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# **Biden Administration Releases Rules on Vaccinate-or-Test Mandate for Employers With at Least 100 Employees**

**Guidance covering 84 million workers sets January 4 vaccination deadline for employees to avoid mandatory masking and weekly testing for COVID-19**

*November 2021*

Employers with 100 or more employees have until January 4, 2022, to develop and implement policies requiring their employees either to be vaccinated against COVID-19 or submit to mandatory masking and weekly testing for COVID-19, under an Emergency Temporary Standard (ETS) issued by the Occupational Safety and Health Administration (OSHA).

## **Summary**

The ETS provides that employers may impose either a mandatory vaccination policy or a policy giving employees the choice of either vaccination or weekly testing and mandatory masking. Employers that adopt the latter policy do not have to pay the costs of weekly testing for employees. However, the ETS imposes numerous record-keeping and documentation requirements on employers, sets out rules on providing paid time off for employees to become vaccinated and recover from any side-effects, and subjects employers that fail to comply with the ETS to possible fines of up to \$13,653 per violation.

This Aon bulletin discusses:

- Determining Covered Employers and Employees
- Implementing Mandatory Vaccination and Vaccination-or-Testing/Masking Policies
- Determining an Employee's Vaccination Status—Proof, Records, and Acceptable Vaccines
- Paid Time Off (PTO) for Vaccinations and Vaccine Side-Effects
- Testing Employees Under a Vaccination-or-Testing/Masking Policy
- Providing Policy Information to Employees
- Preemption, State Plans, and Additional Employer Measures
- Effective Dates

## **Determining Covered Employers and Employees**

Employers with a total of 100 or more employees at any time the ETS is in effect are covered. If the employer has 100 or more employees on November 5, 2021, it is subject to the ETS for its duration. If the employer has fewer than 100 employees on November 5, 2021, the ETS would not apply to it as of



that date. However, the ETS would apply as of the date the employer employs more than 100 employees and would then apply for the duration of the ETS.

The ETS by its terms does not apply to:

- Employers covered by the Executive Order covering federal contractors and subcontractors;
- Health care employers covered by the Centers for Medicare & Medicaid Services rule for health care services or health care support services; or
- State or local governments in states without State Plans.

Employers must count employees at an employer level (firm- or corporate-wide), not at the individual location level. At a traditional franchisor/franchisee setting, where each franchise is individually owned, the franchisor would count employees separately from the franchisee. Presumably the franchisee would combine location counts if it owned more than one location.

The following employees count toward the 100-employee threshold for employers:

- Employees who perform work at offsite locations (including at home or at customer locations);
- Part-time employees;
- Staffing agency employees (but only for the staffing agency, not the host employer);
- Temporary and seasonal employees employed directly by the employer (not through a staffing agency);
- Employees who work exclusively outdoors;
- Vaccinated and unvaccinated employees; and
- Minors.

OSHA expressly provided that independent contractors do not count toward the 100-employee threshold.

Some employees who count toward the 100-employee threshold are not covered by the ETS. The ETS applies to all employees of a covered employer except for the following:

- Employees who do not report to a workplace where co-workers or customers are present;
- Employees while working from home; and
- Employees who work exclusively outdoors.

OSHA expressly provides that the ETS applies to collectively bargained employees unless the requirements of the applicable collective bargaining agreement exceed the requirements of the ETS.

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It's also worth noting that despite early speculation, there are no waivers available for essential employees.

## **Implementing Mandatory Vaccination and Vaccination-or-Testing/Masking Policies**

A covered employer must establish, implement, and enforce a policy that either:

- Mandates vaccination for its employees at the workplace (subject to certain reasonable accommodations described below); or
- Permits employees to choose between becoming vaccinated or undergoing weekly testing and mandatory masking.

Either way, the employer's policy must be in writing and contain the following information:

- The requirements for being vaccinated against COVID-19;
- Reasons for which reasonable accommodations may be granted;
- How an employee's vaccination status will be determined and how information about that status will be collected;
- The availability of PTO to become vaccinated and sick time to recover from any side effects;
- Testing protocols and timing (if the employer's policy will allow testing as an alternative to vaccination);
- The employee's responsibility for notifying the employer of a positive COVID-19 test or diagnosis and procedure for removal of the employee from the workplace (regardless of vaccination status);
- The information to be provided by the employer to the employees and the method of providing it; and
- The disciplinary action for employees who do not abide by the policy.

An employer may have different policies for different groups of employees (e.g., a mandatory vaccination policy for customer-facing employees and a vaccinate-or-test policy for corporate employees).

Neither the OSH Act nor the ETS prevent an employer from taking disciplinary action against an employee who does not comply with the employer's vaccination policy. However, employment agreements, collective bargaining agreements, and other laws, such as the Americans with Disabilities Act and Title VII, may apply, and employers should consult with employment counsel before taking any such action.

## **Determining an Employee's Vaccination Status—Proof, Records, and Acceptable Vaccines**



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**Proof of Vaccination Status.** The following are acceptable forms of proof:

- Vaccination record from a pharmacy or health care provider;
- A copy of the employee's COVID-19 Centers for Disease Control and Prevention (CDC) vaccination card;
- A copy of a medical record documenting the vaccination;
- A copy of immunization records from a public health, state, or tribal immunization information system; and
- A copy of any other official documentation that contains the type of vaccine administered, the date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

If an employee who claims to have been vaccinated is unable to provide one of the forms of proof above, the employer may rely on the employee's signed and dated statement attesting:

- To the employee's vaccination status (whether partially or fully vaccinated);
- That the employee has lost and is unable to produce the required proof; and
- To the type of vaccine, the date(s) of administration, and the administration site(s) for the vaccine(s).

The attestation must include the following language: "I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties."

The employer may not rely on this attestation if the employer knows the statement regarding vaccination status is fraudulent. An employer who knowingly accepts and maintains a fraudulent attestation as a record of compliance with the ETS may be subject to criminal penalties.

An employee cannot be classified as fully vaccinated under a covered employer's mandatory vaccination policy if the employee has previously had COVID-19 and has antibodies but has not been vaccinated.

**Employer Records of Vaccination Status.** Employers are required to maintain a record of each employee's vaccination status. The employer's record or "roster" of employee vaccination status must list all employees and indicate for each whether the employee is fully vaccinated, partially vaccinated, unvaccinated because of a medical disability or religious accommodation, or unvaccinated because the employee has not provided acceptable proof of vaccinated status. The records of vaccinated status and the roster of employees are confidential employee medical records and must be treated as such.

The ETS requires that a covered employer must make available to an employee or the employee's representative, by the next business day after a request: (1) the individual employee's COVID-19 vaccine documentation; and (2) the aggregate number of fully vaccinated employees at a workplace and the total number of employees at that workplace. The request may be electronic, in person, by

phone, or other means. An employer must provide to the Department of Labor, within four business hours of a request, the employer's written vaccination policy and the aggregate and total numbers described just above.

The ETS states that the employer must make available, for examination and copying, the individual COVID-19 vaccine documentation and any COVID-19 test results required by the ETS for a particular employee to that employee and to anyone having written authorized consent of that employee by the end of the next business day after a request.

**Acceptable Vaccines.** Vaccines are acceptable under the ETS if they are: (1) approved for use by the Food and Drug Administration (FDA); (2) authorized for emergency use by the FDA; (3) listed for emergency use by the World Health Organization; or (4) administered as part of a clinical trial at a U.S. site, and a number of conditions are satisfied. Thus, an employee who was vaccinated outside the U.S. may nonetheless qualify as fully vaccinated under the ETS as long as the employee provides acceptable proof of vaccination.

## PTO for Vaccinations and Vaccine Side-Effects

**PTO for Vaccinations.** Employers are required to provide employees with up to four hours of PTO to receive each vaccination. The PTO should be at the employee's regular rate of pay. Employers cannot require employees to use or offset any other types of leave, such as sick leave or vacation leave. For the Pfizer-BioNTech and Moderna vaccines, employers must provide up to four hours of PTO for each of the two-dose regimens.

If an employee gets vaccinated outside of work hours (e.g., on a Saturday), employers are not required to provide PTO for the vaccination. Also, employers are not required to pay for any transportation costs an employee may incur to travel to receive the vaccination.

**PTO for Vaccine Side-Effects.** Employers are required to provide a "reasonable amount" of time to recover from any side-effects from the vaccine. However, the ETS does not specify any particular amount of sick leave that must be required for recovery. Therefore, employers may set a cap on how much time is available for that purpose, but it must be "reasonable." Generally, OSHA will assume that if an employer makes up to two days of paid sick leave available to recover from any side-effects related to each dose, the employer will be in compliance with the requirement.

If an employee has existing accrued paid sick leave, an employer may require the employee to use that paid sick leave to recover from any vaccine side-effects. If the employer provides only one type of leave (i.e., does not distinguish between sick leave and vacation leave), then the employer may require the employee to use that leave to recover from the vaccine. However, if an employer provides both paid sick leave and vacation leave, the employer may require the employee to use only his or her sick leave when recovering from the vaccine. If the employee does not have any paid sick leave, an employer cannot require the employee to use advanced sick leave or borrow against future leave for time spent recovering from any side-effects related to vaccination. This leave requirement is in addition to the PTO that employers must provide for employees to receive the vaccine.

The requirements for PTO to receive the vaccine and recover from any side-effects apply even if the employer provides for vaccinations at the employer's worksite. If the employer provides for vaccinations on-site, the employer will be required to pay for the costs incurred to bring the vaccinations on-site, but the amount of time required to be provided for vaccine administration may be reduced if vaccinations are administered on-site.

## Testing Employees Under a Vaccination or Testing/Masking Policy

**Testing Unvaccinated or Partially Vaccinated Employees.** Unvaccinated employees who work remotely do not need to be tested. Remote workers are those employees who do not report to a workplace where other individuals such as co-workers or customers are present or are those employees who work from home. However, an unvaccinated employee who reports at least once every seven days to a workplace where other co-workers or customers must be tested for COVID-19 at least weekly. Documentation of each test result must be provided to the employer.

An employee who does not report to the workplace on a weekly basis must be tested within seven days of the employee's returning to the workplace. For example, if an unvaccinated employee is not working in the office for two weeks, but then returns to the office, then that employee must receive a negative COVID-19 test within the seven days prior to the day the employee returns to the workplace. Documentation of the test result must be provided to the employer prior to the employee's return to the workplace.

The employer must retain copies of each test result required to be provided by an employee. These records are employee medical records that must be retained and cannot be disclosed except as permitted under certain federal laws.

Weekly testing and mandatory masking must continue until an employee is "fully vaccinated." An employee is fully vaccinated following two weeks after receiving the second dose of the vaccination for two-dose vaccines (e.g., Pfizer-BioNTech and Moderna). Therefore, testing will continue until two weeks after the second dose. However, employees who have received the full vaccination (e.g., both doses of Pfizer-BioNTech or Moderna or one dose of Johnson & Johnson) by the January 4, 2022, compliance date do not have to be tested even if they have not yet completed the two-week waiting period.

Unvaccinated employees who are subject to the testing/masking requirement remain subject to those requirements for as long as the ETS is in effect. Additionally, starting December 5, 2021, unvaccinated employees who are subject to the testing/masking requirements must also wear a face covering in the workplace. The requirement to wear a face covering applies except in very limited circumstances, including when the employer can demonstrate that doing so will create a hazard.

Employers are not required to pay for costs associated with COVID-19 testing, but employers may pay such costs if they choose to do so. However, other laws, regulations, collective bargaining agreements, or other negotiated agreements may require an employer to pay for COVID-19 testing.

**Acceptable Types of COVID-19 Tests.** An acceptable COVID-19 test under the OSHA ETS is a test for SARS-CoV-2 that is:

- Cleared, approved, or authorized (including an Emergency Use Authorization or EUA) by the FDA to detect current infection with the SARS-CoV-2 virus (e.g., a viral test);
- 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.

Examples of acceptable tests include tests with specimens that are processed by a laboratory (including home or on-site collected specimens that are processed either individually or as pooled specimens), proctored over-the-counter tests, point-of-care tests, and tests where specimen collection and processing is either done or observed by an employer.

If there are laboratory delays beyond the employer's or the employee's control, and the employer permits the employee to continue working, OSHA will consider the employer's good faith efforts to comply with the testing requirements in the enforcement process.

***Reasonable Accommodation Due to Disability or a Sincerely Held Religious Belief.*** All unvaccinated employees will be required to be tested weekly (assuming such employees report to a worksite with customers and co-workers), including those employees who receive a reasonable accommodation from the vaccine requirements. However, if testing for COVID-19 conflicts with the worker's sincerely held religious belief, practice, or observance, the worker may be entitled to a reasonable accommodation. The Equal Employment Opportunity Commission has issued [Guidance on Religious Objections to Vaccine Mandates](#).

***Employees Who Test Positive for COVID-19.*** Employers must remove any employees from the workplace who test positive for COVID-19 or who are diagnosed with COVID-19 by a health care provider, regardless of whether the employee is vaccinated. The employee must remain out of the workplace until the employee receives a negative COVID-19 Nucleic Acid Amplification Test, meets the return-to-work criteria in the CDC's Isolation Guidance, or receives a recommendation to return to work from a licensed healthcare provider.

Employers can require employees who have been removed from the workplace under these circumstances to work remotely or in isolation if such work is available and the employee is well enough to work. However, employers are not required to notify other employees or conduct contact tracing after an employee tests positive for or is diagnosed with COVID-19 but should follow state and local public health guidance.

The ETS does not require employers to establish or maintain any records related to an employee's notification of positive COVID-19 tests or diagnoses. However, if the incident is work-related other OSHA requirements will apply.

Employers are not required to provide PTO to any employee who is removed from the workplace because of a positive COVID-19 test or diagnosis. However, employers may be required to provide PTO under other laws, regulations, collective bargaining agreements, or other collectively negotiated

agreements. Employers may pay employees for time required for removal and employees should have access to any accrued leave in accordance with the employer's leave policies.

## Providing Policy Information to Employees

The employer must inform each employee of the employer's policies and procedures for implementing the ETS, including:

- The process that will be used to determine employee vaccination status;
- The time and pay/leave the employee is entitled to for vaccinations and any side-effects experienced following vaccinations;
- The procedures the employee needs to follow to provide notice of a positive COVID-19 test or diagnosis of COVID-19 by a licensed health care provider;
- The procedures to be used for requesting records;
- Information about the employer's policies and procedures for COVID-19 testing and face coverings;
- COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated by providing the document, including the document "[Key Things to Know About COVID-19 Vaccines](#)";
- The rules prohibiting the employer from discharging or discriminating against an employee for reporting work-related injuries or illness and from discriminating against an employee for exercising rights under, or as a result of actions that are required by, the ETS;
- The rules protecting the employee from retaliation for filing an occupational safety or health complaint, reporting a work-related injury or illness, or otherwise exercising any rights afforded by the OSH Act; and
- The criminal penalties associated with knowingly supplying false statements or documentation.

Employers have flexibility to communicate this information to employees using any effective methods that are typically used in their workplaces. An employer may provide this information to employees through email communications, printed fact sheets, or during a discussion at a regularly scheduled team meeting. There are no formal training requirements.

## Preemption, State Plans, and Additional Employer Measures

The ETS is intended to preempt state and local laws that ban or limit an employer's authority to require vaccination, face masks, or testing, except under the authority of OSHA-approved "State Plans." Currently, Arkansas, Iowa, Montana, and Texas have laws restricting the application of vaccine mandates. However, the ETS does not preempt generally applicable requirements intended to protect public health.

State Plans are OSHA-approved workplace safety and health programs operated by individual states or U.S. territories. There are currently [22 State Plans](#) covering both private sector and state and local



government workers. Six State Plans (Connecticut, Illinois, Maine, New Jersey, New York, and the U.S. Virgin Islands) cover only state and local government workers.

The ETS sets the minimum standards that covered employers must meet to safeguard workplace health and safety. Employers may take additional measures or may be required to do so by collective bargaining agreements.

## Effective Dates

Although the effective date for the ETS is November 5, 2021, employers are required to comply with all the requirements of the ETS, except the requirement for testing employees who are not fully vaccinated, on or before December 5, 2021. The compliance date for testing unvaccinated employees for COVID-19 is on or before January 4, 2022.

If an employee completes the entire primary vaccination series on or before January 4, 2022, that employee does not have to be tested, even if the employee has not yet completed the two-week waiting period that is required to be considered fully vaccinated. However, employers must begin compliance with the testing requirements for employees who have not yet received the requisite number of doses for a primary vaccination series by January 4, 2022, meaning that employees who have not received any doses and employees who have received only one dose of a two-dose series.

The following dates apply for the three main vaccination series available in the U.S. in order for an employee to complete a vaccination series by January 4, 2022, and be exempt from the testing requirement:

- **Janssen (Johnson & Johnson) vaccine (one dose).** An employee has to receive the dose on or before January 4, 2022.
- **Pfizer-BioNTech vaccine (two doses).** Employees receiving the Pfizer-BioNTech series have to get their first dose on or before December 14, 2021, and get their second dose on or before January 4, 2022.
- **Moderna vaccine (two doses).** Employees receiving the Moderna series have to get their first dose on or before December 7, 2021, and get their second dose on or before January 4, 2022.

The ETS will be in effect for six months and will be subject to a comment period.

## Resources

The official federal documents on the ETS, including the text of the ETS and OSHA's Frequently Asked Questions, can be found [here](#).



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