
OSHA UNVEILS NEW RULE FOR LARGE EMPLOYERS TO REQUIRE COVID-19 VACCINATIONS OR WEEKLY TESTING

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On November 4, 2021, the Occupational Safety and Health Administration (“OSHA”) issued a temporary emergency rule requiring employers with 100 or more employees to implement mandatory policies requiring employees to either provide proof of being fully vaccinated for COVID-19 or submit to weekly testing. Under the new Emergency Temporary Standard (“ETS”), unvaccinated employees will be required to begin submitting to weekly COVID-19 testing beginning on January 4, 2021.

Which Employers Must Comply with the ETS?

Under the newly published ETS, all employers with 100 or more employees are required to comply with the regulation, regardless of whether such employees are full- or part-time. Additionally, employers who currently have less than 100 employees will be required to comply with the ETS if the business subsequently begins to employ more than 100 employees. Finally, employees who currently have 100 or more employees will remain subject to the new ETS, even if the business later drops below 100 employees.

Businesses that are subject to the executive order requiring COVID-19 vaccines for Federal Contractors and Subcontractors are not subject to the ETS’s requirements. Additionally, healthcare service providers already subject to earlier OSHA requirements regarding COVID-19 vaccine requirements for healthcare providers are not subject to this rule.

Are Employers with 100 or More Employees Required to Create a Vaccine Policy?

Yes. Employers with 100 or more employees are required to put **awritten** mandatory COVID-19 vaccine policy into place. Employers can choose one of two policy types.

Under the first option, the employer must require all employees to be fully vaccinated, other than employees who are medically prevented from receiving a vaccine or who are entitled to a reasonable accommodation due to a disability or sincerely held religious belief.

Under the second option, the employer can require employees to either (1) be fully vaccinated, or (2) provide regular proof of testing for COVID-19 and to wear a face covering while at work.

Regardless of the option selected, employers must put the policy into writing and must supply certain information to employees, including copies of the policy, information about the requirements of the ETS, and certain information from the CDC on COVID-19 vaccines.

What can an Employer Request to Show Proof of Vaccination?

Covered employers must determine the vaccination status of each employee by requiring each vaccinated employee to provide proof of vaccination status. OSHA states that the following are acceptable forms of proof of vaccination status:

- The employee's record of immunization from a health care provider or pharmacy;
- A copy of the employee's COVID-19 Vaccination Record Card;
- A copy of the employee's medical records documenting the vaccination;
- A copy of the employee's immunization records from a public health, state, or tribal immunization information system; or
- A copy of any other official documentation that states the type of vaccine administered, dates of administration, and the name of the healthcare provider administering the vaccine.

If an employee is unable to provide any of the above, an employee may also supply a signed and dated statement stating under penalty of law that the employee is vaccinated and has lost or is otherwise unable to produce proof of the vaccination. Any employee who cannot provide an acceptable form of proof must be treated as not fully vaccinated by the employer.

Employers must maintain documentation related to employee vaccination as an employee medical record maintained confidentially.

Are Employers Required to Assist Employees in Receiving a COVID-19 Vaccine?

Yes. Employers falling under the ETS must:

- Provide employees with a reasonable amount of time to get a vaccine dose, including up to four (4) hours of paid time for each dose an employee receives (including travel time); and
- Provide reasonable time and paid sick leave for employees to recover from side effects experienced following each vaccination dose.

Such leave is only required for the employee's initial vaccination dose(s), and not for any boosters. Additionally, employers that already provide paid sick leave can require employees to use existing, accrued sick leave for recovery.

What are the Requirements for Employers Who Choose to Allow Employees to Submit to Weekly Testing?

If an employer that is covered by the ETS opts to allow employees to choose between weekly testing and vaccination, employees who are unvaccinated must:

- Be tested for COVID-19 at least once every seven (7) days;
- Provide documentation of their most recent COVID-19 test results within 7 days following the last test results submitted by the employee.

Employees who do not report to a workplace (such as employees teleworking or on vacation) for more than 7 days do not have to submit to weekly testing, however they must be tested for COVID-19 within 7 days prior to their return to the workplace and must provide documentation of that test result upon their return.

Under the rule, employees who do not provide the required documentation of their testing **must** be kept out of the workplace until they provide a test result.

Additionally, employers that fall under the ETS are required to make sure that unvaccinated employees wear face coverings while indoors and when occupying a vehicle with another person for work purposes, except:

- When an employee is alone in a fully separated room with a closed door;
- When an employee is eating or drinking at the workplace;
- When a mask needs to be removed for identification purposes in compliance with safety and security requirements;
- When an employee is wearing a respirator; or
- When an employer can show that wearing a mask is infeasible or would create a greater hazard in the workplace.

Importantly, under the ETS, Employers **do not** have to pay for any costs associated with testing for COVID-19, although employers are allowed to pay such costs for their employees if they choose to do so.

Are Any Employees Exempt from the ETS?

Yes. While all employers with 100 or more employees are required to comply with the ETS, the following employees of those employers are not subject to the OSHA rule:

- Employees who work at a workplace where there are no other individuals, such as coworkers or customers;
- Employees who are working **solely** from home; and
- Employees who work exclusively outdoors.

While those employees are not subject to the ETS's requirements, those employees do still count for purposes of determining whether the employer has 100 or more employees.

Are There any Other Requirements?

Yes. Employers must require all employees, whether vaccinated or unvaccinated, who tests positive for COVID-19 to promptly notify the employer of the test result.

Employees who test positive or who are diagnosed with COVID-19 are also exempt from the weekly testing requirements for a period of 90 days.

Employers must also report to OSHA any COVID-19 work-related fatality within eight (8) hours of the employer learning of the death and any COVID-19 work-related in-patient hospitalization within 24 hours of the employer learning of the hospitalization.

What are the Penalties for Not Complying with the ETS?

Employers that do not comply with the requirements of the ETS are subject to penalties of up to \$13,653 per violation. In preparing the ETS, OSHA intentionally drafted the requirements so that it could separately cite employers for *each* instance of the employer's failure to protect employees and for each affected employee.

When will Employers Have to Comply with the New ETS?

Employers with 100 or more employees will be expected to begin complying with the testing requirements by January 4, 2022. Compliance with all other provisions, such as requiring masks for unvaccinated employees and providing paid leave for employees to get vaccinated, will be required beginning December 5, 2021.

If you have any need assistance drafting a vaccine mandate policy or have questions about OSHA or the new ETS, please contact Denis Jacobson at djacobson@tuggleduggins.com or (336) 271-5242, Ross Hamilton at atrhilton@tuggleduggins.com or (336) 271-5279, or Daniel Stratton at dstratton@tuggleduggins.com.

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