

# What We Know

## ARTICLES & INSIGHTS

### ABOUT THE AUTHOR



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## Eight Key Takeaways from OSHA's Vax-Or-Test Rule

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On Friday, November 5, 2021, the United States Occupational Safety and Health Administration (OSHA) published its highly-anticipated emergency temporary standard (ETS), also known as the COVID-19 "vax-or-test rule." The ETS, which applies to employers with 100 or more employees firm- or company-wide, provides options for compliance that will permit employers to either mandate vaccination for all employees (except those with a legally protected exemption) or to permit unvaccinated employees to have weekly testing. Below are key takeaways from OSHA's vax-or-test rule:

1. **Prepare Now.** As an initial matter, it is important to note that the implementation of the ETS is temporarily stayed as a result of a ruling by the 5<sup>th</sup> Circuit Court of Appeals on Saturday, November 6, 2021. This ruling is currently being briefed, and the ETS's status remains uncertain while this ruling and other legal challenges move through the Courts. In the meantime, covered employers should familiarize themselves with the requirements contained in the ETS and forge ahead with laying the groundwork for implementing the mandated policy before the stated deadline of December 5, 2021, as the penalties for noncompliance are substantial. For example, covered employers who ignore the ETS could face OSHA citations of up to \$14,000 per violation, in addition to potential whistleblower, retaliation, and other claims which employees can assert for noncompliance.
2. **Count Your Workers Accurately.** In determining the 100-employee threshold, employers must count all employees across all United States locations, including part-time employees, regardless of vaccination status. Independent contractors are not included in this calculation. Two or more related entities may be regarded as single employers for ETS purposes, but franchisees are generally considered separate from the franchisor entity.
3. **Contractor and Remote Employee Considerations.** Workers covered under the separate federal contractor vaccine mandate and the healthcare ETS are not governed by the OSHA ETS. In addition, employees who exclusively work remotely or spend their entire workday outdoors are not included in the ETS. Therefore, they are not required to undergo weekly testing so long as they fall within these two categories.
4. **Employer Requirements.** On or before December 5, 2021, employers must establish, implement, and enforce a written policy on vaccines, testing, and face coverings. They

must provide OSHA-mandated information to their employees regarding vaccines and the requirements of the ETS. They must obtain and maintain records of each employee's vaccination status. They must comply with certain notice requirements when an employee tests positive for COVID-19 and report employee work-related COVID-19 fatalities and hospitalizations to OSHA. Under the requirements of the ETS, employees are not permitted to self-administer COVID-19 testing via at-home tests unless independent confirmation of the result by a licensed healthcare provider is obtained.

5. **Employee Responsibilities.** On or before January 4, 2022, all employees of employers covered by the ETS must comply with the employer's COVID policy by either providing proof of vaccination or beginning weekly testing, with paid time off offered to obtain the vaccine and reasonable time and paid sick leave provided to recover from any side effects experienced from receiving the vaccine. Employees who have tested positive for COVID-19 within the immediately preceding 90 days do not have to comply with a testing requirement, but unvaccinated employees (regardless of whether they have previously been infected with COVID-19) must wear a face-covering in the workplace.
6. **Reasonable Accommodation Requests.** Employers are required to evaluate the basis for employee requests for reasonable accommodation from either the vaccination or testing requirements contained in the ETS on the basis of either medical reasons or a sincerely held religious belief and to determine whether requested reasonable accommodations would enable to perform all essential functions of their job without posing a direct threat to the safety of themselves or others or creating an undue hardship for the employer.
7. **Implementation Period.** The ETS will remain in place for six (6) months, at which point it will either be replaced by a permanent OSHA standard or expire. A permanent standard would require a formal rulemaking process and an opportunity for comment on anticipated implementation.
8. **Notes about Enforcement.** The federal government can enforce safety rules against private employers in 29 states and the District of Columbia. The remaining 21 states – including North Carolina — have approved “state plans” in which a state agency enforces safety regulations. In those jurisdictions, state authorities have been provided up to 30 days to either adopt the federal ETS or adopt alternative regulations or standards that are at least as effective as the ETS. Until such regulations are adopted, it is recommended that employers be prepared to comply with the ETS within the stated deadlines. Employers that maintain operations in multiple states must comply with the varying standards and timeframes applicable in each state. In states that have passed laws to ban vaccine mandates, like Texas, the ETS provides that it preempts and therefore invalidates any such state or local requirements.

If you have questions about this OSHA rule or any other employment-related matter, please call [Connie Carrigan](tel:9192502119) at (919) 250-2119 or e-mail her at [ccarrigan@smithdebnamlaw.com](mailto:ccarrigan@smithdebnamlaw.com).

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