



## What every HR leader should know about compliance



# What Employers Need to Know About the OSHA Vaccine Emergency Temporary Standard

November 8, 2021

**Read time:** 30 minutes

Federal workplace safety officials just released the mandate-or-test workplace vaccine emergency rule, and employers are sure to have questions. The Emergency Temporary Standard (ETS) developed by the Occupational Safety and Health Administration (OSHA) will require all covered employers with 100 or more employees to either mandate their workforce receive the vaccination against COVID-19 or test them weekly to ensure they are not infected. This is a comprehensive series of Frequently Asked Questions about the ETS – released November 4, 2021, and with an effective date of November 5, 2021 – that will enable you to expertly navigate this new requirement.

## The Basics

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### What is an “ETS”?

The OSH Act permits the agency to issue an Emergency Temporary Standard (ETS) it can enforce immediately if it arrives at the conclusion that a “grave danger” to worker safety exists. For this reason, the rule did not go through the typical notice-and-comment period that federal regulations usually follow.

### What does the ETS require?

Generally, OSHA’s ETS requires private employers with more than 100 employees to either mandate covered employees be fully vaccinated against COVID-19 or require covered employees that are not fully vaccinated to test for COVID-19 at least weekly and wear a face covering.

As part of OSHA’s ETS, employers must also:

- Establish, implement, and enforce a written policy on vaccines, testing, and face coverings.
- Provide certain information to employees on vaccines and the requirements of the ETS.



- Provide paid time off to employees to obtain the vaccine and reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination series dose to each employee for each dose.
- Obtain and maintain records and roster of employee vaccination status.
- Comply with certain notice requirements when there is a positive COVID-19 case and reporting to OSHA when there is an employee work-related COVID-19 fatality or hospitalization.

### **What are the ramifications for non-compliance?**

Covered employers who ignore the ETS while it is in effect could face OSHA citations and penalties of up to \$13,653 per violation, and additional citations or penalties as determined by OSHA or state OSHA for willful or egregious failures to comply. This means a covered employer could face a penalty of that amount for each facility, area within a facility, or each employee within a facility. In addition to OSHA citations and penalties, covered employers may face potential exposure for individual whistleblower, retaliation, negligence and other claims potentially asserted by employees.

### **How long will the ETS be in place?**

The ETS takes effect on November 5, 2021. Enforcement begins December 5, 2021, for all portions of the ETS other than testing and vaccination compliance date, which starts January 4, 2022.

The ETS can only remain in place for six months. After that time, it must be replaced by a permanent OSHA standard, which must undergo a formal rulemaking process involving a typical notice-and-comment period during that six-month period.

### **If an employer has implemented a mandatory vaccine policy that is more restrictive than the ETS, is that sufficient to comply?**

Generally, yes. You should ensure that you meet all the requirements of the ETS including:

- Establishing, implementing, and enforcing a written policy on vaccines, testing, and face coverings.
- Providing certain information to employees on vaccines and the requirements of the ETS.
- Providing paid time off to employees to obtain the vaccine and reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination series dose to each employee for each dose.
- Obtaining and maintaining records and a roster of employee vaccination status.
- Complying with certain notice requirements when there is a positive COVID-19 case and reporting to OSHA when there is an employee work-related COVID-19 fatality or hospitalization.

## **Timing and State-by-State Impact**

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### **When will the ETS take effect?**

It depends on the state(s) in which you operate. Federal OSHA does not have jurisdiction over every private employer in the country. Rather, the federal government can largely enforce safety rules against private employers only in 29 states plus the District of Columbia and other American territories (e.g., subject to



exceptions like federal worksites/military bases/navigable waters in other states). The remaining 21 states have approved “state plans,” where a state agency enforces safety regulations in that jurisdiction.

**Federal OSHA states** (private-sector employers): Alabama, American Samoa, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, Idaho, Illinois, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Virgin Islands, West Virginia, and Wisconsin.

**In Federal OSHA states, where the federal government enforces the OSH Act, the ETS will be effective immediately on November 5. Employers in these states have 30 days to comply with most of the requirements in the ETS. This means that by December 5, 2021, you must:**

- Establish a vaccination policy that includes requirements for employees to report positive COVID-19 tests, positive COVID-19 employees to be removed from the workplace, and ensuring unvaccinated and not fully vaccinated employees wear face coverings when indoors or when occupying a vehicle with another person.
- Provide employees with information about the ETS, workplace policies and procedures, vaccination efficacy, safety and benefits, protections against retaliation, and laws providing for criminal penalties for supplying false documentation.
- Determine the vaccination status of each employee and required unvaccinated employees to wear face coverings.
- Provide paid leave for employees to get vaccinated.
- Establish a reporting policy and recordkeeping policy for COVID-19 related records.

The deadline for vaccines and weekly testing of employees to begin is January 4, 2022.

**State OSHA plans** (private-sector and local and state government workers): Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

**In State Plan states, state government agencies enforce safety regulations. Those states have up to 30 days to adopt the federal ETS or alternative regulations or standards that are at least as effective as the ETS.**

### **What if we have operations in multiple states?**

You will need to follow the varying standards and timeframes applicable in each state.

### **What if we operate in a state (like Texas) that “banned” vaccine mandates?**

This question is important because we anticipate that the Texas order may not be the last one employers see banning vaccine mandates. You can expect governors in conservative Federal States – including Louisiana, Oklahoma, Georgia, Florida, Alabama, and Mississippi – to issue similar orders to push back against the federal government.



The ETS preempts states from adopting and enforcing workplace requirements relating to the occupational safety and health issues of vaccination, wearing face coverings, and testing for COVID-19, except under the authority of a federally approved State Plan. **In particular, OSHA states that the ETS invalidates any state or local requirements that bans or limits an employer's authority to require vaccination, face covering, or testing.**

To ensure that the ETS supplants the existing state and local vaccination bans and other requirements that could undercut its effectiveness, and to foreclose the possibility of future bans, OSHA defined the issues addressed by the ETS in section 1910.501(a).

During the time between the issuance of any governor's order banning mandates and the adoption of the ETS in State Plan states, employers in such states will be in limbo with respect to their vaccine policies. If you are faced with that situation, you should comply with the governor's order during the pendency of the directive but be prepared to change course once the ETS takes effect. Otherwise, you may risk receiving penalties for violating the order.

If you are unclear about a course of action or cannot reconcile differences between applicable state and federal rules, you should confer with counsel to develop an appropriate response.

## Coverage

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### Which employers are covered by the ETS?

**All** private employers with **100 or more employees** must comply with the ETS, unless they meet one of the limited exceptions. Most significantly, [federal contractors covered by the federal contractor mandate](#) and [healthcare employers covered by the Healthcare ETS](#) are not covered by this ETS. Many employers who are covered by the Healthcare ETS will, however, have to comply with emergency regulations issued by CMS, which are applicable to participants in the Medicare or Medicaid programs.

Many office-based employers may not realize that they are covered because they have not had to interact with OSHA in the past. For example, financial institutions, insurance companies, automobile dealerships, law firms, and other professional and technical work environments are often unaware that they fall under OSHA's workplace safety jurisdiction. Regardless of your prior experience with OSHA, if you are a covered employer, you should still comply with the ETS.

Please note that OSHA is also considering what requirements it may issue in the future for employers with fewer than 100 employees. OSHA has indicated that such requirements may include a strict vaccination policy and elimination of the testing alternative.

### Why did OSHA pick 100 or more employees as the threshold?

OSHA says that there are at least four reasons supporting the 100-employee threshold:

1. The ETS is feasible for employers of that size to enact promptly and without undue disruption.
2. To enable the ETS to cover two-thirds of all private sector workers in the nation.
3. Because of the risk of spread in large workplaces where the deadliest outbreaks can occur.
4. Because the threshold is comparable to decisions in analogous contexts with similar size requirements.



## How do we determine whether we have 100 or more employees?

Employers must count all employees across all of their U.S. locations, regardless of an employee's vaccination status or where they perform their work. Part-time employees *do* count toward the total number of employees, but independent contractors *do not*. As in other employment law contexts, you should be cautious about independent contractors who may be misclassified and could be found to meet the legal definition of an employee.

For a single corporate entity with multiple locations, all employees at all locations are counted for purposes of the 100-employee threshold for coverage under this ETS.

## What about joint employment, related entities under an ownership umbrella, or franchise operations?

The ETS provides different standards for these business arrangements.

### *Related Entities*

The ETS states that “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.” The ETS does not give further guidance on what “safety matters” may be considered, nor does the ETS discuss whether OSHA intends to look at how an employer is treated under other employment laws when deciding if you are a single employer for purposes of the ETS. OSHA did state that traditional joint employer principles would apply “where both employers are covered by the ETS in terms of who is responsible for which workers,” but did not further discuss the role of joint employment principles in situations where there are multiple entities that each have fewer than 100 employees but are somehow related in ownership or operations. Accordingly, you should expect OSHA to decide coverage on a fact-specific basis. In assessing whether the ETS may apply to related entities, we suggest that you analyze several factors.

- First, and of primary importance, you should look at how interrelated your entities are in handling workplace safety issues. This includes whether you have integrated safety directors, whether you have responded to prior OSHA inspections through an umbrella entity rather than the entity that employed the employee(s) at issue, and other workplace safety matters. For example, consider whether your COVID-19 policies were developed by one entity to be used by several entities and what enforcement of those policies has looked like in terms of entity involvement.
- Second, consider whether you are considered a joint employer for purposes of other employment laws. We do not yet have enough information to gauge whether OSHA enforcement will look to such other employment laws to find coverage when several related entities would otherwise be below the 100-employee threshold.

Employers should also be cautious about making operational changes now in an attempt to avoid coverage. The ETS went into effect as of November 5, 2021.

### *Franchisor-Franchisee*

The ETS explains that 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. Accordingly, the franchisor would only count “corporate” employees, and each franchisee would only count employees of that individual franchise.

#### *Staffing Agencies or Similar Relationships*

The ETS states that “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.” This is the case even if the staffing agency and host employer would normally share responsibility for the workers under the OSH Act for other purposes. The ETS refers to [OSHA’s existing guidance for temporary workers](#). While the ETS uses the phrase “staffing agency,” we expect that this analysis may also be applied to similar business models even if they do not use buzz words like “staffing agency” or “host employer.”

#### **What about when multiple, unrelated employers all have employees at the same worksite?**

The ETS discusses this issue and specifically references construction sites. In such cases, each company represented – the host employer, the general contractor, and each subcontractor – would only need to count its own employees rather than the total number of workers at each site.

#### **What about a change in the number of employees above or below 100?**

If you have 100 or more employees on the effective date (November 5, 2021), the ETS will apply for the duration of the standard. If you have fewer than 100 employees on the effective date, you do not have to comply. If you subsequently hire more workers and hit the 100-employee threshold for coverage, however, then you would then be expected to come into compliance. Once an employer falls within the scope of the ETS, the standard continues to apply for the remainder of the time the standard is in effect, regardless of fluctuations in the size of the employer’s workforce. So, once you are in, you are in.

OSHA explained that the decision to cover employers despite fluctuation above and below the 100-employee threshold during the term of the ETS was made because those employers will typically have already developed systems and capabilities in place for compliance, such that a decrease in the number of employees is unlikely to make them less capable of compliance.

#### **Are there any exceptions?**

Yes. There are two main exceptions for employers covered by other related legal requirements (described below). Some employees may also be excluded from the requirements of the ETS, which are discussed in more detail below, but in such cases the employer remains covered for all other employees.

1. Workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors ([Federal Contractor Vaccine Mandate](#)) are not required to comply with the OSHA ETS.
2. Settings where any employee provides healthcare services or healthcare support services when subject to the requirements of 29 CFR 1910.502 ([Healthcare ETS](#)) are not required to comply with the OSHA ETS.



### **Does the ETS apply to remote employees?**

The ETS requirements (such as showing proof of vaccination or weekly testing) do not apply to employees who never work in an office and never meet with co-workers or customers. However, you must still include those employees in your count to determine if you meet the 100-employee threshold.

OSHA also provides additional guidance for remote employees. Employees who work remotely some of the time, but not all of the time, will still need to show proof of vaccination or testing based on when they are at the workplace rather than at home. Specifically, OSHA has said that employers must ensure that employees who enter the workplace or interact with others as part of their job are tested for COVID-19 within seven days prior to returning to the workplace and provide documentation of that test result to the employer upon return. OSHA provided the following example:

If an unvaccinated office employee has been teleworking for two weeks but must report to the office, where other employees will be present (e.g., coworkers, security officers, mailroom workers), on a specific Monday to copy and fax documents, that employee must receive a COVID-19 test within the seven days prior to the Monday and provide documentation of that test result to the employer upon return to the workplace. The employee's test must occur within the seven days before the Monday the employee is scheduled to report to the office, but it also must happen early enough to allow time for the results to be received before returning to the workplace.

A "workplace" is defined as a physical location (e.g., fixed, mobile) where the employer's work or operations are performed. It does not include an employee's residence, even if the employee is teleworking from their residence. Examples of fixed locations include offices, retail establishments, co-working facilities, and factories or manufacturing facilities. A workplace includes the entire site (including outdoor and indoor areas, a structure or a group of structures) or an area within a site where work or any work-related activity occurs (e.g., taking breaks, going to the restroom, eating, entering or exiting work). The workplace includes the entirety of any space associated with the site (e.g., workstations, hallways, stairwells, breakrooms, bathrooms, elevators) and any other space that an employee might occupy in arriving, working, or leaving. Examples of employees who have mobile workplaces include maintenance and repair technicians who go to homes or businesses to provide repair services, or those who provide delivery services.

### **Does the ETS apply to employees who work outside?**

The ETS requirements (such as showing proof of vaccination or weekly testing) do not apply to employees who work *exclusively* outdoors. It is critical that employees have no work time indoors, even if brief. An example provided by OSHA was for construction workers who have a brief indoor meeting as part of the workday and spend the rest of the day outdoors. Those employees would still need to meet the ETS requirements.

You may make slight adjustments to your current work practices to ensure that your employees qualify for the outdoor exemption, such as by holding toolbox talks outdoors instead of in a traditional indoor location. Again, these workers do not have to comply with the ETS requirements but will still be included in the count to determine if you meet the 100-employee threshold.



## Did OSHA provide any examples of employers that fall above or below the 100-employee threshold?

Yes, the following excerpt from the ETS provides several examples of how to count the number of employees.

- If an employer has 75 part-time employees and 25 full-time employees, the employer would be within the scope of this ETS because it has 100 employees.
- If an employer has 150 employees, 100 of whom work from their homes full-time and 50 of whom work in the office at least part of the time, the employer would be within the scope of this ETS because it has more than 100 employees.
- If an employer has 102 employees and only 3 ever report to an office location, that employer would be covered.
- If an employer has 150 employees, and 100 of them perform maintenance work in customers' homes, primarily working from their company vehicles (i.e., mobile workplaces), and rarely or never report to the main office, that employer would also fall within the scope.
- If an employer has 200 employees, all of whom are vaccinated, that employer would be covered.
- If an employer has 125 employees, and 115 of them work exclusively outdoors, that employer would be covered.
- If a single corporation has 50 small locations (e.g., kiosks, concession stands) with at least 100 total employees in its combined locations, that employer would be covered even if some of the locations have no more than one or two employees assigned to work there.
- If a host employer has 80 permanent employees and 30 temporary employees supplied by a staffing agency, the host employer would not count the staffing agency employees for coverage purposes and therefore would not be covered. (So long as the staffing agency has at least 100 employees, however, the staffing agency would be responsible for ensuring compliance with the ETS for the jointly employed workers.)
- If a host employer has 110 permanent employees and 10 temporary employees from a small staffing agency (with fewer than 100 employees of its own), the host employer is covered under this ETS and the staffing agency is not.
- If a host employer has 110 permanent employees and 10 employees from a large staffing agency (with more than 100 employees of its own), both the host employer and the staffing agency are covered under this standard, and traditional joint employer principles apply.
- Generally, in a traditional franchisor-franchisee relationship, if the franchisor has more than 100 employees but each individual franchisee has fewer than 100 employees, the franchisor would be covered by this ETS but the individual franchises would not be covered.

## Certification and Recordkeeping

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### Will we be required to collect proof of vaccination?





Yes. Employers must require employees to provide an acceptable proof of vaccination status, including whether they are fully or partially vaccinated. If no proof of vaccination is provided, you must treat such employees as unvaccinated. Acceptable proof of vaccination status is:

- 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).

A signed and dated employee attestation *is acceptable* in instances when an employee is unable to produce proof of vaccination. The attestation must state their vaccination status and that they have lost and are otherwise unable to produce proof. In such cases, you must require that employees declare that the statement of their vaccination status is true and that they understand providing false information may subject them to criminal penalties.

You should be cognizant that relying on the attestation form is permissible only when an employee truthfully cannot produce proof of vaccination. If you know the employee is not being truthful and rely on the attestation, you could be subject to penalties for failure to comply with the ETS or, under certain circumstances, criminal penalties for providing false information.

Finally, for employers that have collected proof of vaccination status before the effective ETS date and have retained such records, you are not required to re-evaluate vaccination status for fully vaccinated employees and are permitted to use any record of response, even if it is not listed as acceptable proof under the ETS. Under these circumstances, you are still required to create a roster of each employee's vaccination status and are required to maintain proof of vaccination and the roster as "employee medical records" while the ETS is in effect.

### **What recordkeeping obligations coincide with collecting vaccination certification?**

The ETS requires employers to maintain a record and a roster of each employee's vaccination status. You must also maintain a record of each test result provided by each employee. These records must be maintained as confidential medical records and must not be disclosed except as required or authorized by this ETS or other federal law. The records are not subject to the retention requirements of 29 CFR 1910.1020(d)(1)(i) but must be maintained and preserved while the ETS is in effect. The standard OSHA 30-year record retention requirements *do not* apply.

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, or not fully vaccinated because they have not provided acceptable proof of their vaccination status. Although unvaccinated employees will not have proof of vaccination status, the standard requires the employer to include all employees, regardless of vaccination status, on the roster.



### **What best practices are recommended for proving vaccination status?**

When collecting vaccination status, be careful about delving into an employee's other health information. Simply tracking if an employee was vaccinated or having employees produce a copy of the vaccination card would not dig too deeply – but asking an employee why they were or were not vaccinated could be a disability-related inquiry, triggering additional obligations.

Additionally, remember that some state laws also define medical records with some jurisdictions specifically addressing vaccination records and the maintenance of the records. Be sure to comply with these laws in addition to the ETS.

Finally, maintain the records as you would any other confidential medical-related documentation (e.g., in a separate file, accessible to only those who need to know) and be sure to comply with all other state-specific privacy rules. You should also employ a reasonable standard of care with respect to digitally maintaining such information that would apply to other confidential or sensitive information.

## **Medical and Religious Accommodations**

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### **If we mandate the vaccine as the government requires, do we have to provide exceptions for any employees?**

Yes, federal law requires that you would still need to consider and possibly accommodate valid medical and religious accommodation requests if an employee requests to be exempted from the vaccination requirement. For this reason, you should ensure that your vaccination policies include provisions explaining how employees can request exemptions in the form of accommodations on the basis of medical or religious reasons.

- The Americans with Disabilities Act (ADA) establishes the federal framework applicable to evaluating accommodation requests based on medical reasons.
- Title VII of Civil Rights Act of 1964 (Title VII), as amended, provides the basis for requests for reasonable accommodation based on religion.
- State or local laws may provide similar protections.

### **What should we do if someone presents us with a medical accommodation request?**

Under the ADA, you must evaluate requests to determine whether a “reasonable accommodation” would enable the employee to perform all essential functions of their job without posing a “direct threat” to the safety of themselves or others, which cannot be eliminated or reduced through reasonable accommodation. The ADA direct threat requirement is a high standard, requiring you to use objective information to show that the individual poses a “significant risk of substantial harm” in the workplace.

Accommodations can take various forms, depending on the circumstances, but may include remote work, other schedule changes, following additional safety precautions (including masking, distancing and frequent testing), changes in the working environment or possibly even unpaid leave, to name a few. You should interactively confer with the employee seeking accommodation but are not required to grant an accommodation that would impose an undue hardship on them. An undue hardship would be characterized by a significant difficulty or expense. “Undue hardship” can also be very challenging standard for employers to meet. You must therefore consistently evaluate accommodation requests in an interactive, individualized manner and document your communications and rationale for arriving at conclusions.



### **What should we do if someone presents us with a religious accommodation request?**

As a best practice, you should confirm whether the employee's accommodation request is indeed based upon a sincerely held religious belief or practice (as opposed to a more secular or non-spiritual reason for not wanting to get vaccinated), how receiving the vaccine would violate the employee's beliefs, and what accommodation the employee is requesting. As [explained in a previous Fisher Phillips Insight](#), you must confer with the employee interactively to determine what, if any, reasonable accommodation options exist. Accommodations may take the form of those described in the previous section. Again, you are not required to grant a request that would constitute an undue hardship. Although this process is also detailed and requires thorough consideration, the legal standard applicable to evaluating requests for accommodation based on religious beliefs or practices is less demanding for employers than the undue hardship standard applicable to requests presented under the ADA. Nevertheless, you should evaluate these requests individually and carefully, recognizing that these issues are likely to be the subject of considerable future litigation.

### **If an employee is exempt from the vaccine due to a reasonable accommodation related to a disability or sincerely held religious belief, do they still need to be tested weekly?**

Yes. The ETS requires weekly COVID-19 testing of all unvaccinated employees, including those exempt from the vaccine due to a reasonable accommodation. However, if testing for COVID-19 conflicts with an employee's sincerely held religious belief, the worker may be entitled to a reasonable accommodation.

## **Testing Option**

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### **What do we need to generally know if we are considering the testing option?**

Generally, employees who report to a workplace where there are other individuals (or who interact with coworkers or customers outside of the home, collectively "the workplace") and who are not vaccinated must be tested once weekly. Weekly testing applies to employees who report to the workplace at least once every seven days and employees must provide documentation of the most recent COVID-19 test result no later than the seventh day following the date the employee last provided a COVID-19 test result.

If an employee reports to the workplace less than once every seven days, the employer must ensure that the employee is tested for COVID-19 within seven days of returning to the workplace and the employee must provide documentation of that test to its employer. Employees who work exclusively outdoors are not subject to the ETS.

### **Can we test more often than seven days?**

Unvaccinated employees need to be tested at least every seven days. You can elect to shorten this interval, but the minimum is every seven days.

### **What if an unvaccinated employee has had a prior COVID-19 infection?**

Employees who have tested positive for COVID-19 within the immediately preceding 90 days do not have to comply with a testing requirement. Testing positive means the employee received a positive COVID-19 test or has been diagnosed with COVID-19 by a licensed healthcare provider. However, unvaccinated employees (regardless of whether they have previously been infected with COVID-19), must still wear a face covering in the workplace.



### **When must we comply with the weekly testing requirement?**

Employers have until 60 days after the publication in the Federal Register (November 5) to comply with the testing requirements, and employees have completed the entire primary vaccination by that date do not have to be tested, *even if they have not yet completed the two-week waiting period.*

### **What about remote workers?**

Workers who are completely remote do not need to be tested provided that the employee does not report to a workplace where other individuals such as coworkers and customers are present (the “workplace”). In other words, if you have an employee who comes into work once a month, the employee is not required to be tested every seven days when not appearing to work. Employers, however, must ensure that the employee is tested within seven days prior to returning to the workplace and provides documentation of that test result to the employer.

What is key about the timing is that the employee’s test must occur within seven days prior to that Monday the employee is scheduled to return in person but must happen early enough that will allow appropriate time for the result to be received by the employer.

### **How long do unvaccinated employees have to submit to weekly COVID-19 testing?**

You are required to comply with the testing requirement of the ETS until unvaccinated employees are fully vaccinated (two weeks after the final shot) or until the ETS is no longer in effect.

In the case of two-dose primary vaccination series, an employee is not considered fully vaccinated until two weeks after the second shot and still needs to comply with the weekly testing requirement until this date, even within the two-week waiting period.

### **What kinds of tests will suffice?**

Under the ETS, a “COVID-19 test” must be a test for SARS-CoV-2 that is:

1. cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the U.S. Food and Drug Administration (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.

This includes laboratory tests, including home or on-site collected specimens, proctored over-the-counter tests, point-of-care tests, and tests where they are collected or processed by the employer or observed by an employer.

*Employees are not allowed to self-administer and self-read unless observed by employer or an authorized telehealth provider. Antibody tests do not meet the definition of a COVID-19 test for purposes of the ETS.*



### **What are the limitations to at-home tests?**

While OTC tests are authorized, OSHA requires an independent confirmation of the test to ensure the integrity of the result. This can be done by a licensed healthcare provider or point-of-care test provider (i.e., physician offices, urgent care facilities, pharmacies, school health clinics, drive-through testing sites). If an OTC test is being used, the employer can validate the test through the use of a proctored test that is supervised by an authorized telehealth provider. Alternatively, the employer could proctor the OTC test itself.

### **What is pool testing?**

“Pool testing” can satisfy an employer’s testing requirements under the ETS. Pooling means combining the same type of specimen from several people and conducting one antigen lab test on the combined pool of specimen. If the pooled specimen is negative, all employees who participated in the test are considered negative. If the pooled specimen is positive, additional individual testing is required to determine which employees are positive or negative.

### **Should we administer OTC tests?**

While the ETS allows for employers to proctor the OTC test, we caution employers from administering the tests as it may implicate various privacy laws and regulations. You can, however, allow the employee to self-administer and then review the results in the employee’s presence to meet the testing requirement of the ETS.

### **What if an employee says they need a medical or religious accommodation preventing them from being tested weekly?**

OSHA directs employers to the [EEOC’s guidance relating to COVID-19](#). If vaccination, weekly testing, or wearing a face covering conflict with an employee’s sincerely held religious belief or practice, [the employee may be entitled to a reasonable accommodation under Title VII](#), so long as such accommodation does not cause an undue hardship for the employer.

For employees who have a disability or medical contraindication to weekly testing, you should comply with the ADA to determine what reasonable accommodations are available that would not cause a direct threat or create an undue hardship.

### **Who pays for the tests?**

The ETS does not require employers to pay for the cost of COVID-19 testing. However, an employer may be required to pay for COVID-19 testing if required by other laws, regulations, or a Collective Bargaining Agreement.

For example, if an employee was exempted from a COVID-19 vaccine requirement due to a disability or medical contraindication to the vaccine, you would be required to pay for testing as an accommodation under the Americans with Disabilities Act (ADA). Additionally, some states (such as Kentucky) require employers to cover the cost of any employer required test.



### **Are employers required to pay for the time employees spend testing?**

The ETS does not provide a clear answer on whether employers must pay employees to test, and only states that the “ETS does not require employers to pay for any costs associated with testing.” Whether “costs associated with testing” include paying for time spent testing is unclear.

Under [current DOL guidance](#), employers are required to pay employees for time spent waiting for and receiving medical attention (including COVID-19 testing) at their direction or on their premises during regular working hours under the Fair Labor Standards Act (FLSA). This likely includes required testing occurring on employees’ days off if such testing is necessary to perform their jobs safely and effectively during the pandemic.

However, during a stakeholder webinar on November 4, 2021, Department of Labor officials stated that the DOL’s Wage and Hour division will be updating its guidance on the impact of the ETS on federal wage and hour laws, so this may change. Until the DOL clarifies whether an employer is required to pay for an employee’s time getting tested, it is recommended to err on the side of caution and pay employees for the time spent testing. To help avoid the burden of this expense, you can opt to have testing on your worksite.

### **What if there is a shortage of testing supplies or the lab an employer uses is backed up?**

OSHA has determined that, as of the November 5 effective date, there are sufficient COVID-19 testing supplies available and laboratory capacity to meet the requirements of the ETS. If you are unable to comply with the testing requirements of the ETS due to inadequate supply, OSHA will look at what efforts you make to comply with the testing requirement and will consider not enforcing the ETS requirements in situations where you can show good faith in attempting to comply with the standard.

If you encounter a shortage of testing supplies or laboratory backlogs are impeding your ability to comply with the ETS, you should contemporaneously document these events and make every effort to comply until the supply is replenished or the laboratories are no longer backlogged.

## **Miscellaneous**

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### **Do we still have to report COVID-19 fatalities and hospitalizations?**

OSHA removed the 24-hour hospitalization and 30-day fatality reporting parameters. Thus, you must report any hospitalization or fatality from a work-related COVID-19 case no matter when it occurs.

### **What do unionized employers need to know?**

It remains to be seen whether and to what extent unionized employers would be compelled to bargain over the decision to effectuate compliance with the new mandate (or at least the discretionary aspects with respect to vaccines vs. weekly testing) under NLRB doctrine. At a minimum, you should prepare for a corollary obligation to bargain over the effects of that decision on demand. In the meantime, non-union employers should consider the practical implications of compliance from a labor relations perspective, as unions may attempt to leverage aspects of the new requirements for organizing purposes. On a September 10 webinar, Labor Department officials confirmed that the ETS will not change any collective bargaining agreement obligations, similar to all other OSHA standards.



### **What if we are a federal contractor?**

The ETS does not apply to workplaces subject to Executive Order 14042, covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (“Federal Contractor Mandate”). Employers covered by the Federal Contractor Mandate are subject to [different requirements](#).

### **What if some of our workforce is covered by the Federal Contractor Mandate and some of our workforce is not covered by the Federal Contractor Mandate?**

If you otherwise meet the requirements of the OSHA ETS, the portion of your workforce not covered by the Federal Contractor Mandate will likely be subject to the OSHA ETS requirements.

### **If our employees are subject to the Federal Contractor Mandate, will we be required to test employees who receive an approved exemption from the Federal Contractor Mandate?**

It depends. Each federal contractor employer must evaluate its own circumstances to determine appropriate accommodations. Federal contractor employers exempt from the OSHA ETS do not currently have a separate requirement to test an employee who seeks and has an approved accommodation (unless a federal agency or worksite requires testing). However, employers must comply with Title VII and the ADA, which implicates direct threat to health and safety as the underlying reason that vaccination may be mandated in these workplaces.

If there is another accommodation outside of testing that is available, you can provide that – it doesn’t have to be testing. However, there are not a lot of options outside of testing beside masking and social distancing, which are largely already required by the Federal Contractor Mandate. It likely would not be enough under Title VII/ADA to simply state that testing does not have to be provided because of the exemption from the OSHA ETS. For example, if a workplace COVID-19 case results in death and the employer was not taking safety precautions such as testing for those with exemptions, then the employer would need to explain why it chose to forego testing.

It is also important to note to that federal contractors may be subject to more stringent requirements imposed by a worksite (e.g., only those who are fully vaccinated may enter).

### **What if we are in the healthcare industry?**

The federal Centers for Medicare & Medicaid Services (CMS) has issued a [separate workplace vaccine mandate](#) to encompass hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, among others, as a condition of participation in the Medicare and Medicaid programs.

## **Conclusion**

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[Legal challenges](#) have already been filed against the ETS, and more are sure to come – the ETS has already been temporarily blocked by a court order until it can be reviewed by the federal court.

Fisher Phillips has developed a [five-step action plan](#) you can implement immediately to put yourself in the best position to comply with the ETS.



While the effective date may still be weeks away, you should begin preparing now by establishing policies for determining employees' vaccination status and procedures for tracking weekly test results. You should also prepare for the possibility that employees may refuse to comply with the requirements of the ETS and begin planning and appropriate response – which would include terminating their employment.

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This information has been prepared for UBA by Fisher & Phillips LLP. It is general information and provided for educational purposes only. It is not intended to provide legal advice. You should not act on this information without consulting legal counsel or other knowledgeable advisors.