

UPDATED DEC. 23, 2021

# OSHA vaccine and testing mandate for employers with 100 or more employees

## *Updated guidance for clients during the COVID-19 pandemic*

On Nov. 4, 2021, the U.S. Occupational Safety and Health Administration (OSHA) issued the long-awaited emergency temporary standard (ETS) to protect workers from the spread of COVID-19 in the workplace, which was subsequently published in the [Federal Register](#) on Nov. 5, 2021. The ETS requires employers with 100 or more employees to institute either a mandatory vaccine policy or a weekly testing and mask policy.

Companies that don't comply with the ETS could face potential fines of \$13,653 per violation or \$136,000 per willful violation. **The ETS is effective immediately and currently applies for six months (Nov. 5, 2021 to May 5, 2022).** OSHA may amend the duration of the ETS based on its assessment of "grave danger" to the workforce.

States with their own OSHA plans (state plan) must implement a standard that is identical to or as effective as the ETS or show they have an existing standard that is at least as effective.

Below, we address some of the relevant provisions of the standard. For additional guidance, you can refer to OSHA's [FAQs](#).

### LEGAL PROCEDURAL HISTORY — WHERE THINGS HAVE BEEN AND WHAT IS TO COME

On Nov. 6, 2021, the Fifth Circuit Court of Appeals stayed the ETS pending briefing. Subsequently, on Nov. 12, 2021, the Fifth Circuit further stayed enforcement and implementation of the ETS pending judicial review.

On Dec. 17, a panel of three judges in the Sixth Circuit Court of Appeals released their opinion that OSHA has clear authority to regulate viruses and infectious diseases workplace control standards and, as a result, dissolved the stay. In the opinion, this authority was likened to many OSHA regulations, such as the Needlestick Safety and Prevention Act, bloodborne pathogen regulation and protections from harmful dust and fog.

Within hours of the Sixth Circuit's order, over two dozen trade groups joined to file an Emergency Application for Immediate Stay. The Application was directed to U.S. Supreme Court Justice Brett Kavanaugh, who oversees the Sixth Circuit. On Dec. 21, the Supreme Court announced it would hold a special hearing in January to assess the legality of the vaccine and testing mandate. Oral arguments have been set for Jan. 7.

While we await updates on the Supreme Court's decision, our guidance remains unchanged; employers should continue their efforts to ensure adoption of the compliance requirements that follow. Sedgwick will continue to closely follow these matters and provide updates as appropriate.

## COMPLIANCE DEADLINES

Given the recent stay of the ETS, OSHA has extended the compliance deadlines to provide sufficient implementation time for employers. It's important to note that the outcome of the Supreme Court's review could alter these compliance deadlines once again. Compliance deadlines for the various components of the ETS can be found in question 12.A of the [FAQs](#).

Requirements	Jan. 10, 2022	Feb. 9, 2022
Establish policy on vaccination	X	
Determine vaccination status of each employee Obtain acceptable proof of vaccination Maintain records and roster of vaccination status	X	
Provide support for employee vaccination	X	
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 seven days before returning to work (if away from the workplace for a week or longer)		X
Require employees to promptly provide notice of a positive COVID-19 diagnosis	X	
Remove any employee who received a positive COVID-19 test or COVID-19 diagnosis	X	
Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes	X	
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	X	
Report work-related COVID-19 fatalities to OSHA within eight hours and work-related COVID-19 inpatient hospitalizations within 24 hours	X	
Make certain records available	X	

Question 12.B of the [FAQs](#) also provides timing guidelines for unvaccinated employees who wish to be fully vaccinated by Feb. 9, 2022.

## EXEMPTIONS AND TESTING

This new ETS applies to employers with 100 or more employees companywide. Certain categories of employees are exempt from the ETS:

- Those who have a medical or religious exemption.
- Those who work at a site where no coworkers are present.
- Those who telework exclusively.
- Those who work outdoors all the time.

Employees who fall under the new ETS and choose not to be vaccinated must produce a negative test result each week. Employers are not required under the rule to cover the costs of these tests, nor are they required to pay for face coverings. For an explanation of testing that meets ETS requirements, please refer to questions 6.J. and 6.K. of the [FAQs](#). For a definition of acceptable face coverings, please refer to question 8.A.

#### **DETERMINING EMPLOYEE COUNT**

In determining whether an employer has 100 employees, an employer should combine the total number of workers at all its locations. Part-time employees are included in this count, but independent contractors are not.

Although remote workers are exempt from the ETS requirements, they are included in the count to determine application of the rule. Thus, if an employer has 650 employees — 600 of whom work from their homes full-time and 50 of whom work in the office at least part of the time — the employer falls within the scope of this ETS because it has more than 100 employees. However, the standard's requirements would only apply to the 50 employees who work in the office around other individuals at least part-time and not to those 600 employees working exclusively from their homes.

#### **DETERMINING VACCINATION STATUS**

The ETS requires employers to determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status.

Acceptable proof of vaccination status includes:

- The record of immunization from a healthcare 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 healthcare professional(s) or clinic site(s) administering the vaccine(s).
- Where an employee is unable to produce acceptable proof of vaccination (as outlined above), a signed and dated statement by the employee attesting to their vaccination status and further attesting that they are unable to prove it.

Employers should treat written proof of vaccination as confidential medical information and store it separately from an employee's personnel file. In addition, access to this information should be limited to those on a need-to-know basis.

COVID-19 test results must be maintained for employees who are not vaccinated. All such records must be retained as confidential medical records for as long as the ETS remains in effect. This roster must list all employees and clearly indicate for each one whether they are fully vaccinated, partially (not fully) vaccinated, not fully vaccinated because of a medical or religious accommodation, or not fully vaccinated because they have not

provided acceptable proof of their vaccination status. Although unvaccinated employees will not have proof of vaccination status, the standard requires the employer to include all employees on the roster, regardless of their vaccination status.

#### **POLICY DEVELOPMENT AND DEPLOYMENT**

In regard to policy development and deployment, OSHA states that an employer may have both a mandatory vaccination policy for certain employees while having a different policy for others. As an example, an employer may require a mandatory vaccination policy for employees working with the general public. For others (e.g., possibly those working from corporate locations), having a vaccination/testing policy is an option. For more policy information see Section 3 of the [FAQs](#).

#### **PAID TIME OFF TO GET VACCINATED**

According to the ETS, employers must provide paid time off for employees to get vaccinated and to recover from any side effects. Specifically, the ETS requires up to four hours of paid time to receive each dose of the vaccine and an undefined but “reasonable” amount of paid time to recover from the side effects of each dose of the vaccine.

#### **TESTING AND OTHER CONSIDERATIONS FOR UNVACCINATED EMPLOYEES**

As described above, some employees will qualify for an exemption from the vaccine. Employers will need to ensure that those employees get tested for COVID-19 at least weekly (if in the workplace at least once a week) or within seven days before returning to work (if away from the workplace for a week or longer). Acceptable COVID-19 tests are tests that are cleared, approved, or authorized (including emergency use authorization) by the FDA and that are administered in accordance with authorized instructions. Employers must ensure that the test is not both self-administered and self-read, unless observed by the employer or other authorized telehealth proctor.

Regardless of vaccination status, if an employee tests positive for COVID-19, the employer must remove that employee from the workplace until the employee receives a negative result from a subsequent test. And, although the ETS doesn't require paid leave for employees with a positive test, employers should be aware of any state or local laws that may require otherwise.

Further, while employers may choose to assume the cost of testing, the ETS does not require this. However, like the paid leave discussion above, employer payment for testing may be required by other laws, regulations or collective bargaining agreements.

#### **MASKING**

Employers must ensure all unvaccinated employees wear a face covering while indoors or when occupying a vehicle with another person for work purposes, with limited exceptions. As we've advised previously, if an employee cannot wear a face covering because of a disability, the employee may be entitled to a reasonable accommodation. Please refer that employee to contact Sedgwick if accommodation management is part of your current service offering.

### CONFLICTING STATE LAW

OSHA intends the ETS to comprehensively address the occupational safety and health issues of vaccination, wearing face coverings, and testing for COVID-19. Thus, the federal standard is intended to preempt states, and political subdivisions of states, from adopting and enforcing workplace requirements relating to these issues, except under the authority of a federally-approved state plan. In particular, OSHA intends to preempt any state or local requirements that ban or limit an employer from requiring vaccination, face covering or testing.

### CONCLUSION

Employers should familiarize themselves with the requirements of the ETS and prepare to implement the rule as if it will take effect as scheduled. Please also refer to OSHA's [FAQs](#).