

## **OSHA ISSUES EMERGENCY TEMPORARY STANDARD REGARDING VACCINE AND TESTING MANDATES FOR LARGER EMPLOYERS**

On November 5, 2021, the Occupational Safety and Health Administration (OSHA) published its [COVID-19 Vaccination and Testing; Emergency Temporary Standard](#) (ETS) along with helpful [FAQs](#) associated with same.

In summary, these new standards require covered employers (with 100+ employees) to develop, implement, and enforce a mandatory vaccination policy, with an exception for covered employers who instead adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination.

This law takes effect immediately, but specific dates regarding each requirement are discussed below. Please also keep in mind that the ETS sets a floor for compliance, and employers always have the option of doing more.

### **HOW DOES THE ETS DEFINE COVERED EMPLOYER?**

A covered employer includes all employers **with 100 or more employees**, regardless of where the employees work, whether they are onsite or not, and whether or not they are full or part-time.

Once an employer has come 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. For example, an employer that has 103 employees on the effective date of the standard, but then loses four within the next month, would continue to be covered by the ETS. Additionally, an employer that has 97 employees on the effective date of the standard, but jumps up to 101 after, would begin coverage on that date, and coverage would continue even if they fluctuate between the two numbers as time goes on.

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, such that the franchisor would only count "corporate" employees, and each franchisee would only count employees of that individual franchise.

In other situations, two or more related entities may be regarded as a single employer 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.

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. Although the staffing agency and the host employer would normally share responsibility for these workers under the OSHA, this ETS raises

unique concerns in that OSHA has set the threshold for coverage based primarily on administrative capacity for purposes of protecting workers as quickly as possible, and the staffing agency would typically handle administrative matters for these workers. Thus, for purposes of the 100-employee threshold, only the staffing agency would count the jointly employed employees. The host employer, however, would still be covered by this ETS if it has 100 or more employees in addition to the employees of the staffing agency.

### **WHICH EMPLOYEES ARE AFFECTED?**

The ETS vaccination/testing requirements **are mandatory** for all workers including those who had a prior COVID-19 infection.

The ETS requirements are **not mandatory** for:

1. workers who do not work where others are present or who work from home;
2. workers who perform their work exclusively in an outdoor setting (defined as open air or structures with one wall);
3. workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors or settings where any employee provides healthcare services or healthcare support services when subject to the requirements of the Healthcare ETS (29 CFR 1910.502).

### **WHAT DOES THE ETS REQUIRE OF COVERED EMPLOYERS?**

The ETS requires each covered employer to establish and implement a **written** mandatory vaccination policy unless the employer adopts an alternative policy requiring COVID-19 testing and face coverings for unvaccinated employees.

Mandatory vaccination policies must require vaccination of all employees, including all new employees as soon as practicable, other than those employees:

1. for whom a vaccine is medically contraindicated;
2. for whom medical necessity requires a delay in vaccination; or
3. those legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely-held religious beliefs, practices, or observances that conflict with the vaccination requirement.

In addition to addressing the requirements of the standard as to vaccinations and testing, employers should include all relevant information regarding the policy's effective date, who the policy applies to, deadlines (e.g., for submitting vaccination information, for getting vaccinated), and procedures for compliance and enforcement, all of which are necessary components of an effective plan. Having a comprehensive written policy will provide a solid foundation for an effective COVID-19 vaccination program, while making it easier for employers to inform employees about the program-related policies and procedures.

## **HOW SHOULD EMPLOYERS DETERMINE EMPLOYEES' VACCINATION STATUS?**

Employers must determine the vaccination status of each employee. This determination must include whether the employee is fully vaccinated. The ETS defines “fully vaccinated” as meaning:

a person’s status two weeks after completing primary vaccination with a COVID-19 vaccine with, if applicable, at least the minimum recommended interval between doses in accordance with the approval, authorization, or listing that is: (i) approved or authorized for emergency use by the FDA; (ii) listed for emergency use by the World Health Organization (WHO); or (iii) administered as part of a clinical trial at a U.S. site, if the recipient is documented to have primary vaccination with the active (not placebo) COVID-19 vaccine candidate, for which vaccine efficacy has been independently confirmed (e.g., by a data and safety monitoring board) or if the clinical trial participant at U.S. sites had received a COVID-19 vaccine that is neither approved nor authorized for use by FDA but is listed for emergency use by WHO. An employee who does not meet this definition is not considered fully vaccinated, regardless if they have previously tested positive for COVID-19.

Employers must require each vaccinated employee to provide acceptable proof of vaccination status, including whether they are fully or partially vaccinated. Acceptable proof of vaccination status includes:

1. the record of immunization from a health care provider or pharmacy;
2. a copy of the COVID-19 Vaccination Record Card;
3. a copy of medical records documenting the vaccination;
4. a copy of immunization records from a public health, state, or tribal immunization information system; or
5. 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).

If an employee is unable to produce any of the above, employees may provide a signed and dated statement by the employee, subject to criminal penalties for knowingly providing false information, attesting to their vaccination status (fully vaccinated or partially vaccinated) and that they have lost and are otherwise unable to produce proof required by the ETS.

Otherwise, any employee who does not provide an acceptable form of proof must be treated as not fully vaccinated.

## **WHAT IF EMPLOYEES ARE NOT FULLY VACCINATED?**

Employees who are not fully vaccinated must wear face coverings and be tested every seven days as described below.

### **Testing**

An unvaccinated employee who reports at least once every 7 days to a workplace where other individuals, such as coworkers or customers, are present must:

1. be tested for COVID-19 at least once every 7 days; and
2. provide 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.

An employee who does not report during a period of 7 or more days to a workplace where other individuals, such as coworkers or customers, are present (e.g., teleworking for two weeks prior to reporting to a workplace with others) must:

1. be tested for COVID-19 within 7 days prior to returning to the workplace; and
2. provide documentation of that test result to the employer upon return to the workplace.

Furthermore, if an employee does not provide documentation of a test result as required by the ETS, the employer must keep that employee removed from the workplace until they provide a test result. In addition, when an employee has received a positive test, or has been diagnosed with COVID-19 by a licensed healthcare provider, the employer must not require that employee to undergo COVID-19 testing as required under this pertinent ETS section for 90 days following the date of their positive test or diagnosis.

Finally, the employer must maintain a record of each test result provided by each employee or obtained during tests conducted by the employer. These records are considered to be employee medical records and must be maintained as such.

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.

## Face Coverings

A “face covering” means a covering that:

1. completely covers the nose and mouth;
2. is made with two or more layers of a breathable fabric that is tightly woven (i.e., fabrics that do not let light pass through when held up to a light source);
3. is secured to the head with ties, ear loops, or elastic bands that go behind the head. If gaiters are worn, they should have two layers of fabric or be folded to make two layers;
4. fits snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and
5. is a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings.

According to the ETS FAQs, face coverings can be manufactured or homemade, and they can incorporate a variety of designs, structures, and materials. Face coverings provide variable levels of protection based on their design and construction.

For employees who are not fully vaccinated, face coverings are required at all times except:

1. when an employee is alone in a room with floor to ceiling walls and a closed door;
2. for a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements;
3. when employees are wearing respirators or face masks; or
4. where the employer can show that the use of face coverings is infeasible or creates a greater hazard.

## **WHAT RECORDS SHOULD BE MAINTAINED?**

Employers must maintain a record of each employee’s vaccination status and must preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated. This includes maintaining a roster of each employee’s vaccination status. These records and roster are considered to be employee medical records and must be maintained as such. They must not be disclosed except as required or authorized by the ETS or other federal law.

Importantly, if employers have already collected evidence of vaccination status through attestation or proof, and retained those records, they need not to collect such information again.

## **HOW ARE EMPLOYEES PAID FOR TIME OFF ASSOCIATED WITH GETTING THEIR VACCINATION?**

Employers must support COVID-19 vaccination by providing both paid time for getting the vaccine and possible paid time for recovery, as described below:

### Paid Time for Getting the Vaccine

Employees must provide paid time off for getting the vaccine. This includes a reasonable amount of time to each employee for each of their primary vaccination series dose(s); and up to 4 hours paid time, including travel time, at the employee's **regular rate of pay** for this purpose.

### Paid Time for Recovery

Employers must also provide reasonable time and paid sick leave to recover from side effects experienced following any vaccination dose to each employee for each vaccination dose. Employers may require employees to use paid sick leave benefits otherwise provided by the employer to offset these costs, if available.

### **WHO PAYS FOR THE COST OF TESTING?**

While the ETS states that there is no requirement that the employer pay for testing, California Labor Code section 2802 requires reimbursement for all necessary expenses incurred by employees in direct consequence of the discharge of their duties. In line with California Labor Code section 2802, CalOSHA's ETS and related [FAQs](#) regarding testing currently state that employees must incur **no costs** for testing, and that employers must pay "employees' wages for their time to get tested, as well as travel time to and from the testing site. It would also include reimbursing employees for travel costs to the testing site (e.g., mileage or public transportation costs)."

### **When Does All of This Have to Happen?**

The effective date of the ETS is November 5, 2021.

The following must happen within **30 days** of November 5, 2021 (December 5, 2022):

1. Vaccination or testing policy must be established;
2. Vaccination status of employees must be determined;
3. Employees must begin providing notice of positive COVID-19 tests and diagnosis;
4. Employees who are not fully vaccinated must wear face coverings when indoors or when occupying a vehicle with another person for work purposes;
5. Employers must provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation; and
6. Make certain records available to OSHA if requested.

The following must happen within **60 days** of November 5, 2021 (January 4, 2022):

Employers must ensure employees who are not fully vaccinated are tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer).

**WHAT ELSE DO WE NEED TO KNOW?**

Expect CalOSHA to update its ETS to fall in line, if not slightly update the current OSHA ETS requirements. This is important not only because California employers must ensure they are also following all CalOSHA requirements, but also because challenges to the federal OSHA ETS may not matter given the local agency's requirements will remain effective.

Keep in mind that there are additional obligations in case of positive cases or deaths related to the workplace and COVID-19 and reporting same. Employers must be sure to follow all reporting requirements, including those set by state and local health departments.

Finally, it is important to note that the ETS specifically states that OSHA is looking into similar requirements for smaller employers. As stated in the ETS, "OSHA needs additional time to assess the capacity of smaller employers and is seeking comment to help the agency make that determination."

If you have any questions, please do not hesitate to contact us! It would be our pleasure to advise you.