

# Understanding and Implementing OSHA COVID-19 Vaccination Regulations (FAQs Included)

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On November 4, 2021, the Occupational Safety and Health Administration (OSHA) released its Emergency Temporary Standard (ETS) applicable to all private employers in the United States with 100 or more employees. A link to the ETS can be found [here](#). Almost immediately after the ETS was issued, on November 6, a federal appeals court granted an emergency injunction staying the implementation of the regulations pending further legal proceedings and that court's determination as to whether an injunction should be issued to halt permanently the implementation of the ETS. As of the time of the posting of this article, that temporary stay is still in effect. Depending on the outcome of that court proceeding, the matter may be appealed to the Supreme Court of the United States for final ruling. This article is written from the premise that the ETS will go into effect as scheduled, though that is not certain at this time.

As a general summary of the regulations, the ETS provides that all employers with 100 or more employees must ensure that certain of its employees, as discussed further below, are either "fully vaccinated" (2 weeks post single-dose vaccine or second dose of two-dose vaccine) or that they test weekly (every 7 days) for COVID-19 by no later than January 4, 2022 (60 days after release of the regulations). Employers are permitted to pass the cost of testing to the employees, absent other laws requiring otherwise, but those tests may not be self-administered and self-read by the employee. In addition, unvaccinated individuals must wear masks at all times while indoors and in company vehicles and when not actively eating or drinking or alone in their closed office/room. In addition, by December 6, 2021, employers must have a COVID-19 vaccination and testing policy. Employers are required to obtain proof of employee's vaccination status before that employee can be deemed "fully vaccinated," and those vaccination records must be kept confidential. Records of vaccination status and testing must be maintained by the employer, and they are subject to inspection by OSHA. As with other OSHA health and safety regulations, employers who violate the provisions of the ETS can be subject to a penalty of \$13,653 per serious violation and \$136,532 per willful violation.

Of course, the devil is in the detail, and it is in those details of the ETS that employers are now struggling to implement. The following are some of the frequently asked questions about the regulations and how employers can implement them.

**FAQ 1: Do all of a covered employer's employees have to be vaccinated or tested weekly and, if so, by when?**

No. First, the ETS applies only to private employers with 100 or more employees at any time that the ETS is in effect. In addition, the ETS vaccine or weekly testing requirement does not apply to employees of covered employers who:

- do not report to a workplace where other workers or customers are present;
- while working from home; or
- if they work exclusively outdoors. If these employees ever report to the workplace, they must be fully vaccinated or provide a negative COVID-19 test prior to entry into the facility.

In addition, as noted in FAQs #17 and #18, certain employees who work for federal government contractors or subcontractors or certain health care facilities may not be covered by this ETS and are, instead, covered by mandatory vaccination rules that do not provide for a testing alternative. Employees must provide proof of their vaccination, or first test result if unvaccinated or not fully vaccinated, by January 4, 2022.

**FAQ 2: Are we required to have a company vaccination and testing company policy?**

Yes. By December 6, 2021, employers must have and issue a company policy that summarizes the requirements of the ETS, including the requirement for vaccination or testing, requirements for masking, and requirements that employees quarantine if they test positive for COVID-19 following guidance from the Centers for Disease Control (CDC). The policy should inform employees of COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated, also as per CDC guidance. The policy must inform employees that they will not be retaliated against or discriminated against for reporting work-related injuries or illness or exercising a right under the OSH Act.

**FAQ 3: Are employers allowed to inspect employee vaccination records, and if so, what do we do with those records?**

Yes. By January 4, 2022, employers must review (and employees must provide) proof of vaccination and must maintain a roster of employees' vaccination status. Acceptable proof of vaccination status is:

- a 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;

- 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); or
- in instances where an employee is unable to produce acceptable proof of vaccination as noted in OSHA's guidance, a signed and dated statement by the employee:
  - Attesting to their vaccination status (fully vaccinated or partially vaccinated);
  - Attesting that they have lost and are otherwise unable to produce proof required by this section; and
  - Including 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 vaccination records, including any log of vaccination status for employees, must be treated as a confidential medical record under the Americans With Disabilities Act (ADA).

**FAQ 4: Do employers need to pay for the weekly tests, and what do we do with those test records?**

Employees who are not fully vaccinated, and not exempted as set forth in FAQ #1 above, must be tested for COVID-19 at least once every 7 days and must provide proof of the same to the employer. Employers are not required to pay for the cost of COVID-19 testing, and they may pass that cost along to its employees. However, if the employer has a collective bargaining agreement or is subject to a state or local law requiring the employer to pay for the test, then the employer cannot pass the cost of the test to employees and the employer must pay for those tests. For example, under North Carolina law, employers are generally required to pay for mandatory employer testing, but only for job applicants and not current employees. In addition, in Virginia, the Department of Labor & Industry (DOLI) COVID-19 Permanent Standard (Permanent Standard) requires that employers pay for the cost of employee testing, though those provisions of the regulations were in the context of return-to-work COVID-19 testing. A copy of our prior client alert relating to those September 2021 regulations are provided [here](#). In addition, Virginia has a general statutory requirement that any medical test that is required by the employer must also be paid for by the employer. Employers must maintain a record of each test result and must treat those records as confidential medical records under the ADA. These records are subject to inspection by OSHA upon by the end of the next business day after OSHA has requested the records.

**FAQ 5: Are there any other requirements that employers must place on unvaccinated people besides testing, like face masks?**

Yes. Unvaccinated employees are required to wear a mask or face covering that completely and snugly fits over the nose, mouth, and chin; is secured to the head with ties, ear loops, or elastic band (or two layers of fabric if a gaiter); and is made of a solid piece of material with two or more layers of breathable fabric. The employee must wear the face covering anytime while indoors and when

occupying a vehicle with another person for work purposes. The only time that an unvaccinated person may remove his face covering is when he is alone in a room with floor to ceiling walls and a closed door (i.e., not a cubicle or shared workspace), for a limited time while actively eating and drinking, while wearing a respirator, or when the employer can prove to OSHA that the face covering would create a work hazard. In addition, of course, employees must inform their employer of any positive test result and must stay out of the workplace until permitted to return under the CDC ?Isolation Guidance.? Please also keep in mind that some states have laws that provide greater protection for the health and safety of employees. For example, in Virginia, the DOLI regulations referenced in FAQ #4 above also require that even fully vaccinated employees wear face masks or face coverings if the employees are working in a workplace that has been designated by the CDC as being within a ?high? or ?substantially high? transmission risk area.

**FAQ 6: Do we need to ask employees about religious or medical exemption needs if they are not fully vaccinated?**

No. Because this ETS is not a mandatory vaccination policy, any employee, irrespective of the reason, who is not vaccinated is merely subject to the testing policy. Because the vaccine is not mandatory, an employee need not provide proof of a sincerely held religious belief or medical disability or contraindication for the vaccine. That employee simply needs to state that she is not vaccinated and, thus, must be subject to testing. That said, employers may be presented with a request for exemption from the testing requirement on the basis of a sincerely held religious belief or medical disability. Upon receipt of such an exemption request, the employer and employee would be required to engage in a good faith interactive process to determine if there is a reasonable accommodation that can be provided to the employee that does not pose an undue burden on the employer, including its obligation to protect the health and safety of its workforce. This determination must be made on a case-by-case basis and in light of the specific needs of the employer and the workplace.

**FAQ 7: We have a union; do we have to bargain with the union before implementing our vaccination policy/testing policy?**

While generally an employer would have to bargain a vaccination policy in a unionized workplace because such a policy is a term and condition of employment, a covered employer under OSHA?s ETS will not have to negotiate whether it will follow the requirements of the ETS. However, should an employer decide to go beyond the requirements of the ETS and add vaccination incentives or ?mandate? more restrictive requirements than are included in the ETS, then it will have an obligation to bargain with a union in the workplace over the implementation and effects of the additional requirements.

**FAQ 8: What type of COVID-19 tests are allowed under the ETS?**

The ETS sets forth specifically what type of tests may be used to satisfy the ETS? testing standards. The permitted tests are those that are:

- cleared, approved or authorized, including an emergency use authorization (EUA), by the U.S. Food and Drug Administration to detect current COVID-19 infections;

- administered in accordance with the authorized instructions; and
- are not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

Accordingly, for most employers, the various testing mechanisms currently available will all be acceptable means of testing. However, again, the Virginia's DOLI Permanent Standard, which went into effect on September 8, 2021, only permits employers to use polymerase chain reaction (PCR) tests. Accordingly, unless and until the DOLI standard is revised, Virginia employers would be smart to use PCR tests.

**FAQ 9: How should employers administer COVID-19 tests?**

Whether an employer runs the testing process itself or requires unvaccinated employees to be tested at a pharmacy or at a health care provider's office will depend on various facts and circumstances unique to each employer. For large employers with a significant number of unvaccinated employees, it may make more sense for the employer to do the testing at the place of work as such an approach may eliminate disruptions in the workplace. For other employers in communities where tests are readily available, it may make more sense for the employer to require that the employee get their tests at the local pharmacy or health care providers after work.

**FAQ 10: Do employers need to compensate employees for the time they spend getting the tests?**

The ETS makes it clear that an employer does not have to compensate employees for the time they spend taking a COVID-19 test as part of the weekly testing protocol. The idea behind such a decision is seemingly driven by the thought that the employee is being provided the accommodation of weekly testing rather than having to receive a vaccination. However, employers must remember the Fair Labor Standards Act (FLSA) requirements of what is compensable time. If the amount of time it takes for an employee to receive a test is less than 10 minutes and the test is taken during the employee's traditional working hours, the time will likely be compensable. Employers would be smart to have any testing done before or after work begins so that testing employees have either not yet clocked-in for the day or they have clocked-out at the end of the day. Further, some states may have their own wage and hour laws that will require an employee to be compensated for time spent traveling to and receiving a test. Finally, employers with labor unions will need to study their collective bargaining agreements to determine if testing time is compensable.

**FAQ 11: Do we need to compensate employees for the time they spend getting the vaccine?**

Yes, the ETS makes it clear that an employer must (a) provide a reasonable amount of time for each employee to receive each of his primary vaccination dose(s); and (b) pay each employee who receives a vaccination up to four hours of pay, including travel time, at the employee's regular rate of pay. Further the ETS also provides that an employer must provide employees reasonable time and paid sick leave to recover from the side effects experienced following any primary vaccination dose. The ETS is silent as to the compensatory time off and time paid component for booster shots. Under the ETS, the

pay employees receive for the time it takes to receive their vaccinations and/or recovery time cannot be taken from the employees paid time off (PTO) or sick leave banks.

**FAQ 12: Can employees who are undergoing weekly testing still work while awaiting test results?**

As a general rule, the ETS permits an employee to continue to work while awaiting test results unless such an employee fails to provide the results of the test within seven (7) days of the testing. At that point the employee must be kept out of work until the employee provides proof of a timely negative test result. Of course, if an employee is awaiting test results and starts to exhibit COVID-19 symptoms, they will need to be removed immediately from the workplace.

**FAQ 13: What happens if an employee tests positive or is diagnosed by a health care provider as having COVID-19?**

Pursuant to the ETS once an employee tests positive or is diagnosed by a health care provider as having COVID-19, he must promptly notify the employer of the positive test and then the employer must immediately remove the employee from the workplace. Once removed the employee may not return to work until the employee:

- receives a negative result on a COVID-19 nucleic acid amplification test;
- meets the CDC's Isolation Guidance return to work criteria; or
- receives a recommendation to return to work from a licensed health care provider.

Further, the ETS does not require an employer to pay employees for any time they are out under quarantine requirements. Employees can use PTO or sick leave to cover such periods. However, employers must keep in mind that specific states or collective bargaining agreements may require paid sick leave while an employee is quarantining due to a positive COVID-19 diagnosis. Finally, if an employee has a positive diagnosis/test but the employee is asymptomatic, he may be able to telework, and any such time spent doing so would be compensatory under the FLSA and state wage and hour laws.

**FAQ 14: Do I have to report to OSHA if an employee gets sick or dies?**

An employer does not have to report an employee's positive diagnosis to OSHA, it simply needs to maintain the records of such positive tests. However, Virginia employers must remember that pursuant to DOLI's Permanent Standard, employers must report to the Virginia Department of Health and to DOLI within 24 hours of learning that it has had two or more employees test positive at a worksite when those two or more employees were on the worksite within the previous 14 days. The OSHA ETS does require employers to report to OSHA each COVID-19 work related death or hospitalization. Such report must be made within eight hours of the employer learning of the work related death of an employee and within 24 hours of learning of a work related COVID-19 hospitalization.

**FAQ 15: Do employers have to keep any records of vaccination and tests?**

Yes, the ETS mandates that covered employers keep vaccination records of their employees who have been vaccinated. The ETS also requires that employers keep records of those employees who have received accommodations from having to be vaccinated pursuant to the ADA and/or Title VII. Finally, the ETS also requires that employers keep all weekly testing records on the employees who are being tested for COVID-19. All such vaccination and testing records are considered medical records and the employer must keep these records separate from the employees' personnel file.

**FAQ 16: What happens if an employer does not comply with the ETS?**

OSHA will attempt to work with employers who have made a good faith effort to comply with the ETS and have reached fully vaccinated status for the vast majority of employees at a particular worksite. OSHA will exercise discretion with employers where:

- almost all workers are vaccinated (e.g., approximately 95%) and the remaining unvaccinated workers have limited to no contact with others;
- worksites with only a small portion of unvaccinated workers, when those who are unvaccinated have had the first dose and are scheduled to receive the final requisite dose; or
- establishments with high employee turnover rates, and where consistent efforts are made to ensure that new employees are promptly incorporated into the employer's vaccination policy.

However, for those employers that OSHA concludes have not acted in good faith, OSHA can issue fines of \$13,653 for serious violations and \$136,532 for willful violations.

**FAQ 17: We are a federal contractor employer. Does this rule apply to us?**

No. Workplaces covered under the "Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors" are not subject to this ETS with respect to any employees who are working on or in support of a qualified federal contract. Please see our prior client **alert** for discussion of those requirements. However, if employees of a federal contractor company are not working on or in support of a federal contract, and thus not covered by the Safer Federal Workforce Task Force Guidance, then they do still fall under this ETS and must either be fully vaccinated or test weekly by January 4, 2022.

**FAQ 18: We are a health care facility. Does this rule apply to us?**

Maybe. The ETS could apply to a health care facility, or the facility might be subject to one of the other federal safety rules. If the health care facility bills Medicare or Medicaid for services and is regulated under the Centers for Medicare & Medicaid Services (CMS) Conditions of Participation, Conditions for Coverage, or Requirements, then the rule that it must follow is the CMS Omnibus COVID-19 Health Care Staff Vaccination Regulation. FAQ #19 addresses that rule in more detail. If the health care facility is not regulated under the CMS Conditions of Participation, then it should instead continue to follow

OSHA's Health care ETS, which went into effect on June 21, 2021 and requires employers to develop and implement effective COVID-19 plans. If the facility also employs more than 100 employees, then this ETS will apply.

#### **FAQ 19: What is the new CMS rule for certain health care facilities?**

The new CMS rule mandates COVID-19 vaccines for employees of providers and suppliers that are regulated under the CMS Conditions of Participation. Hospitals, ambulatory surgery centers, long term care facilities, home health agencies, and hospices are among the facilities subject to the rule. By December 5, 2021, the covered facilities must ensure all employees have at least received the first dose of an approved COVID-19 vaccine (and a second dose by January 4, 2022, if administered Moderna or Pfizer). The requirements do not apply to physicians' offices, assisted living facilities, or group homes. Although physicians' offices are not included in the mandate, there are circumstances under which employees of physicians' offices are subject to the rule because of their position with another entity that is subject to the rule, such as a hospital or an ambulatory surgical center. For example, a physician may have his own practice that is not subject to the CMS rule. But if the physician, as an individual, has privileges at a hospital, then he is required to receive a vaccine because he interacts with patients and staff of the hospital. The same would be true for any person who provides care or other services to the hospital or its patients, whether it is as an employee, a contractor, a student, or a volunteer of the hospital. For more information, including a full list of the types of facilities subject to the CMS rule, please see the CMS FAQs, which are available [here](#).

In conclusion, as we await the federal courts to decide whether the ETS should be implemented or an injunction stopping its implementation should be granted, employers should still prepare to comply with the new regulations. Assuming the regulations are upheld, employers will have very little time to ensure that their workers are fully vaccinated or tested starting on January 4, 2022.

Please contact any of our Williams Mullen employment attorneys if you need additional guidance on these OSHA ETS requirements and stay tuned for further information on the current litigation status on the enforceability of the ETS. If you have further questions about the federal contractor requirements noted in FAQ# 17 above, please contact **Tony Anikeeff** or **Laura Windsor**. If you have further questions about the health care facility requirements in FAQ #18 or 19, please contact **Rebecca Ivey** or **Lauren Walker**.

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