

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) released its highly anticipated emergency temporary standard (ETS) requiring covered employers—businesses with at least 100 employees—to mandate their employees get vaccinated against the coronavirus, or alternatively wear a mask and be tested for COVID-19 on at least a weekly basis.

Several states appealed the ETS, which was subsequently stayed by the Fifth Circuit on November 6, 2021. Several similar vaccine court challenges were consolidated and heard by the Sixth Circuit, which reinstated the ETS on December 17, 2021. Following the Sixth Circuit decision, the Department of Labor released a statement stating employers will have until January 10, 2022 to comply with all of the ETS requirements except the testing requirement, and until February 9 to comply with the testing requirement so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. Several interested parties appealed the Sixth Circuit decision to Justice Brett Kavanaugh, who referred the matter to the full Supreme Court. The Supreme Court heard oral arguments on January 7, 2022. As of the release of this summary, the Supreme Court has not issued a decision.

Compliance Dates:

By January 10, 2022: Employers are obligated to comply with all requirements of the ETS, with the exception of the testing requirement.

By February 9, 2022: Employers will have to comply with the testing requirement in addition to the other requirements of the ETS.

The ETS Requirements at a Glance

Employers must ensure each of the following:

- **A Written Policy requiring either:**
 - **Employee Vaccination.** Requires employees of covered employers be fully vaccinated – either two doses of Pfizer or Moderna, or one dose of Johnson & Johnson/Janssen;
- OR alternatively,
- **Weekly Testing and Face Covering Requirement for Unvaccinated Employees.** Allows employees to choose to be vaccinated or to produce a verified negative test on at least a weekly basis and wear a face covering.

SUMMARY OF OSHA EMERGENCY TEMPORARY STANDARD

- **Determination of Vaccination Status.** Employers must determine the vaccination status of each employee by requiring each employee to provide acceptable proof of vaccination status.
- **Testing of Not-Fully Vaccinated Employees.** Employees who have not received the final vaccine dose of their chosen vaccine must undergo at least weekly testing or test within seven (7) days before returning to work (if they have been away from the workplace for a week or longer), and provide the test results to the employer.
- **Recordkeeping.** Employers must maintain a roster of every employee's vaccination status and collect and maintain proof of full or partial vaccination for vaccinated employees (both to be maintained as confidential medical records).
- **Reasonable Paid Time for Vaccination or Recovery from Vaccination.** Employers must provide employees reasonable time, including up to four hours, to receive each vaccination dose and available paid sick leave to recover from vaccination side effects.
- **Temporary Removal of Infected Employees.** Employers must require employees to notify promptly their employer of a positive COVID test or diagnosis. The employer must temporarily remove any infected employee immediately from the workplace until it is safe for the employee to return.
- **Face Coverings.** The employer must ensure each employee who is not vaccinated wears a face mask when indoors or occupying a vehicle with another person for work purposes.
- **Information to Employees.** The employer must inform each employee in a language and at a literacy level they can understand about each of the following:
 - The requirements of the ETS and any employer policies and procedures implementing the ETS;
 - COVID-19 vaccine efficacy, safety and benefits of being vaccinated (by providing the CDC document, "Key Things to Know About COVID-19 Vaccines);
 - Prohibition against retaliation for reporting a work-related injury or illness, or exercising any rights afforded by OSH Act; and
 - Criminal penalties for knowingly supplying false statements or information.

Purpose of the ETS

The stated purpose of the ETS is two-fold:

First, the ETS is intended to establish “minimum” requirements for the issues it covers. Those items include: vaccination, vaccination verification, face coverings, and testing in light of the “grave danger” of COVID-19 in the workplace. The ETS and accompanying guidance makes clear it “establishes a *floor* for protections,” meaning employers *may* implement *additional* protections—for example, requiring all employees to wear face coverings regardless of vaccination status.

Second, the ETS seeks to “preempt”—i.e., override—inconsistent state and local requirements. Most notably, the ETS nullifies any state or local requirements that “ban or limit an employer’s authority to require vaccination, face coverings, or testing.” The ETS notes it does not fully preempt state or local laws of “general applicability” that apply to workers and non-workers alike, however to the extent those laws conflict with the ETS they are now without effect in the employment context.

Alignment with CMS and federal-contractor vaccination Requirement: The Biden Administration previously implemented executive orders and regulations requiring federal employees and federal contractors to be fully vaccinated. OSHA also will not apply this ETS to workplaces that are covered by either the CMS rule or the federal contractor vaccination requirement. As of the preparation of this summary, some or all of the CMS and/or federal contractor requirements are being challenged in court and may be stayed or no longer enforced. As such, it is best to seek assistance from legal counsel to determine whether there are vaccine mandates or other requirements for these workplaces or whether this ETS applies.

Scope and Application

There are two threshold considerations defining the scope of the ETS: (1) Employer Coverage; and (2) Employee Application.

Employer Coverage: The ETS applies to all private employers with “a total of 100 or more employees at any time this section is in effect.”

Counting: Employers must first determine if they have 100 or more employees, or have had that amount at any point while the ETS is in effect. Counting focuses on the workforce, *not* the worksite—i.e., all employees count, regardless of location. The guidance outlines several common situations for counting for coverage purposes:

- i. *Part-Time Employees* must be counted.
- ii. *Remote or Outdoor Workers* must be counted.
- iii. *Independent Contractors* are not counted.
- iv. *Workers from Staffing Agency* are only counted by staffing agency.
- v. *Multi-Employer Worksites?* Each employer counts only its employees.
- vi. *Franchisor/Franchisee?* Count only “your” employees.

Timing: Once an employer becomes subject to the ETS it remains covered for the entire duration the ETS is in effect. For example, if an employer has 101 employees at the ETS effective date, but two employees leave, the employer remains covered. Similarly, if an employer has 99 employees at effective date, but hires two more, the employer becomes covered for as long as the ETS remains in effect.

Exemptions: The ETS lists only two situations in which a private employer with 100+ employees is not subject to the ETS:

- (1) The employer is already covered by previous guidance issued for federal contractors and subcontractors, issued in September 2021; and/or
- (2) The employer’s work setting includes “provid[ing] healthcare services or healthcare support services” such that it is subject to 29 C.F.R. § 1910.502.

Integrated Employer: Two or more related entities may be regarded as a single employer for OSH Act purposes, including the ETS, if they handle safety matters as one company, in which case the employees of all entities making up the integrated employer must be counted.

Employee Application

Even if the ETS applies to an employer, its requirements may not apply to all employees. Specifically, the ETS does not apply to any employee who:

Does not work where other individuals are present, like co-workers or customers;

Works from home, even if other individuals not working for the covered employer are present; or

Works exclusively outdoors. If an employee works primarily outdoors, but routinely rides in vehicles with other employees, that employee does not fall under the exemption. However, if an employee works outdoors for the duration of every day, except for a *de minimis* use of indoor spaces, such as a multi-stall bathroom or

administrative office, that employee may be considered to work exclusively outdoors and covered by the exemption as long as the time spent indoors is brief. Such a determination should take into consideration cumulative time spent indoors, including the total of brief periods over a workday. Buildings under construction where substantial portions of the building are in place (i.e. walls and ceilings) where natural airflow or ventilation is impeded do not fall under the exemption.

These exceptions only apply while and when the employee falls into one of these discreet categories where they do not work with others. Where an employee has, for example, a hybrid remote/work-from-home arrangement, that employee would fall under the ETS requirements because they work in the office some of the time. Notably, employees who are not subject to the ETS requirements still “count” for purposes of determining whether the employer is covered because it has 100 or more employees.

Definitions

The ETS contains several important definitions that affect an employer’s obligations:

COVID-19 Test: An acceptable test must be:

- (1) Cleared, approved, or authorized, by the FDA to detect current infection;
- (2) Administered in accordance with the authorized instructions; and
- (3) Independently confirmed in some way, meaning it cannot be both self-administered and self-read unless observed by the employer or a telehealth proctor.

There are many COVID-19 tests that fit the ETS definition, which is intended to provide employers with flexibility to select the testing scenarios that are most appropriate for their workplace. However, antibody tests do not meet the applicable definition.

Face Covering: An adequate face covering must:

- (1) Completely cover the nose and mouth;
- (2) Be made with 2 or more layers of a breathable fabric that is tightly woven (i.e., the cannot let light pass through);
- (3) Be secured to the employee’s head;
- (4) Fit snugly over the nose, mouth, and chin with no large gaps; and
- (5) Be a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings.

Fully Vaccinated: A person is fully vaccinated two weeks after completing primary vaccination of an acceptable COVID-19 vaccine in an approved manner. The ETS outlines what standards a vaccine must meet to be acceptable (which currently includes those produced by Johnson &

Johnson, Pfizer-BioNTech, and Moderna), and the manner it must be administered (which includes acceptable length between doses, and allows for certain combinations of doses). A person is deemed partially vaccinated if this process is underway but not yet completed.

Mandatory Vaccination Policy: To meet this definition the policy must be in writing and require “each employee to be fully vaccinated,” meaning it must apply to “all employees” other than those with:

- (1) A medical contraindication;
- (2) A medical condition necessitating a delay in vaccination; and/or
- (3) A disability, and/or sincerely held religious belief, or those who are legally entitled to a reasonable accommodation.

Workplace: The ETS defines this to include any “physical location” where “the employer’s work or operations are performed.” The definition explicitly excludes an employee’s residence, however, even if used for telework. The workplace includes the entire site (including indoor and outdoor areas, a structure or group of structures), an area within a site where work or any work-related activity occurs, and the entirety of any space associated with the site. It also includes mobile workplaces where employees go to homes or other businesses to provide repair or delivery services.

Employer Policy Requirement

The ETS requires covered employers to “establish, implement, and enforce” a “written mandatory vaccination policy.” There is a limited exception to the mandatory vaccination policy requirement. A covered employer may instead opt to allow covered employees to: (1) undergo regular (weekly) testing, *and* (2) wear a face covering while at work in lieu of vaccination. Each is explained below:

Option #1: Mandatory Full Vaccination: Employers can elect to institute a mandatory vaccination policy requiring all employees to be fully vaccinated except those for whom the vaccine is medically contraindicated, medical necessity requires a delay in vaccination, and/or the individual is entitled to a reasonable accommodation for a disability and/or sincerely held religious belief. The policy must also require new employees to become vaccinated as soon as is practicable. OSHA “encourages” all employers to follow this option.

Option #2: Testing and Masks Allowed in Lieu of Vaccination. Alternatively, a covered employer’s policy may allow employees to opt to undergo weekly COVID-19 testing *and* wear a face covering while at the workplace, in lieu of being fully vaccinated. Thus, an employee has a choice between: (a) full vaccination; or (b) regular testing and constant

SUMMARY OF OSHA EMERGENCY TEMPORARY STANDARD

mask wearing while in the workplace. If the employer decides to utilize this option, it must still offer support (time off) for vaccination and may not prevent employees from getting vaccinated.

The ETS requires the employer's policy to be in writing, and be "comprehensive," meaning it must address the following:

- (1) The vaccination requirement and applicable exclusions;
- (2) Information on determining vaccination status and how status will be collected;
- (3) Testing requirements as applicable to differing employees;
- (4) Temporary suspension of testing for 90 days following a positive COVID-19 diagnosis;
- (5) Mandatory face covering requirements;
- (6) The availability of paid time and sick leave for vaccination-related reasons;
- (7) Employee notification of positive COVID-19 tests and removal of employees who test positive;
- (8) How information will be provided to employees;
- (9) How the policy applies to new hires (i.e. need to be fully vaccinated or tested within 7 days prior to entering the workplace for the first time);
- (10) Disciplinary action for employees who do not comply;
- (11) Differentiating procedures for vaccinated and unvaccinated employees as applicable;and
- (12) Other logistical information, such as the effective date of the policy, to whom it applies, deadlines for compliance, procedures for reporting or providing verification and reporting illness.

Employers may distinguish between certain segments of their workforces, so long as the distinction is made for lawful reasons (e.g., number of employees at the jobsite, different site involves higher interaction with customers, etc.). For example, employees at a certain worksite may be required to be fully vaccinated (Option #1) while employees at a different worksite may be allowed to elect testing and mask wearing (Option #2).

Because a covered employer may have some fully vaccinated employees and some non-fully vaccinated employees an employer's policy should address the requirements and procedures for testing and face coverings, even if the employer adopts mandatory vaccination (Option 1 above), as some employees may be exempt from vaccination due to medical conditions or religious belief.

Employers with an existing COVID-19 policy must re-evaluate and amend the policy as necessary to ensure it complies with the ETS requirements. Employers are obligated to ensure

compliance with the policies created the workplace through training, procedures, work rules and disciplinary action as appropriate.

OSHA provides template policies for both a mandatory vaccination policy and a vaccination or testing face covering policy on its ETS website located at:

<https://www.osha.gov/coronavirus/ets2>. Employers should revise the template policy according to their individual workplaces.

Reasonable Accommodations

Some employees may be entitled to a reasonable accommodation if the worker cannot be vaccinated because of a disability and/or if vaccination, testing and/or wearing a face covering conflicts with a sincerely held religious belief. The EEOC resource, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws](#) provides guidance in navigating requests for accommodations. The EEOC also has provided a template [Religious Accommodation Form](#) that employers may modify for their own businesses.

Determination of and Records Related to Vaccination Status

Employers are required to determine and maintain records of the vaccination status of each employee and preserve acceptable proof of each employee who is fully or partially vaccinated. The employer must maintain a roster of each employee's vaccination status ensuring such records comply with confidentiality requirements for medical records. Any employee who does not submit acceptable form of vaccination status must be treated as unvaccinated.

Acceptable proof of vaccination includes: the record of immunization from a health care provider or pharmacy; a copy of the U.S. CDC COVID-19 Vaccination Record Card; a copy of medical records documenting vaccination; a copy of immunization records from a public health official, state or tribal immunization information system; or a copy of any other official documentation containing the type of vaccination administered, the administration date, and the name of the provider or clinic administering the vaccine(s). Digital and hard copies are acceptable so long as they generally contain the name of the employee; name of medical provider or clinic; type of vaccination administered; and date of administration.

If an employee is unable to provide proof of vaccination, an employee may provide a signed and dated attestation of vaccination stating: (1) they have been fully or partially vaccinated; (2) the date, location and provider of vaccination to the best of their recollection; (3) the

vaccination administered; (4) that they lost or otherwise cannot produce proof of vaccination; (5) their statement is true and acknowledge providing false information may subject the employee to criminal penalties. An employee must have attempted to secure official documentation and been unsuccessful before an attestation will serve as acceptable proof of vaccination.

The ETS does not require employers to monitor fraud—rather only to accept proof of vaccination as presented by employees. Employers are obligated to inform employees in their policy that knowingly making a false statement may subject them to criminal penalties.

Testing Requirement

Where an employer provides a testing option in lieu of mandatory vaccination, employees must be tested at least once every seven (7) days and wear a face covering. The test to be used must:

- Be one that is cleared, approved, or authorized, including an Emergency Use Authorization by the FDA to detect current infection with the SARS-CoV-2 virus;
- Be administered in accordance with the authorized instructions; and
- Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

Tests that satisfy the requirement include tests with specimens that are processed by a lab, proctored over the counter tests, point of care tests, and tests where specimen collection and processing is either observed or conducted by the employer. The ETS identifies the wide variety of tests that comply with the standard. The ETS does not require employers to provide or pay for tests. Employers, however, may be required to pay for testing or time spent testing because of other laws or collective bargaining agreements.

See Testing Section below for more information about employee testing.

Reporting and Recordkeeping Requirements

Covered employers are subject to requirements for the following reporting and recordkeeping obligations:

- Collect and maintain proof of full or partial vaccination for vaccinated employees.
- Maintain a roster listing all employees and clearly indicating for each employee vaccination status, identifying as fully vaccinated, partially vaccinated, not fully vaccinated because of a medical or religious accommodation, or not fully vaccinated

because they have not provided acceptable proof.” The roster must be available for production to OSHA upon request.

- Maintain records of the test results of unvaccinated employees.
- Respond to an employee or an employee representative’s request for the aggregate number of fully vaccinated employees at a workplace as well as the total number of employees.
- While the ETS does not contain specific requirements for establishing or maintaining records of employee notifications of a positive test result or diagnosis, if an employer determines a reported case of COVID-19 is work-related, the employer must record that information on the OSHA Forms 300 and 301 or equivalent forms if required to do so under 29 CFR § 1904.
- Each work-related COVID-19 fatality must be reported to OSHA within 8 hours of learning about the fatality regardless of when exposure occurred, and each work-related in-patient hospitalization must be reported to OSHA within 24 hours of the employer learning about the in-patient hospitalization. Notably, such report requires knowing of the fatality or hospitalization and that such was the result of a work-related incident. To be reportable, there must be an exposure to COVID-19 in the work environment.

Vaccination records are considered a medical record subject to medical information confidentiality requirements, meaning access should be restricted and they should not be shared without employee written consent. The records must be maintained and preserved only while the ETS remains in effect.

If a covered employer has previously gathered information regarding every employee’s vaccination status prior to the ETS effective date, and retained records of that proof, then the covered employee is not obligated to re-determine status or require additional proof.

Employer Support for Employee Vaccination

Employers are required to support COVID-19 vaccination by:

- Providing reasonable time to employees during work hours for each of their primary vaccination doses. The amount of time required by OSHA is capped at a total of four hours of paid time for each vaccination dose. An employer cannot require an employee to utilize accrued paid sick or vacation leave for vaccination. Rather, the employer must pay the employee for the time away from work at the employee’s regular rate of pay if an employee is vaccinated during work hours. Reasonable time may include, but is not limited to registering for vaccination appointment(s) and completing paperwork,

time spent at the vaccination site getting vaccinated and post-vaccination monitoring; and time spent traveling to and from the vaccination site. If an employee requires more than four hours to receive a primary vaccination dose, the employer can require the use of accrued leave or unpaid leave.

AND

- Providing reasonable time and paid sick leave to recover from side effects experienced following each primary vaccination dose. An employer is required to provide reasonable time and paid sick leave to recover from vaccination side effects. If an employee has accrued sick or general leave, the employer may require the employee to use that paid sick leave. However, if the employer provides sick and vacation leave as separate forms of leave, the employer cannot require the employee to utilize vacation leave. If the employee has no available paid leave, the employer must provide leave. The employer cannot require an employee to borrow or use advanced leave or go into the negative for paid sick leave. The ETS does not provide a minimum requirement and employers may set a cap if reasonable. OSHA presumes an allowance of two (2) days' leave is reasonable.

Employers are NOT required to reimburse employees for transportation costs (e.g., gas money, train/bus fare, etc.) incurred to receive the vaccination or grant paid time to the employee for time spent receiving the vaccine during non-work hours. Employers must, however, still grant reasonable time and paid sick leave to recover from vaccination side effects experienced during scheduled work time.

COVID-19 Testing for Employees Who are Not Fully Vaccinated

Testing is only required where an employee has chosen to forego vaccination. Employers must ensure each employee who is not fully vaccinated and reports at least once every seven days to a workplace where other individuals (e.g., coworkers, customers) are present: (1) is tested for COVID-19 at least once every seven days; and (2) provides documentation of the most recent COVID-19 test result to the employer no later than the 7th day following the date on which the employee last provided a test result. The testing must occur regardless of an employee's work schedule. OSHA recommends employees set a consistent testing schedule for themselves to ensure timely documentation to the employer. In the case of remote employees or other individuals who do not regularly report to work, an employee must participate in a COVID-19 screening test within seven days prior to returning to the workplace

and provide documentation of that test result to the employer upon return to the workplace. Similarly, new hires need to be tested for COVID-19 within seven days prior to reporting to the workplace for the first time and provide documentation of their test results no later than the first day of work.

Employers have discretion as to whether the employer will provide testing at the workplace, employees will independently schedule testing at point of care locations or employees will be on their own for obtaining tests. However, the employer must specify how testing can be performed and results submitted in the written policy.

Test results submitted to the employer must contain:

- Worker identification information: full name plus at least one other identifier, such as date of birth;
- the specimen collection date;
- the type of test;
- the entity issuing the result (e.g., laboratory, healthcare entity); and
- the test result.

An employer is allowed to utilize test-pooling procedures (i.e., combining the same type of specimen from several people and conducting one laboratory test). The ETS outlines specifications for positive and negative results when test pooling.

An employer's testing and test reporting procedures must be detailed in the employer's written policy (i.e. how and when testing will be performed and by whom, and how test results should be provided to the employer). The employer must maintain records of the test results as employee medical records as long as the ETS is in effect.

If the employer is notified that that an employee tests positive for COVID-19, the employee must be removed from the workplace (see below). If an employee fails to submit a test result, the employer must remove the employee from the workplace until the employee provides a test result.

An employer is not required to pay for the costs associated with testing. It is also not prohibited from doing so. Employers should be cognizant that collective bargaining agreements and state laws may require paying for tests, and wage and hour laws may require paying employees for the time it takes an employee to be tested.

If an employee has received a positive COVID-19 test or diagnosed by a licensed healthcare provider, the employer must not require that employee to undergo COVID-19 testing for 90

days following the date of the positive test or diagnosis. Such exclusion must be included in the employer's policy.

Employee Notification to Employer of a Positive COVID-19 Test and Removal

Employers must require prompt notification from employees when they receive a positive COVID-19 test and/or are diagnosed with COVID-19 by a licensed healthcare provider. This includes all positive test results, not just those obtained through required testing, and regardless of employee vaccination status. Prompt notification means that employees who are not at the workplace when they receive a positive COVID-19 test result or diagnosis must notify the employer as soon as practicable before they are scheduled to start their next shift or return to work. Employees who receive a positive test or diagnosis while in the workplace must notify the employer as soon as is safely possible while avoiding exposing any other individuals in the workplace. Employees should be notified of these obligations.

An employer must immediately temporarily remove any employee (regardless of vaccination status) who receives a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider from the workplace. The employer can require the employee to work remotely or in isolation if suitable work is available and if the employee is not too ill to work. If an employee is unable to work, the employer should make leave available consistent with the employer's general policies and practices.

An employee can return to work only if they meet one of the three following criteria:

- (1) If 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 (the most common screening test); or
- (2) If the employee meets the following return to work criteria in the CDC's "Isolation Guidance":
 - at least ten days have passed since the first appearance of the person's symptoms;
 - the person has gone at least 24 hours without a fever (without the use of fever-reducing medication); and
 - the person's other symptoms of COVID-19 are improving (excluding loss of taste and smell); or
- (3) If the employee receives a return-to-work recommendation from a licensed healthcare provider.

If an employee tests positive via an antigen test, but then receives follow-up confirmatory testing via a NAAT and the NAAT is negative, the positive antigen test can be considered a false positive and the employee can return to work.

Employers may remove employees from the workplace above and beyond that required by the ETS.

The ETS does NOT require employers to provide paid time to any employee for removal as a result of a positive COVID-19 test or diagnosis of COVID-19, though a CBA or other applicable law may require paid leave.

Face Coverings

Employers must ensure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes. The ETS provides the following exceptions for the mask mandate:

- When an employee is alone in a room with floor to ceiling windows and a closed door. (If that employee exits the room or another individual enters the room, they are required to wear a face covering);
- For a limited time while an employee is eating or drinking at the workplace;
- For identification purposes in compliance with safety and security requirements;
- When an employee is wearing a respirator or facemask in accordance with other OSHA standards (e.g., 1910.134, 1910.504, 1910.1030, 1910.502);
- Where employers can show that the use of the face covering is infeasible or creates a greater hazard; or
- Where the employee is entitled to a disability or religious accommodation.

To meet the ETS mask wearing standards, a mask must be:

- Worn by the employee to fully cover the employee's nose and mouth, and fit snugly against the side of the face without any gaps; and
- Replaced when wet, soiled, or damaged (e.g., is ripped, has holes, or has broken ear loops). The employer must ensure mask replacement in any of these situations.

An employer cannot discourage any employee, including vaccinated employees from wearing a face covering, face mask or respirator unless doing so poses a hazard. An employer must comply with OSHA's mini respirator standards where a respirator is worn. Employers are not required to bear the cost of face coverings where employees have chosen not to get vaccinated.

An employer cannot prohibit customers or visitors from voluntarily wearing face coverings. While not required, face coverings for customers and visitors are encouraged.

Face coverings by fully vaccinated workers are not required by this ETS, but are strongly encouraged in areas of substantial or high transmission, when indoors and when in crowded outdoor areas. Employers are not obligated by the ETS to pay for face coverings.

Information Provided to Employees

Employers are obligated to provide the following information to employees in a language and at a literacy level so they understand rights and responsibilities under the ETS and the employer's related policies and procedures:

- The requirements of the ETS, as well as any employer policies and procedures established to implement the ETS, including: the details of the employer's vaccination policy; the process that will be used to determine vaccination status; the time and pay/leave they are entitled to for vaccinations and any side effects; positive COVID-19 test or diagnosis notification procedures; procedures for requesting records; and information to unvaccinated employees about the employer's policies and procedures for COVID-19 testing and face covering as required by the ETS;
- COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated, through providing the document, "Key Things to Know About COVID-19 Vaccines," available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>;
- The requirements of 29 CFR 1904.35(b)(1)(iv), which prohibits the employer from discharging, or in any manner discriminating, against an employee for reporting a work-related injuries or illness, and section 11(c) of the OSH Act, which prohibits the employer from discriminating against an employee for exercising rights under, or as a result of actions that are required by the ETS, and protects employees from retaliation for filing an occupational safety or health complaint, reporting a work-related injuries or illness, or otherwise exercising any rights afforded by the OSH Act; and
- The prohibitions of 18 U.S.C. 1001 and of section 17(g) of the OSH Act, which provide for criminal penalties associated with knowingly supplying false statements or documentation.

Employers may use discretion in determining how information is shared based upon the size and type of workplace and may use any effective method typically used to provide information to employees. The ETS recommends a point of contact for questions.

To the extent existing policies and procedures and employee communication conform to the ETS, employers may use already existing policies and procedures and related employee communication, but may need to add additional provisions pursuant to the ETS requirements, or provide additional communication where policies or procedures are altered.

Reporting COVID-19 Fatalities and Hospitalizations to OSHA

If a Work-Related Fatality: Employer must make a report to OSHA within 8 hours of learning both: (1) that an employee has died from a confirmed case of COVID-19, and (2) that the cause of death was the result of a work-related exposure to COVID-19. A work-related fatality due to COVID-19 is deemed to be one that occurred following an employee's exposure in the work environment, regardless of when exposure occurred (eliminating the standard 30-day limitation period).

If a Work Related In-Patient Hospitalization: An employer must make a report to OSHA within 24 hours of learning that: (1) an employee has been in-patient hospitalized due to a confirmed case of COVID-19, and (2) the reason for the hospitalization was the result of a work-related exposure to the illness, regardless of when exposure occurred (eliminating the standard 24 hour limitation period). In-patient hospitalization is "a formal admission to the in-patient services of a hospital or clinic for care or treatment." Treatment in an ER only is not reportable.

Work-Related. Employers must consider a fatality or hospitalization to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition, or significantly aggravated a pre-existing injury or illness. To evaluate whether a fatality or in-patient hospitalization is the result of a work-related cause of COVID-19, an employer must follow the criteria in OSHA's recordkeeping regulation at 29 CFR 1904.5. An employer is expected to make reasonable efforts to acquire necessary information to make good-faith work-relatedness determinations and rely on information reasonably available at the time of the fatality or hospitalization.

Work-related exposure would likely include close contact with a person know to be infected with COVID-19. If no known exposure, an employer must evaluate the employee's work duties and environment to determine whether it is more likely than not that the employee was exposed to COVID-19 during the course of their employment. The determination must be made on a case-by-case basis, considering factors such as: (1) the type, extent and duration of contact the employee had at the work environment with other people, particularly the general public; (2) physical distancing and other controls that impact likelihood of work-related

SUMMARY OF OSHA EMERGENCY TEMPORARY STANDARD

exposure; (3) the extent and duration of time spent in a shared indoor space with limited ventilation; and (4) whether the employee had work-related contact with anyone who exhibited signs and symptoms of COVID-19.

Availability of Records

In addition to other records, employers are required to maintain under OSHA, the ETS requires employers to:

- Make available any individual vaccine documentation to an individual employee and anyone for whom the employee has granted written consent (by end of next business day after request); and/or
- Make available to an employee or an employee's representative on request: (1) the aggregate number of fully vaccinated employees at a workplace; and (2) the total number of employees at that workplace (by end of next business day after request).

Variance

As with any OSHA standard, an employer may seek a variance from the standard. To do so, an employer must demonstrate that the conditions, practices, means, methods, operations or processes used or proposed to be used by an employer will provide employment and places of employment which are as safe and healthful as those which would prevail if the company complied with the standard. More about OSHA's variance program can be found at <https://www.osha.gov/variance-program>.

Resources

OSHA COVID-19 Vaccination & Testing ETS Text:

- <https://www.osha.gov/coronavirus/ets2> (November 4, 2021)

Fact Sheets:

- About the ETS
<https://www.osha.gov/sites/default/files/publications/OSHA4161.pdf> (November 4, 2021)
- ETS Summary
<https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf> (November 4, 2021)
- How You Can Provide Comments
<https://www.osha.gov/sites/default/files/publications/OSHA4155.pdf> (November 4, 2021)

OSHA Policy Templates, including Mandatory Vaccine or Vaccination or Testing and Face Covering

- <https://www.osha.gov/coronavirus/ets2>

FAQs: <https://www.osha.gov/coronavirus/ets2/faqs> (November 4, 2021)



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