours paid time, including travel time, at the employee’s **regular rate of pay** for this purpose.”
 - » “The maximum of four hours of paid time that employers must provide under paragraph (f) (1)(ii) for the administration of each primary vaccination dose **cannot be offset by any other leave** that the employee has accrued, such as sick leave or vacation leave.”
 - » “In some circumstances, an employee may need more than four hours to receive a primary vaccination dose, in which case the additional time, as long as it is reasonable, would be considered unpaid but **protected leave**. The employer cannot terminate the employee if they use a reasonable amount of time to receive their primary vaccination doses. The employee may use other leave time that they have available (e.g., sick leave or vacation time) to cover the additional time needed to receive a vaccination dose that would otherwise be unpaid.”
 - “Reasonable time may include, but is not limited to, time spent during work hours related to the vaccination appointment(s), such as
 - » registering,
 - » completing required paperwork,
 - » all time spent at the vaccination site (e.g., receiving the vaccination dose, post-vaccination monitoring by the vaccine provider), and
 - » time spent traveling to and from the location for vaccination (including travel to an off-site location (e.g., a pharmacy), or situations in which an employee working remotely (e.g., telework) or in an alternate location must travel to the workplace to receive the vaccine).”
 - “Employers are not, however, obligated by this ETS to reimburse employees for transportation costs (e.g., gas money, train/bus fare, etc.) incurred to receive the vaccination.”
 - “If an employee chooses to receive the vaccine outside of work hours, OSHA does not require employers to grant paid time to the employee for the time spent receiving the vaccine during non-work hours (although other laws may include additional requirements for employers, such as those addressing reasonable accommodations or exemptions).”





- + **“Time for recovery.”**
 - “The employer must provide reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination series dose to each employee for each dose.”
 - “Employers **may require employees to use paid sick leave benefits otherwise provided** by the employer to offset these costs, if available.”
 - “If an employer provides employees with multiple types of leave, such as sick leave and vacation leave, the employer can only require employees to use the sick leave when recovering from vaccination side effects.”
 - “Employers cannot require employees to use advanced sick leave...If the employee does not have available sick leave, leave must be provided for this purpose.”
 - “Employers may set a cap on the amount of paid sick leave available to employees to recover from any side effects, but the cap must be reasonable...Generally, OSHA presumes that, if an employer makes available up to **two days of paid sick leave per primary vaccination dose** for side effects, the employer would be in compliance with this requirement. When setting the cap, an employer would not be expected to account for the unlikely possibility of the vaccination resulting in a prolonged illness in the vaccinated employee (e.g., a severe allergic reaction).”
- + “Neither the paid time required to receive any vaccine dose(s) nor the paid sick leave required to recover from side effects experienced following any vaccination dose are retroactive requirements for vaccine dose(s) received prior to the promulgation of this ETS.”
- + Of course, OSHA recognizes other state or local paid leave requirements may apply.
- + “The ETS does not require the employer to provide paid time off to any employee for removal as a result of the employee’s refusal/failure to provide documentation of a COVID-19 test result.”
- + “The ETS does not require employers to provide paid time off to any employee for removal from the workplace as a result of a positive COVID-19 test or diagnosis of COVID-19; however paid time off may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements.”

Mandatory Testing (Section G) and Masking (Section I) for Unvaccinated Employees

Employees who do not provide satisfactory proof or attestation of being fully vaccinated are subject to mandatory testing and masking under the ETS, with testing to begin no later than 60 days after the ETS takes effect (i.e., Tuesday, January 4, 2022).

- + An employee expected to report to a worksite with other workers or customers at least once every seven days must be tested at least once every seven days.
- + An employee not expected to report to a worksite with other individuals at least once every seven days cannot enter a worksite with others unless they provide proof of a negative test taken in the seven days prior to coming to work.



- + “Employees who are partially vaccinated are also required to be tested weekly until they are fully vaccinated.” However, “employees who have completed the entire primary vaccination series by [January 4, 2022] do not have to be tested, even if they have not yet completed the 2 week waiting period.”
- + “If an employee does not provide documentation of a COVID-19 test result as required..., **the employer must keep that employee removed** from the workplace until they provide a test result.”
- + “Additionally, OSHA finds it necessary to **require** employers that do not implement a mandatory vaccination policy to ensure that **unvaccinated workers wear face coverings in most situations when they are working near others**. This reflects OSHA’s recognition that regularly testing unvaccinated workers for COVID-19 will not be 100% effective in identifying infected workers before they enter the workplace.”
- + “When an employee has received a positive COVID-19 test, or has been **diagnosed with COVID-19** by a licensed healthcare provider, the employer **must not require that employee to undergo COVID-19 testing...for 90 days following** the date of their positive test or diagnosis.”
- + While there may be other laws, regulations, accommodations, or collective bargaining agreements imposing a stricter rule, **“this ETS places no obligation on the employer to pay for costs associated with the regular testing** of unvaccinated workers for COVID-19 or their use of face coverings, which will provide a financial incentive for some employees to be fully vaccinated.”
- + “OSHA notes that a COVID-19 test under the ETS is a test for SARS-CoV-2 that is:
 1. Cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the FDA to **detect current infection** with the SARS-CoV-2 virus (e.g., a viral test);
 2. Administered in accordance with the authorized instructions; and
 3. **Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.**”
- + “Diagnostic tests for current infection fall into two categories: nucleic acid amplification tests (NAATs) and antigen tests.”
- + “Examples of tests that satisfy this requirement include:
 1. tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens),
 2. proctored over-the-counter tests,
 3. point of care tests, and
 4. tests where specimen collection and processing is either done or observed by an employer.”
- + “Antibody tests do not meet the definition of COVID-19 test for the purposes of this ETS.”
- + “Finally, the employer must maintain a record of each test result provided by each employee” and treat them as confidential medical records.



Positive COVID-19 Prompt Reporting and Removal from the Workplace (Section H)

“Regardless of COVID-19 vaccination status or any COVID-19 testing required under...the ETS, the employer must:

- + **Require each employee to promptly notify** the employer when they receive a positive COVID-19 test or are diagnosed with COVID-19 by a licensed healthcare provider; and
- + **Immediately remove** from the workplace any employee who receives a **positive COVID-19** test or is diagnosed with COVID-19 by a licensed healthcare provider and keep the employee removed until the employee:
 1. receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if the employee chooses to seek a NAAT test for confirmatory testing;
 2. meets the return to work criteria in CDC’s “Isolation Guidance” (incorporated by reference, § 1910.509); or
 3. receives a recommendation to return to work from a licensed healthcare provider.”

Recordkeeping, Notice to Employees (Section J), Mandatory Reporting (Section K), and Availability of Records (Section L)

“The employer must maintain a roster of each employee’s vaccination status” along with the medical records of proof of vaccination or weekly testing.

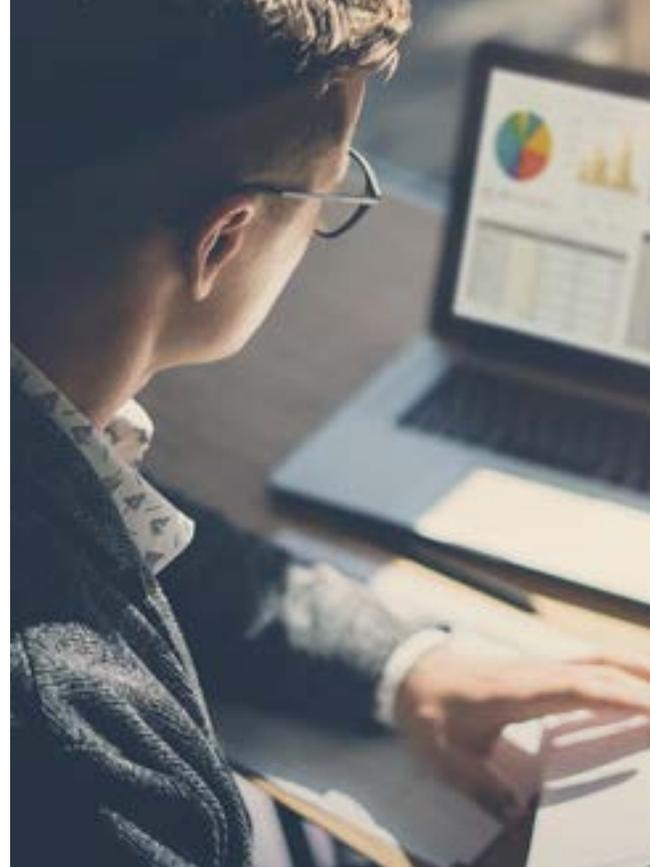
- + “The roster must list all employees and clearly indicate for each one whether they are fully vaccinated, partially (not fully) vaccinated, not fully vaccinated because of a medical or religious accommodation (see Note to paragraph (d)), or not fully vaccinated because they have not provided acceptable proof of their vaccination status.”

Of course, the employer must provide all employees its workplace policies as modified to comply with this ETS, along with:

- + the CDC’s document, “Key Things to Know About COVID-19 Vaccines,” available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>, in either electronic or print format, in the language that best informs the employee
- + information regarding 29 CFR 1904.35(b)(1)(iv) and section 11(c) of the OSH Act. “These two provisions work together to protect employees from retaliation for engaging in activities protected by OSHA statute or regulation.”
 - “The first of these provisions, section 1904.35(b)(1)(iv), prohibits employers from discharging or in any manner discriminating against any employee for reporting a work-related injury or illness.”



- “The second provision, section 11(c) of the OSH Act, prohibits employers from discriminating against employees for exercising rights under, or as a result of actions required by, the ETS. Section 11(c) also protects employees from retaliation for filing an occupational safety or health complaint, reporting a work-related injury or illness, or otherwise exercising any rights afforded by the OSH Act.”
- + “information regarding the prohibitions of 18 U.S.C. 1001 and Section 17(g) of the OSH Act, which provide for criminal penalties associated with knowingly supplying false statements or documentation.”
 - “The first of these two provisions, 18 U.S.C. 1001(a)... provides for fines or imprisonment for persons who “knowingly and willfully”
 1. falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
 2. makes any materially false, fictitious, or fraudulent statement or representation; or
 3. makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.
 - And section 17(g) of the OSH Act provides for fines up to \$10,000, and imprisonment for not more than six months, or both, for anyone who “knowingly makes any false statement, representation, or certification” in any application, record, report, plan, or other document “filed or required to be maintained pursuant to this chapter.”



The employer **must report the following to OSHA** (and “must follow the requirements in 29 CFR part 1904.39, except for 29 CFR part 1904.39(a)(1) and (2) and (b)(6)”):

- + “Each work-related COVID-19 **fatality within 8 hours** of the employer learning about the fatality.”
- + “Each work-related COVID-19 in-patient **hospitalization within 24 hours** of the employer learning about the in-patient hospitalization.”
- + “Employers have three options for reporting work-related fatalities and in-patient hospitalizations to OSHA:
 1. by telephone to the OSHA Area Office that is nearest to the site of the incident *[however, if the OSHA Area Office is closed, an employer may not report a work-related fatality or in-patient hospitalization by leaving a message on OSHA’s answering machine, faxing the Area Office, or sending an email];*
 2. by telephone to the OSHA toll-free central telephone number, 1-800-321-OSHA (1-800-321-6742);
 3. by electronic submission using the reporting application located on OSHA’s public website at www.osha.gov.



Also, “by the end of the next business day after a request” from an employee or authorized employee representative, the employer must provide:

- + “for examination and copying, the individual COVID-19 vaccine documentation and any COVID-19 test results for a particular employee to that employee and to anyone having written authorized consent of that employee;” and
- + “the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.”

Finally, “the employer must also provide to the Assistant Secretary for examination and copying:

1. “Within 4 business hours of a request, the employer’s written policy required by...the ETS, and the aggregate numbers” described directly above; and
2. “By the end of the next business day after a request, all other records and other documents required to be maintained by the ETS.”

Accepting Public Comments

OSHA will accept public comment for 30 days, not so much to change what’s effective in the next 30 days but more to address whether and to what extent this should serve as a final rule for the foreseeable future rather than a temporary standard, and the other items they’ve requested (such as smaller employers, natural immunity, etc.).

IMA will continue to monitor regulator guidance and offer meaningful, practical, timely information.

