

SUMMARY OF OSHA-ISSUED ETS GUIDANCE FOR COVID-19 VACCINE-OR-TEST MANDATES FOR LARGE BUSINESSES

Background

Litchfield Cavo partners [Kearney W. Kilens](#) and [Kathleen J. Collins](#) have summarized the Occupational Safety and Health Administration (OSHA) emergency temporary standard (ETS) requiring large employers (100 or more employees) to adopt a policy of mandatory vaccination or weekly testing of unvaccinated employees and mask requirements.

Highlights from the ETS include the following:

- A “covered employer” is an employer that has 100 or more employees. In determining their employee count, employers must include all employees who work for them in the United States, regardless of employees’ vaccination status or where they perform their work. Part-time employees do count towards their company workforce total, but independent contractors do not. Depending on the size of a staffing agency, a staffing agency’s employees may be included in the 100 employee calculation.
- While the ETS encourages covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy, there is an exception for employers that instead adopt a policy requiring employees to either get vaccinated or elect to undergo weekly COVID-19 testing and wear a face covering at work in lieu of vaccination by **January 4, 2022**.
- The ETS requires the employer to inform each employee, in a language and at a literacy level the employee will understand about: 1) the requirements of the ETS as well as any employer policies and procedures established to implement the ETS; 2) COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated; 3) the requirements of 29 CFR 1904.35(b)(1)(iv) and Section 11(c) of the OSH Act; and, 4) the prohibitions of 18 U.S.C. 1001 and Section 17(g) of the OSH Act.
- “Mandatory Vaccination Policy” is an employer policy requiring each employee to be fully vaccinated. To meet this definition, the policy must require: vaccination of all employees, including vaccination of 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) who are 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.
- Under the ETS, fully vaccinated means: 1) a person’s status 2 weeks after completing primary vaccination with a COVID-19 vaccine; or, 2) the second dose of the series must not be received earlier than 17 days (21 days with a 4-day grace period) after the first dose; or, 3) a person’s status 2 weeks after receiving the second dose of any combination of two doses of a COVID-19 vaccine that is approved or authorized.
- The employer must determine the vaccination status of each employee and retain the supporting documentation. This determination must include whether the employee is fully vaccinated, which is 2 weeks after the full required vaccine course is completed. The employer 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 is:
 - the record of immunization from a health care provider or pharmacy;

- a copy of the COVID-19 Vaccination Record Card;
 - a copy of medical records documenting the vaccination;
 - a copy of immunization records from a public health, state, or tribal immunization information system; or,
 - 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).
- In instances where an employee is unable to produce acceptable proof of vaccination, per above, 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,
 - attesting that they have lost and are otherwise unable to produce proof required by the ETS.
 - All unvaccinated workers must begin wearing masks by **December 5, 2021**, and provide a negative Covid-19 test on a weekly basis beginning **January 4, 2022**.
 - Face covering means a covering that: 1A) completely covers the nose and mouth; 1B) 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); 1C) is secured to the head with ties, ear loops, or elastic bands that go behind the head, or if gaiters are worn, they should have two layers of fabric or be folded to make two layers; 1D) fits snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and 1E) is a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings. 2) This definition includes clear face coverings or cloth face coverings with a clear plastic panel that, despite the non-cloth material allowing light to pass through, otherwise meet this definition and which may be used to facilitate communication with people who are deaf or hard-of-hearing or others who need to see a speaker's mouth or facial expressions to understand speech or sign language respectively.
 - Facemask means a surgical, medical procedure, dental, or isolation mask that is FDA-cleared, authorized by an FDA EUA, or offered or distributed as described in an FDA enforcement policy. Facemasks may also be referred to as "medical procedure masks."
 - The employer must ensure that each employee who is not fully vaccinated wears a face covering when indoors and when occupying a vehicle with another person for work purposes, 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.
 - For employees who choose to get vaccinated, employers must pay them for the time it takes to get vaccinated (up to 4 hours) and for time off to recover from any side effects that prevent them from working their regular schedule.
 - Unless otherwise required by state or local laws or a labor union contract, companies are not required to pay for or provide the tests to unvaccinated employees. For example New Jersey, Pennsylvania and Kentucky prohibit companies from charging employees or applicants for such employment related testing while California, Illinois, Iowa, Montana, New Hampshire, and North Dakota have provisions in their wage laws that may cover tests.

- Unvaccinated remote and outdoor workers are not required to comply unless they must report to a worksite where other individuals are present. In such case, they are required to show proof of a negative COVID-19 test within 7 days prior to returning to the workplace and follow all on-site policies, such as masking, while on-site.
- Employees who are partially vaccinated are also required to be tested weekly until they are fully vaccinated. Those receiving the J&J vaccine will require two weeks of testing after the single shot, employees who received the Pfizer-BioNTech Vaccine will require 5 weeks of testing (3 weeks between shots and 2 weeks following the second shot), and Moderna recipients require 6 weeks of testing (4 weeks between shots and 2 weeks following the second shot).
- A “COVID-19 test” means a test for **SARS-CoV-2** that is: 1) cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the **U.S. FDA** to detect current infection with the SARS-CoV-2 virus; 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.
- Regardless of COVID-19 vaccination status or any required COVID-19 testing the employer must 1) require each employee to promptly notify the employer when they receive a positive COVID-19 test or are diagnosed with COVID-19 by a licensed healthcare provider; and, 2) immediately remove from the workplace any employee who receives a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider and keep the employee removed until the employee: A) receives a negative result on a COVID-19; B) meets the return to work criteria in CDC’s “Isolation Guidance”; or, C) receives a recommendation to return to work from a licensed healthcare provider. This section does not require employers to provide paid time to any employee for removal as a result of a positive COVID-19 test or diagnosis of COVID-19; however, paid time may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements.
- Workplaces covered by the federal contractor mandatory vaccination policy contained in Executive Order 14042 are not subject to OSHA’S ETS but are expected to align with them and have been given an extension of time until Jan. 4 to do so.
- OSHA's ETS **pre-empts** all state and local requirements, "including in states with state plans that ban or limit the authority of employers to require vaccination, face covering, or testing," according to the rule.

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