

Guidance for Employers of 100 or more Employees

OSHA has issued an Emergency Temporary Standard (ETS) requiring employers of 100 or more employees to establish a mandatory vaccination program. An OSHA ETS is effective the date it is published in the Federal Register, in this case November 5, 2021. The ETS sets forth dates for contractor's compliance which will be explained below.

There has been litigation filed challenging the authority of OSHA to promulgate this ETS, this has resulted in a Stay of the Mandate. The Stay has paused the process, if the courts rule against the ETS, the rule would be rescinded. If the courts rule in favor of the ETS, the rule would proceed (it has not been stated whether the compliance dates would be adjusted accordingly, OSHA does not have to change those dates).

Covered contractors would be well advised to consider the requirements of the rule and be prepared for implementation should the rule be validated. The following are basic guidelines for employers based on information available as of November 18, 2021 and may be subject to change, it is recommended that employers seek professional advice when preparing their program.

- A. The rule requires employers of 100 or more employees to establish a mandatory vaccination program for all employees but may provide exemptions for those:
 1. Whom a vaccine is medically contraindicated;
 2. Whom medical necessity requires a delay in vaccination; or
 3. 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.

- B. The rule does not cover workers under other regulations:
 1. Workplaces covered under the Safer Federal Workforce Task Force COVID19 Workplace Safety: Guidance for Federal Contractors and Subcontractors; or
 2. Settings where any employee provides healthcare services or healthcare support services when subject to the requirements of Section 1910.502 for healthcare workers.

- C. The rule does not apply to the employees of covered employers:
 1. Who do not report to a workplace where other individuals such as coworkers or customers are present;
 2. While working from home; or
 3. Who work exclusively outdoors (as defined by the rule).

- D. The employer may choose between two options:
 1. Enforce a fully vaccinated plan
 - a. Determine the vaccination status of all employees
 - b. Allow for certain exemptions See paragraph A above.
 - c. Allow for workers working without others present, working at home, or exclusively outdoors
 - d. Not employ unvaccinated workers otherwise

2. Allow for a testing option of unvaccinated workers
 - a. Determine the vaccination status of all employees
 - b. Vaccinated individuals may work subject to CDC guidelines for vaccinated workers
 - c. Unvaccinated workers must provide a negative COVID-19 test results at least every 7 days
 - d. Unvaccinated workers must wear face coverings (masks) when working, limited exceptions apply to mask requirements
 - e. Allow for certain exemptions to policies
- E. Anyone not vaccinated is considered unvaccinated and must follow COVID-19 test protocols and mask protocols even if exempt from vaccination for reasons listed in paragraph A.
 1. Separate exemptions must be considered for masking
 - a. Medical necessity
 - b. Sincerely held religious beliefs
- F. Employers must choose between the two plan options in paragraph D and establish, implement, and enforce that written plan by December 5, 2021.
 1. Vaccination status verification and masking requirements begin on December 5, 2021
 2. All employees must be fully vaccinated by January 4, 2022 (the 2-week post vaccination period is initially waived)
 3. Those employees not fully vaccinated by January 4, 2022 are considered unvaccinated and are subject to COVID-19 testing protocols and mask requirements.
- G. Employers must verify employee vaccination status.
 1. Employees must show vaccination records or make sworn statement of vaccination
 2. Employers must retain records in confidence throughout the life of the rule
- H. Employers must provide paid time to be vaccinated for workers who choose to receive vaccination during working hours.
 1. Up to 4 hours per shot.
 2. Provide paid time off to recover from side effects, may require paid time off to be used if available, if not, employer must provide paid time
- I. Unvaccinated employees must provide negative COVID-19 test results at least every 7 days to continue working
 1. Several forms of testing are acceptable, self-tests must be witnessed by telehealth or employer, not employee reported
 2. Employer is not required to pay for testing nor prohibited from paying for testing
 3. Employer is not required to provide paid time off for testing nor prohibited from paying from time off for testing
- J. Unvaccinated employees must follow masking policies when working; minimum requirement is a face covering.
 1. Employers are not required to provide face coverings for unvaccinated workers unless other working conditions would mandate the use of appropriate PPE.

2. Employees may choose, at their own expense, to wear other forms of PPE such as face masks or respirators, employers may not prevent this unless it interferes with job duties and creates a hazard
 3. Employers are to enforce the use of appropriate protection for unvaccinated workers
- K. Employers must retain all COVID-19 test results required of unvaccinated employees for the life of this ETS.
- L. Employees must immediately report a positive COVID-19 test result regardless of vaccination status.
- M. Employers must immediately remove from the workplace, any employees, regardless of vaccination status, that have tested positive for COVID-19.
1. Employees may be assigned remote work if feasible
 2. Employees that cannot feasibly be assigned remote work or are too sick to work must remain isolated until cleared in compliance with CDC guidelines
 3. Employers are not required to pay employees that are unable to work remotely but are not prohibited from doing so. Employees may use any available paid leave for this time away from work.
 4. Employees are entitled to return to their previous (or similar) job duties when cleared to return to work
- N. Employers must provide specified information to employees regarding COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated, in appropriate languages and at appropriate comprehension levels. Employers must maintain a record of the COVID-19 vaccination status, proof of vaccination, and copies of employee COVID-19 test results, and the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace. This information shall be made available to employees or their designated representatives or to the Secretary of Labor or the Secretary's representative in compliance with specified delivery time intervals listed in the ETS.
- O. Reporting rules apply:
1. Each work-related COVID-19 fatality within 8 hours of the employer learning about the fatality.
 2. Each work-related COVID-19 in-patient hospitalization within 24 hours of the employer learning about the in-patient hospitalization.