

MEMORANDUM

Date: November 4, 2021 (Updates on December 21, 2021, in red)

Subject: COVID-19 Vaccination and Testing; Emergency Temporary Standard

On November 4, the Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard (ETS) titled, "[COVID-19 Vaccination and Testing; Emergency Temporary Standard](#)." The ETS requires all employers with 100 or more employees to develop and implement a COVID-19 vaccine policy by December 5, 2021, and all covered employees must be fully vaccinated or otherwise regularly provide a negative COVID-19 test starting January 4, 2022. This is a temporary mandate that will last for six months. This ETS also acts as a proposed rule and the mandate can be finalized in the next six months. OSHA requests comments on the ETS and is accepting comments from stakeholders until December 6, 2021.

12/21/21 Update: All employers covered under this ETS will to develop and implement a COVID-19 vaccine policy by January 10, 2022, and all covered employees must be fully vaccinated or otherwise regularly provide a negative COVID-19 test starting February 9, 2022.

Who Are Impacted?

The ETS only affects employers that have 100 or more employees within the United States. All types of employees count towards the total such as part-time employees, remote employees, and new employees. For companies with multiple locations, all employees at all locations will be counted towards the 100 threshold. Below are some examples provided by OSHA¹:

- *If an employer has 75 part-time employees and 25 full-time employees, the employer would be within the scope of this ETS because it has 100 employees.*
- *If an employer has 150 employees, 100 of whom work from their homes full-time and 50 of whom work in the office at least part of the time, the employer would be within the scope of this ETS because it has more than 100 employees.*
- *If an employer has 102 employees and only 3 ever report to an office location, that employer would be covered.*

DMEPOS suppliers with 100 or more employees are subject to this mandate.

The following types of employees are not subject to this ETS but still count towards the 100-employee threshold:

- Fully work from home
- Exclusively outdoors
- Do not report to a workplace with individuals present

Entities that were covered under the June 2021 Healthcare ETS are not subject to this ETS.²

Federal contractors and subcontractors covered under the September Executive Order 14042.³

¹ 86 FR 61402

² 86 FR 32620

³ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>

Overview of Vaccine and Testing Requirement

ETS covered employers are mandated to create, execute, and enforce a vaccine policy for their work force. Employers are required to determine and keep records of the status of vaccination of each employee including keeping a copy of proof of vaccination. Employers must maintain the records while the ETS is in effect. Employers must make vaccine exceptions for individuals who are not able to get the vaccine due to “sincerely held” religious beliefs or health conditions. However, exempted employees are required to provide a negative COVID-19 test every seven days.

Requirements for Vaccine Exempted Employees

COVID-19 tests are required every week for unvaccinated employees. Test results need to be submitted every seven days and cannot exceed seven days. Employees that are away from a workplace for more than seven days are required to get tested within seven days prior to reporting to the workplace. Employees that fail to submit a negative test result in time will be removed until they can provide a negative test result.

Employees that test positive for COVID-19 or have been diagnosed with COVID-19 by a licensed healthcare provider will be exempt for testing for 90 days.

If an employee tests positive to a COVID-19 test, the employee must be immediately removed from the workplace. The employee may return to the workplace if one of the following is met:

1. Negative COVID-19 test result
2. Meets the return-to-work criteria in the CDC’s [Isolation Guidance](#)
3. Receives recommendation from a health care professional to return to work

Unvaccinated or partially vaccinated employees will be required to wear a face covering while indoors or in a vehicle with other individuals. However, OSHA allows for the following exceptions:

- When alone in a room
- Eating or drinking in workplace
- Safety and security identification purposes
- Where employer can demonstrate that face coverings are not feasible or creates a greater hazard

Under the ETS, employers are not required to pay for testing or face coverings but other laws in place may require employer payment. OSHA expects employers and employees will negotiate payment terms. OSHA references resources from the Equal Employment Opportunity Commission⁴ to assist employers in determining reasonable accommodations.

Mandatory Vaccination

Employees must be fully vaccinated by either the two-shot Moderna or Pfizer-BioNTech, or one-shot Johnson & Johnson vaccine. All three are either approved or authorized by the U.S. Food and Drug Administration (FDA). Employees that are partially vaccinated must comply to a mask mandate and weekly testing until they are fully vaccinated. Booster shots are not considered in this ETS.

Employers must provide four hours of paid time off for each vaccination appointment and reasonable paid time off for recovery from side effects from the vaccine administration. If employer provides sick leave and other types of leave, employer must use the available sick leave for the purposes of vaccine recovery.

⁴ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Employee Vaccination Records

Employers must maintain a record of employee vaccination status. The records need to be kept as a separate file and should only be accessible for management and/or human resources department. The file should include:

1. Copy of the vaccination card
2. Record of immunization from a health care provider
3. A signed and dated attestation by the employee if proof of vaccination cannot be provided. The employee must have attempted to retrieve a copy of a proof of their vaccination before an attestation is accepted. The attestation must include:
 - a. Attest to their vaccination status
 - b. Explain why they are not able to provide a proof of their vaccination status
 - c. Include the following statement: *"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."*⁵
 - d. Following are not required but encouraged to be included:
 - i. Type of vaccine
 - ii. Dates of vaccination administration
 - iii. Name of health care professional or clinic

Records must be promptly available if they are requested by OSHA and employees. If an employee or employee representative requests their individual records, the employer must provide the records by the end of the next business day. In addition, if an employee or representative requests the aggregate number of fully vaccinated employees and total number of employees at the workplace, the employer must also provide that information by the end of the next business day. If the same request is made by OSHA, the employer must respond to OSHA within four business hours. If OSHA requests a copy of the employer's vaccine policy, the employer must also respond within four business hours.

Employee Communication on Policy

Employers are responsible for providing relevant information to their employees at a literacy level employees understand. Communication must be presented in a way where each employee understands it. Employers must communicate the employees' rights and responsibilities, employer's policies and procedures, and information on the COVID-19 vaccine. When policy or procedure changes, updated or supplemental information must be provided to employees.

⁵ 86 FR 61402