



OSHA'S EMERGENCY TEMPORARY STANDARD ON COVID-19 VACCINATIONS AND TESTING FOR PRIVATE EMPLOYERS

The Department of Labor's Occupational Safety and Health Administration ("OSHA") has issued an emergency temporary standard ("ETS") to reduce the risk of employees of large private employers (100 or more employees) from contracting COVID-19 by strongly encouraging vaccination. Covered employers must develop, implement and enforce either a mandatory COVID-19 vaccination policy or a policy requiring employees to get vaccinated, with an option in lieu of vaccination to undergo regular COVID-19 testing and to wear a face mask at work.

Covered Employers

In counting employees, employers must include all employees from all of their U.S. locations, including part-time employees and employees that work from their homes full-time. If an employer contracts with a staffing agency for workers, the workers are counted by the staffing agency, not the contracting employer, for determining whether the contracting employer is covered by the ETS. The ETS applies to all private employers who have 100 employees anytime during the period of time that the emergency standard is in effect. Once the 100 employee threshold is triggered, the obligation to comply with the ETS remains in place until the ETS is lifted, even if at any point the number of employees falls below 100.

Exclusion from ETS's Requirements for Certain Employers and for Certain Employees of Covered Employers

Not all private employers are subject to the ETS. Different COVID-19 vaccination requirements apply to **federal contractors and subcontractors** and to employers of employees that provide health care services or **health care support services**. Even though a private employer is covered by the ETS, not all employees of that private employer are required to comply with ETS's vaccination, COVID-19 testing or mask requirements. The ETS requirements do not apply to employees of covered employers 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.

Two Options for Employer's COVID-19 Vaccination Policies

Option 1:

Covered employers can choose to establish, implement and enforce a written mandatory vaccination policy, requiring all employees to be fully vaccinated, including vaccination of new hires as soon as practicable, subject to the following exemptions:

- for whom a vaccine is medically contraindicated;
- for whom a medical necessity requires a delay in vaccination; or
- for employees who are legally entitled to a reasonable accommodation under federal civil rights laws because of a disability or sincerely held religious beliefs that conflict with the vaccination requirement.

Option 2:

Covered employers also have the option to establish, implement and enforce a written policy where employees choose between providing proof of being fully vaccinated against COVID-19 or providing proof of regular weekly COVID-19 testing (meeting ETS standards) and wearing a face covering at work. Employers are not required to pay for any costs associated with the COVID-19 testing, unless required by other laws, regulations or collective bargaining agreements.

Under both options, vaccinated employees must provide the employer with acceptable proof of vaccination as set forth in the ETS. Employees who cannot provide one of the acceptable forms of proof of vaccination must be treated as not fully vaccinated.

Employer's Obligation to Support Employees Vaccination

Covered employers must provide a reasonable amount of time for each employee to obtain all required initial vaccination dose(s) and to provide up to four hours of paid time, including travel time, at the employee's regular rate of pay for employees to get vaccinated. Employers must also provide reasonable time and paid sick leave to employees to recover from side effects experienced following each vaccination. The ETS's paid time off requirement only applies to the initial vaccinations and not to booster shots.

Employer's Record Obligations

Covered employers must maintain a record of each employee's vaccination status and must retain acceptable proof of vaccination for each employee who is fully or partially vaccinated. In addition, an employer must maintain a roster of each employee's vaccination status. Information about an employee's vaccination status is considered medical information and must be kept confidential and stored separately from the employee's personnel file.

Employer's Obligation Regarding Employee's Positive COVID-19 Test

Covered employers must request that each employee, regardless of vaccination status, promptly notify the employer when the employee receives a positive COVID-19 test or is diagnosed with COVID-19 by a licensed health care provider. Upon notice from the employee, the employer must immediately remove the COVID-19 positive employee from the workplace. The COVID-19 positive employee must remain out of work until the employee:

- receives a negative result on a COVID-19 nucleic acid amplification test ("NAAT") following a positive result on a COVID-19 antigen test;
- meets the return-to-work criteria in the CDC's "**Isolation Guidance**;" or
- receives a recommendation to return to work from a licensed healthcare provider.

Employer's Obligation of Notice to Employees

Covered employers are required to provide the following information to their employees in a language and at a literacy level each employee understands about:

- the requirement of the ETS and the employer's policy;
- COVID-19 vaccine efficacy, safety and the benefits of being vaccinated by providing CDC guidance "**Key Things to Know About COVID-19 Vaccines**;" and
- an employer's prohibition from discharging or in any manner discriminating against an employee for reporting a work-related injury or illness and OSHA's prohibition of an employer discriminating against an employee for exercising rights under OSHA or as a result of actions required by the ETS.

Employer's OSHA Reporting Obligations

Covered employers must report to OSHA any work-related COVID-19 fatality within 8 hours of the employer learning about the fatality and each work-related COVID-19 in-patient hospitalization within 24 hours of the employer learning about the in-patient hospitalization.

Effective Dates

The ETS became effective on November 5, 2021, and covered employers must comply within 30 days (December 5, 2021) with the requirements in the ETS, other than testing for employees who have not completed all required initial vaccination dose(s). Within 60 days (January 4, 2022), covered employers must comply with the testing requirements for employees who have not received all required initial vaccination dose(s). Political and legal challenges to the ETS may affect its compliance dates and may change one or more of its requirements. However, at this time, covered employers should continue their preparations in order to be in compliance with the ETS.



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