



HIGHLIGHTS: OSHA Emergency Temporary Standard Vaccine Mandate for Private Employers Published 11/5/2021

On November 4, 2021, OSHA released its COVID-19 Emergency Temporary Standard (“ETS”) applicable to private employers with 100 or more employees. The ETS addresses vaccination, vaccination verification, face coverings, and testing requirements. The full standard is available on OSHA’s [ETS2 website](#). Highlights of the standard follow:

Employer Coverage

Section 1910.501

The ETS applies to all private sector employers with 100 or more employees. Government employers are not covered unless in a Plan State (discussed below). The ETS excludes those workplaces subject to the federal contractor and subcontractor requirements under the Safer Federal Workforce Task Force COVID-19 Workplace Safety Guidance, as well as any setting where an employee provides healthcare services or healthcare support services subject to the requirements of the OSHA ETS for health care (29 C.F.R. § 1910.502). Section 501(b).

To determine whether an employer has 100 employees, all employees of the employer in the United States must be counted, including part-timers, seasonals, minors, and temps, as well as any employee who already is vaccinated. Independent contractors are not counted. Independently owned franchises constitute individual employers, although in other situations two or more related entities may be regarded as a single employer. In the staffing agency context, employees placed at a host employer are counted as employees of the agency. The determination is made without regard to an employer’s individual locations; rather, all employees are aggregated to determine if the 100-employee threshold is met. Section 501 (and preamble); OSHA ETS FAQ 2.

The 100-employee determination is made on the effective date of the ETS (i.e. November 5, 2021). If covered on that date, the employer remains covered for the duration of the time the ETS is in effect. If the employer is below 100 employees on the effective date and subsequently crosses the threshold, the employer becomes covered at that time. Section 501 (and preamble).

Excluded Workers

Section 1910.501

Even if the employer is covered, certain workers are excluded from the requirements of the ETS: (1) those who do not report to a workplace where other individuals (coworkers, customers) are present; (2) employees working from home; and (3) those who work exclusively

outdoors. Section 501(b)(3). An employee's residence is not considered a "workplace" for purposes of the ETS. Section 501(c) (definitions). However, if a remote worker comes to the workplace setting, they become subject to the ETS. The ETS provides that an employer must count excluded employees when determining if it meets the 100-employee threshold. Section 501(b)(3) (and preamble).

Employer Choice: Mandatory Vaccine Policy or Testing
Section 1910.501(d)

Covered employers have the choice of establishing, implementing, and enforcing a written policy either for mandatory vaccines, or, alternatively, allowing employees to choose to be fully vaccinated or to provide proof of regular testing for COVID-19 and wearing a face covering. Section 501(d).

OSHA has published model policy templates for each approach, which can be found on OSHA's [ETS2 website](#). These are optional forms. However, employers are required to ensure that their policies address all of the requirements in ETS Sections 501(e) - 501(j).

The ETS recognizes that some employees may be unable to get vaccinated, get tested and/or wear a face covering for legally protected reasons (e.g., disability, religious belief). In those cases, the ETS refers employers to the EEOC's guidance on these issues. Section 1910.501(d).

Employers may opt to implement vaccine policies that differ by location or type of business operation. Section 1910.501(d) (and preamble).

Regardless of the approach selected, OSHA expects employers to enforce the requirements of the policy through training and the use of work rules and workplace disciplinary systems, if necessary. Section 1910.501(d) (and preamble).

Mandatory Vaccine Policy
Section 1910.501(c)

To meet the requirement of having a "mandatory vaccine policy," the policy must require vaccination by all employees, including new hires as soon as practicable, unless subject to an exception. Exceptions are:

- (1) The vaccine is medically contraindicated;
- (2) Medical necessity requires a delay in vaccination; or
- (3) A legal entitlement to reasonable accommodation due to disability or sincerely held religious belief.

Section 1910.501(c) (definitions).

Even if an employer opts for the mandatory vaccine policy, it may have unvaccinated individuals present in the workplace due to the exceptions above or non-compliance with the policy. In a case where there are both vaccinated and unvaccinated individuals present, the employer must comply with the testing and face covering requirements of the ETS for those individuals. Section 1910.501(d) (and preamble).

Fully Vaccinated
Section 1910.501(c)

A person is deemed to be “fully vaccinated” two weeks after completing the primary vaccination with a COVID-19 vaccine that is approved or authorized for emergency use by the FDA or WHO. The ETS does not address boosters, and the definition of “fully vaccinated” does not consider whether the individual has had a booster shot. Section 1910.501(c) (definitions); OSHA ETS FAQ 4.E.

Alternative Policy: Testing/Face Coverings
Section 501(g)

While OSHA “strongly prefers” that employers adopt the mandatory vaccination policy, it has provided for an alternative policy approach which will allow employees to choose whether or not to be vaccinated. However, unvaccinated employees then would be subject to testing and face covering protocols. Section 501(g) (and preamble).

Unvaccinated employees must be tested for COVID-19 at least once every seven days, and provide documentation of the most recent test result to the employer no later than the seventh day following the date on which the employee last provided a test result. This requirement applies regardless of the employee’s work schedule. Employers may set a consistent “testing day” to ensure that the schedule is followed. Section 501(g)(1) (and preamble).

If an employee does not report to a worksite where others (coworkers, customers) are present for seven or more days (e.g., remote working), the employee must be tested within seven days prior to returning to the worksite and provide documentation of the test result before returning to work. Rapid point-of-care testing is an acceptable means, and pooled testing may be done (provided that a positive result triggers additional testing). OSHA expects the employer’s policy will contain procedures that detail how these obligations will be met. Section 501(g)(1) (and preamble).

Employers are not required to pay any costs associated with testing, unless required by other laws or bargaining agreements. Employers are free to pay for testing costs, if they so choose. OSHA noted that, in some circumstances, the employer may be required under the FLSA to pay for the time it takes an employee to be tested – for example, if testing is conducted in the middle of a shift. But OSHA expressed no opinion on this issue, noting that it is beyond its authority and jurisdiction. Section 501(g)(1) (and preamble).

OSHA noted that some employees may not be able to be tested due a sincerely held religious belief and may ask for an accommodation. OSHA referred employers to the EEOC's guidance on these issues. Section 501(g)(1) (and preamble).

Employees must be removed from the workplace until such time as they provide the required test results. If an employee tests positive for or is diagnosed with COVID-19, they cannot be required to submit to testing for 90 days following the date of the positive test result or diagnosis (due to the high likelihood of false positives). Section 501(g)(2)-(3) (and preamble).

Employers must maintain records of each test result and treat them as confidential medical records and subject to OSHA's regulation for employee exposure and medical records in 29 C.F.R. § 1910.1020.

Face Coverings

Section 1910.501(i)

Unless fully vaccinated, employees must wear face coverings when indoors or when in a vehicle with another person for work purposes. The following exceptions are allowed: (1) when alone in an enclosed room with the door closed; (2) for a limited time while eating or drinking or for security identification purposes; (3) when wearing a respirator or face mask; or (4) if the employer can show that a face covering is infeasible or creates a greater hazard. If an individual is in a closed room, and they exit the room or another person enters the room, both should be wearing face coverings. Section 501(i) (and preamble).

Face coverings must fully cover the mouth and nose and must be replaced when wet, soiled or damaged. Section 501(i). Face coverings must be made with at least two layers of breathable fabric that is tightly woven and secured by ties, ear loops, or elastic bands behind the head, without slits, valves or other openings. Gaiters are permissible if they have at least two layers. Section 501(c) (definitions).

Employers are not required to pay for face coverings unless otherwise required by law or bargaining agreements. Section 501(i).

Employee Vaccination Status

Section 1910.501(e)

The ETS requires employers to determine the vaccination status of each employee, including whether they are "fully vaccinated." Each vaccinated employee must provide acceptable proof of vaccination status, including whether fully or partially vaccinated. Acceptable proof means: a record of immunization; a copy of the COVID-19 Vaccine Record Card; a copy of a medical record documenting the vaccination; among other acceptable documents. A signed and dated statement by the employee also is acceptable if they are unable to provide another form of proof. Absent acceptable proof, the employee must be treated as unvaccinated. Section 501(e).

An employee who had COVID-19, but has not been vaccinated, is considered unvaccinated. The ETS does not offer a vaccine exemption based on “natural immunity” or the presence of antibodies from a previous infection. OSHA ETS FAQ 3.

Copies, including digital copies, of proof are an acceptable means of documentation, provided they clearly and legibly display the necessary information. Also, the employer must be able to maintain a copy of the information (simply retaining a QR code is insufficient). Section 501(e) (and preamble).

The employer must maintain both the employee’s proof of vaccination status and a roster of each employee’s vaccination status, all of which are to be treated as confidential medical information under the ADA and are subject to OSHA’s regulation for employee exposure and medical records in 29 C.F.R. § 1910.1020 (except for the 30-year retention requirement). Section 501(e)(4). The roster must list all employees and clearly indicate for each individual whether they are fully or partially vaccinated, not fully vaccinated because of a medical or religious accommodation, or not fully vaccinated because they have not provided acceptable proof. Section 501(e) (and preamble).

If an employer has ascertained that an employee is fully vaccinated prior to the compliance date of these requirements (i.e. December 5, 2021), no further proof is required, but the employer must have records of such ascertainment (i.e. verbal confirmation is insufficient). This limited waiver only applies to those who are *fully* vaccinated. Also, the employer still must include such employees on the roster. Section 501(e)(5) (and preamble).

Paid Time Off **Section 1910.501(f)**

The ETS requires that employers provide “reasonable” paid time off to obtain the primary vaccine dose(s) and to recover from any side effects, regardless of which policy approach is selected. The ETS establishes a mandatory minimum of four hours of paid time off, including travel time, to obtain each primary vaccination dose. The four-hour period cannot be offset by any other leave that the employee has accrued, such as sick leave, although time in excess of four hours may be. Reasonable time may include time spent during working hours related to the vaccine appointment process. Employers are not required to pay employees for getting a vaccine outside of work hours, but they also may not require that employees get vaccine doses on personal time. Section 501(f) (and preamble); OSHA ETS FAQ 5.A.

Reasonable time and paid sick leave also must be available to employees for side effects (with no specific amount of time stated). Employers may require the use of accrued sick leave for this purpose, but if the employee has no accrued leave available, other leave time must be provided (although the ETS does not say it must be paid leave). Employers cannot require employees to borrow against future accruals or go into a negative leave balance for this purpose. Employers may set a reasonable cap on the amount of leave time available for side

effects, and OSHA has said that two days per dose is presumptively compliant. Section 1910.501(f) (and preamble).

Positive COVID-19 Tests

Section 1910.501(h)

Without regard to vaccination or testing status, all employees must be required to notify their employer promptly when they receive a positive COVID-19 test or diagnosis, and the employee must be immediately removed temporarily from the workplace. According to OSHA, “promptly” means as soon as practicable before the employee is scheduled to start their shift or return to work. Employers should establish notification procedures and inform employees about these procedures. Section 501(h) (and preamble).

The employee may return to work after receiving a negative test; meeting the CDC return to work criteria; or receiving a recommendation to return to work from a licensed health care provider. Unless otherwise required by law or a bargaining agreement, the employer is not required to provide paid time off for removal, but OSHA notes that employees should be permitted to use accrued leave in accordance with the employer’s policies and practices. Section 501(h) (and preamble). This provision stands in contrast to OSHA’s Healthcare ETS, which contains paid medical removal protections.

Information Provided to Employees

Section 1910.501(j)

Employers must inform employees, in a language and at a literacy level the employee understands, about the requirements of the ETS and employer policies and procedures established to implement the ETS. Employees also must be provided with the CDC publication “Key Things to Know About COVID-19 Vaccines” in electronic or print format. In addition, employers must inform employees about OSHA’s requirements regarding discrimination, discharge, and retaliation for reporting injuries and illnesses or exercising protected rights. Section 501(j) (and preamble).

Finally, employees must be informed of criminal penalties for knowingly supplying false statements or documentation. Section 501(j). OSHA regards this as particularly important to avoid fraudulent reporting by employees of their vaccination status. Employers also are subject to criminal sanctions for accepting and maintaining knowingly fraudulent evidence of vaccine status, although employers are not charged with the duty to monitor or detect such fraud. Section 501(e) (and preamble).

This information may be provided in the methods typically used to communicate with employees, including through email communications, printed fact sheets, and/or during discussions at regularly scheduled team meetings. If employers have already informed employees about vaccination, testing, and face covering policies, they may rely on such communications to satisfy the ETS requirements, provided that communications meet the ETS

requirements and have not changed. Where policies or procedures do change, updated information must be provided. Section 501(j) (and preamble).

Reporting COVID-19 Fatalities and Hospitalizations

Section 1910.501(k)

Employers are required to report to OSHA each work-related COVID-19 fatality within 8 hours, and each work-related COVID-19 in-patient hospitalization within 24 hours. With certain exceptions, the requirements of 29 C.F.R. § 1904.39 apply to such reports. Section 501(k).

Access to Records

Section 1910.501(l)

Upon request, employers are required to make available to an employee for examination and copying the individual COVID-19 vaccine documentation and test results for that employee. In addition, employees or their representatives (both personal and bargaining) may request and receive the aggregate number of fully vaccinated employees at a workplace along with the total number of employees. The ETS also provides for the Assistant Secretary of Labor for Occupational Safety and Health to have access to all records required by the ETS. Section 501(l).

In the preamble, OSHA clarified that the term employee includes former employees and that requesters are entitled to one free copy of each requested record. Section 501(l) (and preamble).

Effective Dates

Section 1910.501(m)

The ETS takes effect immediately, but compliance is delayed for 30 days after its November 5, 2021 publication in the Federal Register – or until December 5, 2021. Employers must be in compliance with all requirements of the ETS by that date, with the exception of the requirements related to COVID-19 testing for employees who are not fully vaccinated which take effect on January 4, 2022. Employees who have completed the primary vaccination by January 4, 2022, do not have to be tested, even if they have not yet completed the two-week waiting period. Section 1910.501(m).

OSHA anticipates that the ETS will be in effect for six months, or until May 5, 2022, but OSHA also has stated that it will continue to monitor COVID-19 trends.

Preemption

Section 1910.501(a)

The ETS is intended to establish minimum vaccination, verification, face covering and testing requirements. To that end, the ETS states that it will preempt inconsistent state and local

requirements relating to COVID-19 vaccines, testing, and masks, including such requirements that ban or limit an employer's authority to require vaccination, face coverings, or testing. This preemptive effect is intended "regardless of the number of employees." Section 1910.501(a). OSHA, however, does not intend the ETS to preempt state and local laws that are protective of employees and complement, rather than conflict with, the ETS.

Plan States

Certain states have opted to become "Plan States," meaning that they have opted out of the federal OSHA regulatory scheme and instead have adopted occupational safety and health plans which are at least as effective as the federal OSHA standards. Plan States also must cover state and local government employees. Plan States must notify OSHA within 15 days of the action they will take under the ETS and must adopt regulations at least as effective within 30 days. OSHA ETS FAQ 1.

Collective Bargaining **Section 1910.501(a)**

The ETS sets the floor and does not prevent employers from agreeing with workers or unions to additional measures. Nor does the ETS supplant collective bargaining agreements or other negotiated agreements in effect that may have negotiated terms exceeding the ETS requirements. Section 1910.501(a); OSHA ETS FAQ 2.F. OSHA illustrated this principle by noting that a bargaining agreement may provide for paid time off for vaccines or side effects and would be compliant with the ETS as long as it provides for at least four hours to obtain each primary vaccine dose and reasonable sick leave for side effects. Section 1910.501(f) (and preamble).

Comment Period

The ETS is open for public comment. Written comments on all aspects of the ETS, including whether it should become a final rule, are due by December 6, 2021. Comments on the information collection determination are due by January 4, 2022.