

COVID-19 NEWS OF INTEREST

# U.S. DOL Issues Emergency Temporary Standard on COVID-19 Vaccination and Testing

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## AUTHORS

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On November 4, 2021, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") issued an emergency temporary standard ("ETS") that requires most employers with 100 or more employees to adopt either a mandatory vaccination policy or a policy that allows employees to choose between getting vaccinated or submitting to weekly testing and wearing face coverings. OSHA anticipates the ETS will remain in effect for six months, although this time frame is subject to change.

**Exceptions.** The ETS does not apply to:

- Employees while working remotely, who do not report to a worksite where others are present, or who work exclusively outside
- Employers with fewer than 100 employees
- Workplaces covered under the [Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors](#)
- Settings where any employee provides healthcare services or healthcare support services when subject to OSHA's [Healthcare ETS](#)
- Certain federal, state and local government employers

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**Deadlines.** Employers must comply with all of the ETS's requirements by **December 6, 2021**, except they have until **January 4, 2022** to comply with weekly testing of unvaccinated or partially vaccinated employees.

### **Employer Obligations.**

Employers must take the following steps by **December 6, 2021**:

- **Adopt a Vaccination Policy.** Employers must develop, implement, and enforce a written policy (1) mandating COVID-19 vaccination, or (2) allowing employees to choose to either be fully vaccinated against COVID-19 or to provide proof of weekly testing for COVID-19 and wear a face covering while at work. A mandatory vaccination policy must require all employees to be fully vaccinated, except those (i) for whom a vaccine is medically contraindicated; (ii) for whom medical necessity requires a delay in vaccination; or (iii) who are legally entitled to a disability or religious accommodation under federal civil rights laws. OSHA has published a Mandatory Vaccination Policy Sample and a Vaccination or Testing and Face Covering Policy Sample, available [here](#). Employers with existing vaccination policies should modify them as needed to ensure compliance.
- **Determine and Record Vaccination Status.** All employers, regardless of which policy they adopt, must determine and maintain records of every employee's vaccination status (*i.e.*, unvaccinated, partially vaccinated or fully vaccinated).
  - *Vaccination Status.* Employees are considered fully vaccinated two weeks after a second dose in a two-dose series, such as the Pfizer or Moderna vaccines, two weeks after a single-dose vaccine, such as the Johnson & Johnson vaccine, or two weeks after the second dose of any combination of two doses of different COVID-19 vaccines as part of one primary vaccination series. Notably, the definition of "fully vaccinated" does not include booster shots or additional doses.
  - *Proof of Vaccination.* Acceptable proof of vaccination includes (1) immunization records from a health care provider or pharmacy; (2) a copy of the COVID-19 vaccination record card; (3) a copy of medical records documenting 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 shows the type of vaccine administered, date(s) of administration, and the name of the administering health care professional(s) or clinic site(s). Where such proof is unavailable, employers may accept a signed and dated employee attestation that notes that false information may subject them to criminal penalties.
  - *Recordkeeping.* Employers must maintain a record and roster of each employee's vaccination status and preserve proof of vaccination while the ETS is in effect. Proof of vaccination must be treated as confidential medical information and stored separately from an employee's personnel file.

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- *Availability of Records.* By the end of the next business day after a request, employers must make available to an employee for examination and copying (i) individual vaccine documentation and any test results for the employee making the request or (ii) the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.
- **Provide Time Off For Employees To Get Vaccinated.**
  - *Time for Vaccination.* All employers must provide up to 4 hours paid time off, including travel time, at the employee's regular rate of pay for an employee to receive each of their primary vaccination dose(s); if more time is needed, employers must provide a reasonable amount of time off for this purpose. Employers may not require employees to use vacation time or sick leave to get vaccinated.
  - *Time for Recovery.* Employers also need to provide a reasonable amount of time off to recover from vaccination side effects, at least some of which must be paid. For such recovery time, employers may require employees to use available paid sick leave. If an employee does not have paid sick leave available, OSHA guidance suggests that employers need to provide two paid days off per vaccine dose.
- **Require Employees To Report Positive COVID-19 Tests.** Employers must require all employees, regardless of vaccination status, to promptly report a positive COVID-19 test or diagnosis and immediately remove any such employees from the workplace until (i) the employee receives a negative test result; (ii) meets the return to work criteria in the CDC's "[Isolation Guidance](#)"; or (iii) a licensed healthcare provider recommends their return to work.
- **Mandate Face Coverings For Unvaccinated Employees.** Employers must require employees who are not fully vaccinated to wear face coverings over their nose and mouth when indoors and when in a vehicle with another person for work purposes. This rule does not apply (i) when an employee is alone in a fully enclosed room; (ii) for limited periods of time when eating or drinking; (iii) when an employee is wearing a respirator or facemask; or (iv) where the employer can show that the use of face coverings is infeasible or creates a hazard greater than wearing one.
- **Provide Employee Notices.** Employers must supply employees with information about (i) the ETS and the employer's associated policies, (ii) COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated by providing the CDC's resource titled [Key Things to Know About COVID-19 Vaccines](#), (iii) the anti-discrimination and anti-retaliation provisions of the Occupational Safety and Health Act "[OSH Act](#)" and (iv) the OSH Act's prohibitions against supplying false information. OSHA has published a [Workers' Rights Fact Sheet](#) and a [Penalties Fact Sheet](#) on these topics.

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- **Report Work-Related COVID-19 Hospitalizations or Deaths.** As outlined in the [Reporting COVID-19 Fatalities and In-Patient Hospitalization Fact Sheet](#), employers must report to OSHA work-related COVID-19 fatalities within 8 hours of learning of them and work-related COVID-19 hospitalizations within 24 hours of learning of such hospitalizations.

Employers must take the following steps by **January 4, 2022**:

- **Mandate Testing For Unvaccinated or Partially Vaccinated Employees.** Employers must ensure that any employee who is not fully vaccinated provides documentation of a COVID-19 test at least once every 7 days (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). However, when an employee has received a positive COVID-19 test or diagnosis, 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 the ETS does not require employers to pay for testing, they may be required to do so under state or local laws, or by collective bargaining agreements.
- **Maintain Test Results.** Employers must maintain COVID-19 test results while the ETS is in effect. Test results must be treated as confidential medical information and stored separately from an employee's personnel file.

**Penalties.** Non-compliance with the ETS may subject employers to financial penalties of \$13,653 per violation (or \$136,532 per willful or repeated violation) and an OSHA enforcement action, which could lead to more severe penalties and ongoing reporting obligations. Pending legislation could modify these penalties. Furthermore, non-compliance may expose employers to litigation from individuals who allege they contracted COVID-19 at the worksite or who claim they were retaliated against for raising concerns about compliance with the ETS or unsafe working conditions.

**Next Steps.** Employers are advised to promptly review the ETS's requirements and to update their policies and procedures accordingly. While we anticipate that there will be no shortage of legal challenges to the ETS, employers should not delay compliance, including in jurisdictions that have adopted conflicting laws or executive orders.

**Additional Resources.** While this Client Alert summarizes the key provisions of the ETS, employers are encouraged to fully familiarize themselves with the standard. For additional information, see OSHA's [webinar](#), [fact sheet](#), [summary](#), and [FAQs](#).

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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