



CLIENT ADVISORY OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

ETS Issued 11.05.21

COVID-19 Vaccination and Testing ETS

Overview

The [Occupational Safety and Health Administration \(OSHA\)](#) recently issued an Emergency Temporary Standard (ETS) that imposes new requirements and deadlines on employers with 100 or more U.S. employees in connection with COVID-19 vaccinations, testing, face coverings, notification, and recordkeeping.

The intent of the ETS is to provide COVID-19 workplace protections for approximately 84 million private-sector U.S. workers. The ETS establishes minimum requirements to be adopted by employers but employers can always implement additional measures.

Implementation Timeline

December 6, 2021 (30 Days)*

January 4, 2022 (60 Days)*

On Saturday, November 6, 2021, the U.S. Court of Appeals for the Fifth Circuit temporarily blocked OSHA's ETS pending further litigation. While we expect that the court will expedite litigation of this matter, it is currently unknown whether OSHA will provide additional time for employers and employees to comply with the ETS requirements. As such, we recommend employers continue obtaining vaccination status of employees in a manner that is currently deemed acceptable under the ETS. Also, covered employers may want to ready their vaccination/testing policies for publication upon judicial resolution.

The ETS, as currently presented, could result in significant fines if employers, and their employees, do not comply with the rule. OSHA currently issues penalties of up to \$13,653 per violation per day for failure to remedy non-compliance with other OSHA rules once a citation is issued; fines for willful violations can be higher.

Risk Strategies will continue to work diligently to provide our clients with the most up-to-date information.

- Establish vaccination/testing policies
- Collect and retain vaccination status of each employee
- Create roster of vaccination status
- Deploy training on policy and enforcement
- Ensure unvaccinated employees wear face coverings when indoors or in a vehicle with another person for work purposes
- Provide employees with information about the ETS, workplace policies, [CDC vaccine](#) information, anti-retaliation protections and criminal penalties for providing false statements or documentation in connection with vaccines or testing

- Ensure unvaccinated employees are tested weekly.

*Tentative dates pending judicial resolution

Employer Requirements

- **Employer Policies:** Covered employers must either implement and enforce a mandatory COVID-19 vaccination policy for all employees or implement and enforce a policy permitting unvaccinated employees to submit to weekly COVID-19 testing and wear a face covering in the workplace. OSHA provided [sample policy language](#) that employers may tailor for their own use. If an employer decides to implement a mandatory vaccination policy for employees, it must provide a reasonable accommodation process for employees with medical reasons for not being vaccinated or sincerely held religious beliefs.
- **Employee Notifications:** Employers must provide employees with information, in a language and at a literacy level understood by an employee, about the ETS and the policies the employer has adopted to comply with the ETS. Employers must also provide employees with a [CDC vaccine](#) information document. Further, employers are required to provide employees with information regarding ETS anti-retaliation and discrimination protections as well as criminal penalties for providing false statements or documentation in connection with vaccines or testing. Employers are required to make available to an employee or employee representative, the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that location within one business day of request.
- **Proof of Vaccination:** Employers will need to determine their workforce vaccination status by obtaining acceptable proof of vaccination from each employee (i.e. medical records, vaccination cards). If a vaccinated employee is unable to provide proof of vaccination, they must sign an attestation statement of their vaccination status in order to be deemed vaccinated.
- **Vaccination Roster:** Employers will need to create a roster of vaccination status.
- **Recordkeeping:** Employers are required to collect and maintain the vaccination records, along with the weekly COVID-19 test results from unvaccinated employees. These records must be kept confidential and stored separately from employment files. Note these records must be maintained and preserved only while this ETS remains in effect and are not subject to OSHA medical records retention requirements.
- **Paid Time Off for Vaccines:** Employers must provide up to 4 hours paid time off for employees to receive the vaccine, including travel time, at an employee's regular rate of pay. Employers cannot require employees to use accrued paid leave to satisfy this requirement. Employers are also required to provide reasonable time off for an employee to recover from any side effects caused by the vaccine but can require employees to use their accrued sick time for this purpose to the extent allowable by local applicable law.
- **Weekly Testing:** Unvaccinated employees who work onsite or in the presence of others (co-workers, customers, etc.) must submit proof of negative COVID-19 tests every 7 days. For those unvaccinated employees who intermittently work onsite or in the presence of others, they must be tested within 7 days prior to returning to work and provide proof of that test upon their return to work. The ETS clarifies that any COVID-19 test authorized by the FDA is suitable for use here but there are limitations for self-administered and self-read tests.
- **Face Coverings:** Face coverings are required for all unvaccinated employees in the workplace when indoors and when in a vehicle with another person for work purposes. Note that unvaccinated employees may remove their face covering when alone in a room with floor to ceiling walls and a closed door, or while eating/drinking for a limited time or showing their face for identification purposes.
- **External Communications:** Employers must report work-related COVID-19 in-patient hospitalizations to OSHA within 24 hours and fatalities within 8 hours of being notified. In addition, employers must provide the Department of Labor (DOL) a copy of the written policy and aggregate numbers within 4 hours of request and all other records required to be maintained by the end of the next business day following the request.
- **Cost Considerations:** Employers are **not** required to pay for the costs associated with the testing of unvaccinated employees, sick time associated with a positive COVID-19 test result or face coverings for employees, except where required by collective bargaining agreements or other laws and regulations.

Employers who are federal contractors or subject to Centers for Medicare and Medicaid Services (CMS) rules should follow applicable regulations that are superseded by this ETS. Those states with their own OSHA-approved State Plan will be required to publish their own standards shortly that meet or exceed the requirements in this ETS.

Employers Covered by the ETS

- **100-Employee Threshold Count:** The ETS applies to all U.S. employers with 100 or more employees. Employers must include all employees across all of their U.S. workplaces in determining this threshold, not just the individual location level.
- Generally, each employer must count the total number of workers it employs regardless of where they report for work on a particular day, even if exempt from the requirements of this ETS.
- Remote, part-time and seasonal workers employed directly by the employer are all counted to determine if an employer meets the 100-employee threshold under the ETS.
- Independent contractors do not count towards the total number of employees. For multi-employer worksites, each company represented would only need to count its own employees.
- Overall employee count does not include temporary employees supplied by a staffing agency.

Who is Exempt?

Employees

The following employees are exempt from the ETS requirements of mandatory vaccination or the weekly testing/face covering alternative, for any 7 day period where the following applies:

- Workers who exclusively telework from home
- Workers who do not report to a workplace where other individuals are present
- Workers who work exclusively outdoors

Employers

- Employers already subject to the Safer Federal Workforce Task Force COVID-19 Workplace Safety requirement
- Employers already subject to the [Federal OSHA Healthcare ETS requirement](#)
- Public employers in states without OSHA-approved State Plans.

How Risk Strategies Can Assist

This document provides a summary of the most current information available from OSHA and the CDC. In addition to other resources and guidance provided to clients, Risk Strategies has a portal available including the KPA-Risk Management Center, to assist in providing COVID-19 training for employees and managers, access to OSHA compliant posters and notifications, and an audit mechanism for assuring adherence to employer policies.

Risk Strategies will continue to work diligently to provide our clients with the most up-to-date information.

For additional information and or guidance, please reach out to your Risk Strategies client team member or visit our COVID-19 Resource Center on our [website](#).

The information provided in this client advisory alert does not, and is not intended to, constitute legal advice. Any recommendations contained in this alert are intended to provide insight based on currently available information for consideration and should be vetted against applicable legal and business needs before application to a specific client.