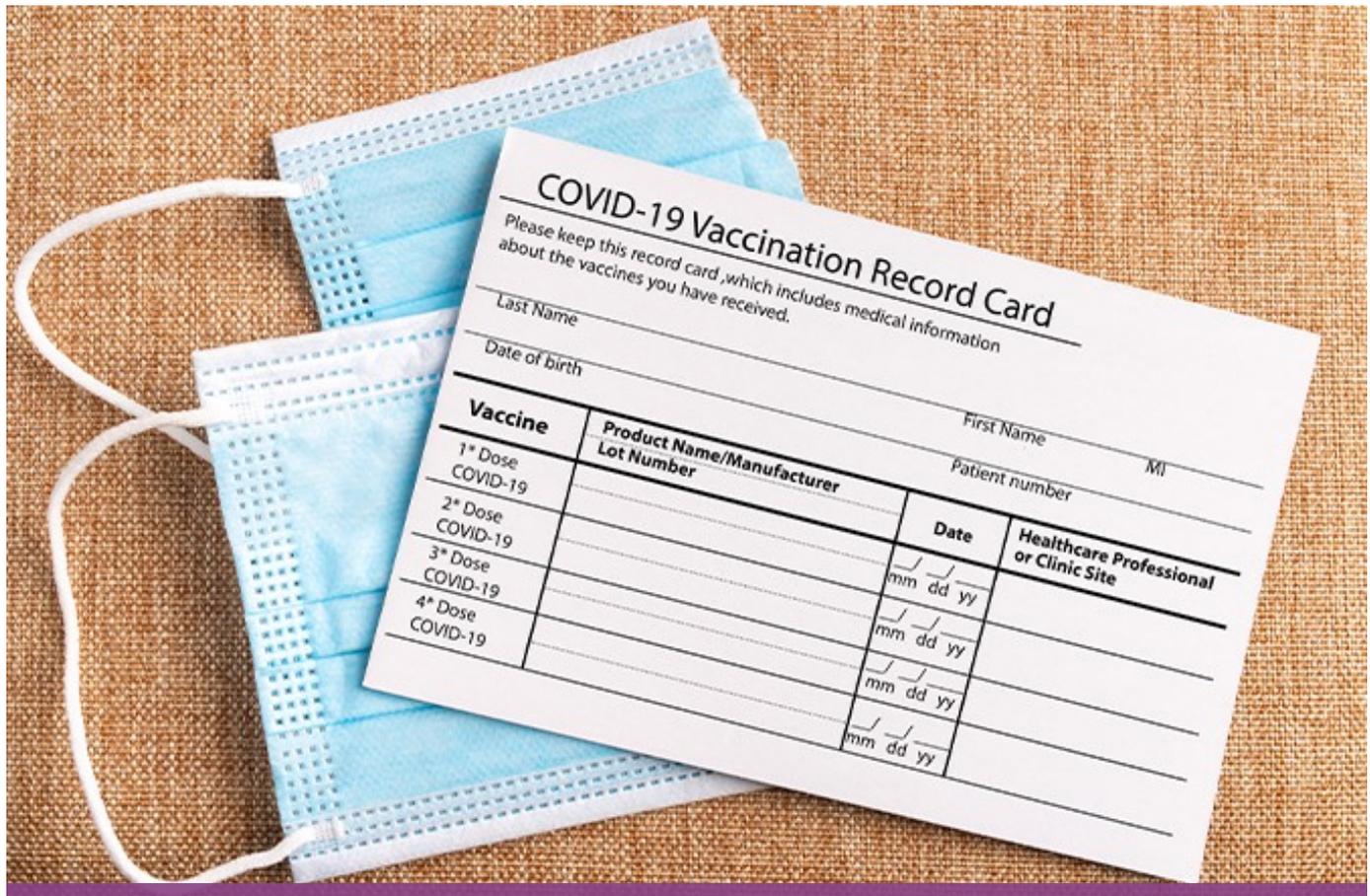


## Ready, set, go: Employers race to comply with OSHA ETS vaccine requirements



Miriam L. Rosen | Friday, November 5, 2021

**UPDATE (November 15, 2021): The 5th Circuit has continued its stay on the OSHA ETS. Here is a statement from the OSHA website:**

**On November 12, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard, published on November 5, 2021 (86 Fed. Reg. 61402) ("ETS"). The court ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order." While OSHA remains confident in its authority to protect workers in emergencies, it has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.**

**UPDATE (November 9, 2021: The United States Court of Appeals for the Fifth Circuit issued a stay on Saturday, Nov. 6, freezing the Emergency Temporary Standard released by OSHA two days earlier which required businesses with 100 or more employees to implement policies on vaccines, testing and masking.**

**While the joint petition by the states of Texas, Louisiana, Mississippi, South Carolina, and Utah, together with multiple businesses and advocacy groups, convinced the court to put a hold on the ETS, Reuters and other media outlets reported that *the Labor Department remains confident in its authority to issue the rule and that it will eventually be enforced.***

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Almost two months after President Joe Biden called for quick action on COVID-19 vaccine or testing rules, the Occupational Safety and Health Administration (OSHA) released Emergency Temporary Standards (ETS) on November 4, 2021. With these new rules, employers with 100 or more employees have a tight timeframe to implement policies on vaccines, testing, and masking – assuming that the rules are not halted by a legal challenge.

The ETS are effective November 5, although certain key portions have compliance dates 30 and 60 days after that. Specifically, required policies and vaccine status collection must take place by December 5 and weekly testing of the unvaccinated is required by January 4, 2022. Practically, this means employers are now under pressure to implement the new rule. To do that, they'll need to process the content of the ETS and then quickly turn to implementation mode. At 490 pages, the ETS is a lengthy read. Employers can find the actual rules beginning at page 473 (once officially published in the Federal Register, the page count will be condensed).

The overview below is intended help employers understand the most critical details in the ETS. If you have questions about the ETS or need assistance with compliance, please contact McDonald Hopkins [Labor and Employment team](#).

### Coverage Issues

The first issue that employers must assess is whether the ETS applies to their organization and which employees are covered.

#### **Who is a covered employer for purposes of the ETS?**

The ETS applies to private employers with 100 or more employees in the total firm or corporate-wide. This means that employers with a small numbers of employees at various locations are covered if the total workforce is 100 or more within the company. Part-time and remote employees are included in the count; independent contractors are not.

Note, however, that workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors or where the Healthcare ETS are applicable are covered by those separate rules and are NOT this ETS.

#### **Who are covered employees under the ETS?**

The ETS requirements apply to employees who work in the employer's physical location (e.g., fixed, mobile) where the employer's work or operations are performed.

The requirements do not apply to employees who do not report to a workplace where other individuals such as coworkers or customers are present, who work from home, or who work exclusively outdoors.

### Vaccine and Testing Requirements

The next step for employers is to understand the scope of the obligations imposed by the ETS.

#### **What are the vaccine and weekly testing requirements of the ETS?**

The key requirements of the ETS can be broken down into two parts:

- **Vaccine mandate.** A covered employer must establish a written mandatory vaccination policy, **unless** the employer chooses to comply with the testing and masking requirements for unvaccinated workers

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as explained below. This policy must be established by December 5, 2021.

- **Testing and masking requirements for unvaccinated employees.** An employer is **exempted** from the mandatory vaccination policy requirement if the employer establishes a written policy providing that any employee not subject to a mandatory vaccination policy either be fully vaccinated against COVID-19 or provide proof of regular testing for COVID-19 and wear a face covering. The testing requirement will begin on January 4, while the masking requirements for unvaccinated employees begins on December 5, 2021.

The scope of each of these requirements is explained below.

### **Vaccine-related Rules**

#### **What is a Mandatory Vaccine Policy?**

Simply put, a mandatory vaccine policy requires each employee to be fully vaccinated. To meet this definition, the policy must require vaccination of all employees, including vaccination of all new employees as soon as practicable, other than those employees:

- For whom a vaccine is medically contraindicated;
- For whom medical necessity requires a delay in vaccination; or
- 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.

#### **What qualifies as “fully vaccinated”?**

Fully vaccinated means a person’s status two weeks after completing primary vaccination with a COVID-19 vaccine with, if applicable, at least the minimum recommended interval between doses.

#### **How is vaccine status established?**

The employer must determine the vaccination status of each employee, including whether the employee is fully vaccinated.

The employer must require each vaccinated employee to provide acceptable proof of vaccination status, including whether they are fully or partially vaccinated. Acceptable proof of vaccination status includes:

- The record of immunization from a health care provider or pharmacy
- A copy of the 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 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);
- In instances where an employee is unable to produce acceptable proof of vaccination, a signed and dated statement by the employee that meets specific requirements is acceptable.

#### **Who pays for time off for vaccine and recovery?**

Employers must provide paid time off for employees to get vaccinated and recover from any adverse side

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effects of the vaccine.

- **Time for vaccination.** Employers must provide employees up to four hours paid time, including travel time, at the employee's regular rate of pay for each of their primary vaccination dose(s).

OSHA's FAQs indicate that the maximum of four hours of paid time for each vaccination dose **cannot be offset** by any other leave that the employee has accrued, such as sick leave or vacation leave.

The FAQs also provide that the employer is not required to pay for vaccination time if an employee chooses to receive the vaccination doses during non-work hours.

- **Time for recovery.** The employer must also provide reasonable time and paid sick leave for employees to recover from side effects experienced following any primary vaccination dose.

In contrast to the time for vaccination, employers **can require** an employee who has accrued paid sick time to use that paid sick time when recovering from vaccine side effects. However, employers cannot require employees to use advanced sick leave or "go negative" to cover reasonable time needed to recover from vaccination side effects.

Also note that state or local requirements may address paid vaccine/recovery time. In addition, employers with union-represented employees should review the CBA and consider any obligations to bargain over these terms.

### **Are medical and religious exemptions allowed?**

As noted above, employers choosing to implement a mandatory vaccine policy may exempt employees for certain medical or religious reasons. These specifically include employees:

- For whom a vaccine is medically contraindicated
- For whom medical necessity requires a delay in vaccination
- 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.

Employers who decide to implement a vaccine mandate will need to establish a process for receiving and approving exemptions. Employees who receive an exemption will need to follow the testing and masking requirements (unless exempted from those as well).

### **Weekly Testing and Masking Requirements**

#### **What is the weekly testing requirement for unvaccinated employees?**

Unvaccinated employees who report to a workplace at least once every seven days must be tested at least once every seven days.

Those unvaccinated employees who are working remotely and occasionally report to a workplace must be tested within seven days of reporting to the workplace.

Employees are responsible for providing documentation of the test to the employer. An employee who

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does not produce a test or tests positive is not permitted in the workplace.

### **What tests comply with the regulations' testing requirements?**

The ETS allows use of at home or over-the-counter tests, but the test may not be both self-administered and self-read. Tests that meet the requirements tests include “proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer.”

### **Who pays for weekly COVID-19 testing and testing time?**

One of the key issues that employers have been waiting to understand is who bears the cost of testing and testing time. The ETS addresses this squarely, but it may be more complicated than it seems.

The ETS **does not** require employers to pay for testing or provide employees with paid time off for testing. OSHA notes, however, that the ETS also does not prohibit the employer from paying for testing costs. Otherwise, the agency leaves the decision regarding who pays for the testing to the employer.

Employers must consider whether other federal or state laws or regulations require testing or testing time to be paid. Further, employers with union-represented employees will also need to consider bargaining obligations.

### **What if an employee tests positive?**

Employees must report positive test results regardless of vaccination status. Employees who test positive must be removed from the workplace. Employers can allow employees to return with a negative test result, by meeting the CDC return-to-work criteria, or with a recommendation from a health care provider.

### **What are the masking requirements?**

Employees who are unvaccinated must wear a face covering while indoors or in a vehicle with a co-worker. A “face covering” consists of two or more layers of fabric, secured to the head with straps or ties, covering the nose and mouth, and solid with no slits or holes. “Facemask” means a surgical or medical mask.

Face coverings must be worn, with few exceptions:

- The employee is alone in a room with floor to ceiling walls with the door closed.
- For a “limited time” while eating or drinking.
- The employee is wearing a respirator or face mask.
- If the employer can show that wearing a face covering is infeasible or causes a greater hazard, such as situations when the work requires the employee’s mouth to be uncovered.

Employers are not required to pay for face coverings. Again, the ETS notes that payment may be required by other laws or collective bargaining agreements.

### **What information must an employer provide employees?**

The ETS requires employers to provide employees with the following information:

- The ETS requirements and the employer’s policies implemented to comply with the ETS.
- The CDC document entitled “[Key Things to Know About COVID-19 Vaccines.](#)”
- The employee’s rights under OSHA whistleblower provisions and the recordkeeping regulations, which prohibits retaliation when an employee reports a work-related illness.

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- The criminal provisions in the OSH Act and other federal laws; OSHA concludes that these provisions prohibit falsifying a vaccination, testing, or other required record.

Employers may provide this information to employees through email communications, printed fact sheets, or during a discussion at a regularly scheduled team meeting. As such, there are no formal training requirements.

### What recordkeeping requirements apply?

The employer must maintain and provide the following information upon request:

- An employee or anyone with written authorized consent from the employee is entitled to the employee's COVID-19 vaccination records and test results, which the employer must provide by the end of the next business day following the request.
- By the end of the next business day after a request by an employee or an employee representative, the employer must make available to the requester the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.
- Within four hours of a request from OSHA, the employer must provide a copy of the written COVID-19 policy requiring vaccination or requiring vaccination and testing and vaccination and testing records for each employee.
- Any other written records required by the ETS must be produced to OSHA by the end of the next business day following the request.

### What are the penalties for non-compliance?

As OSHA rules, the ETS follow the standard OSHA requirements, which may be up to \$14,000 per incident, per employee.

### ETS Resources for Employers

OSHA has provided various informational resources to employers, such as Fact Sheets, FAQs, and sample policies at [OSHA Covid-19 Vaccination and Testing ETS](#). The FAQs address many detail explanations regarding the requirements and employers will likely find them particularly helpful.

### ETS Compliance Dates

As previously noted, the ETS are effective November 5; however, compliance dates on certain key provisions are actually 30 and 60 days after that. OSHA has a helpful chart in the FAQs. Dates for the key provisions include:

- **December 5.** By this date, among other requirements, employers must establish a policy on vaccinations, determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status, and provide support for employee vaccination.
- **January 4.** By this date, employers must ensure employees who are not fully vaccinated are 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).

Twenty-one states, including Michigan, Indiana, and California, are certified by OSHA to adopt and enforce their own state-specific workplace safety and health plan. These states will have 30 days to adopt the ETS

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or publish their own rules that are at least as protective as the ETS.

The ETS will be in effect for six months from the November 5 date of publication in the Federal Register.

### Challenges to the ETS

Legal challenges to the ETS are likely and this may impact the effective date of the new rule. It is possible that a federal district court will issue a nation-wide injunction putting the entire rule on hold.

### Next steps for employers

After months of contemplating vaccine mandates and testing requirements, now is go time for employers in terms of decision making. In short order, employers should take the following steps:

- Determine employer coverage under the ETS, federal contractor, or healthcare ETS.
- Decide whether to implement a vaccine mandate or allow employees to remain unvaccinated and require mask wearing and weekly testing.
- Develop and implement a written policy stating the employer's requirements related to vaccine and/or testing and mask-wearing by December 5.
- Collect vaccine status information by December 5.
- Provide required information to employees by December 5.
- Prepare for testing of unvaccinated employees by January 4.

Of course, many other decisions flow out of the decision about whether to implement a vaccine mandate or allow weekly testing/masking for unvaccinated employees.

With just a month to get many of these provisions in place, now is the time for employers to review the ETS and the other available resources, consult with counsel, and prepare for implementation. The McDonald Hopkins Labor & Employment Team will continue to provide regular updates and to assist with compliance.



**Miriam L. Rosen**