



## **EMA COMPLIANCE BULLETIN**

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### **OSHA MANDATES EMPLOYEE VACCINATION OR TESTING FOR COMPANIES WITH 100 OR MORE EMPLOYEES**

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#### **OSHA Issues Emergency Standard Requiring Employee COVID-19 Vaccination or Testing:**

OSHA released a final emergency temporary standard (ETS) in November requiring employee COVID-19 vaccination or weekly testing at all employers with 100 or more employees. The ETS was stayed by a federal court last month which delayed the original December 5, 2021 compliance deadline. On Dec. 17, the 6th U.S. Circuit Court of Appeals lifted the stay and OSHA is now requiring employers with 100 or more employees to have their covid-19 testing in place by January 10, 2022. Employee testing must begin by February 9, 2022. However, compliance may be stayed once again as a number of state attorney generals opposed to ETS have appealed the lifting of the stay to the U.S. Supreme Court. It is not known if or when the Court will hear the appeal. In the meantime, covered employers should assume the ETS is going forward as planned and prepare to come into compliance by the January 10<sup>th</sup> and February 9<sup>th</sup> compliance deadlines.

#### **OSHA ETS Basics:**

The ETS requires employers with more than 100 employees to ensure that employees in the workplace are either fully vaccinated against COVID-19 **or** provide weekly negative test results for COVID-19 infection. No employee is required to get vaccinated under the ETS. But employees choosing not to vaccinate, must submit to weekly testing **and** wear a face mask at work. There are several exemptions from the ETS including those for medical reasons, religious belief, for those who work out of doors and do not come inside the workplace and those who work remotely from home. However, exempt employees must still be counted when calculating the 100-employee compliance threshold requiring compliance. Covered employers must have a written company policy in place implementing the vaccinate or test program, including recordkeeping for employee test results and vaccination status.

#### **Employer Do's and Don'ts in a Nutshell:**

Employers must create a company policy implementing the vaccinate or test rule and keep employee vaccination and testing records. Employers are only required to pay time off (up to 4 hours for each dose) for employees leaving work to get vaccinated. Employers cannot require employees to use sick or vacation time for employees leaving work to vaccinate. Employers are not required to pay for employees who leave work to get tested. Employers are not required to pay for employee time away from work due to vaccination side effects. However, employers must provide at least 2 non-compensated days off for any employee experiencing vaccination side effects. Employers are not required to pay for testing or vaccination. Employers must mandate masks wearing for all employees who are not **fully** vaccinated or those **not** vaccinated but undergoing weekly testing. Employers are not required to fire employees who refuse to vaccinate or undergo weekly testing but, must keep that employee away from the workplace until they comply. Employers are not required to pay employees who refuse to vaccinate or undergo weekly testing.

#### **OSHA ETS Effect on State Laws:**

The ETS preempts and invalidates any state or local requirements that ban or limit an employer's authority to require vaccination, face covering, or testing. States with OSHA program authority must either amend their standards to be **identical or "at least as effective as"** the federal OSHA ETS standard. States with OSHA program authority are required to adopt the required language implementing ETS within 30 days after publication of the federal rule. The ETS was published in the *Federal Register* on November 5, 2021. Therefore, OSHA program states should have had their state plans implemented by December 5, 2021. Employers in OSHA program states should contact their state OSHA authority for the ETS status in their state. A list of states with OSHA program authority can be found [here](#).

#### **OSHA ETS Compliance Q&A:**

The following Q&A explains the key provisions of the emergency standard that affect energy marketers with over 100 employees. Additional questions and answers may be found [here](#).

#### **HOW TO CALCULATE THE 100-EMPLOYEE THRESHOLD COUNT FOR ETS COMPLIANCE:**

**Q1. Which employees must employers count to determine if a company meets the 100-employee compliance threshold?**

- *Count all **full time and part time** employees, **those working remotely and exclusively outdoors**.*
- ***Do not count independent contractors**.*
- *In cases where the number of employees fluctuates above and below the 100-employee threshold, once the employee count total reaches 100, the employer is covered by the ETS and remains covered regardless of future fluctuations in the employer's workforce.*

**Q2. Must employers count employees on a company-wide basis or on a per location basis when determining the 100-employee compliance threshold?**

- *The ETS requires that all workers employed by a single corporate entity, with multiple locations be counted when determining the 100-employee threshold for compliance.*

#### **VACCINATION, TESTING AND FACE COVERINGS:**

**Q1. What does the ETS require regarding vaccination, testing and face coverings?**

- ***Employees** - must be fully vaccinated or undergo weekly testing for COVID-19.*
- ***Employees Fully Vaccinated** - are not required to undergo weekly testing or wear face coverings.*
- ***Employees Not or Partially Vaccinated** - must undergo weekly testing and wear face coverings.*
- ***Employees Working Remotely** are not required to be vaccinated or tested so long as they do not enter the workplace.*
- ***Fully Vaccinated** - means the employee's status two weeks after the second dose of the Moderna or Pfizer two series vaccination, or two weeks after a single dose of the Johnson and Johnson single series vaccination. Vaccinated employees must wear face coverings and undergo weekly testing until two weeks after their two series vaccination or single series vaccination. Employees who have not reached the two-week post vaccination period are not considered "fully vaccinated."*
- ***Face Coverings** - must be doubled layered fabric that do not allow light to pass through. Face coverings must fit snugly around the nose and mouth with no large gaps, holes or perforations. Employers **are not** required to pay for the cost of face coverings. Face coverings are not required when eating or providing facial identification.*

**Q2. What type of COVID-19 testing is required?**

- *Employees must use a COVID-19 screening test that determines **current** infection status. Diagnostic tests that detect antibodies in the immune system produced in response to COVID-19 are not acceptable as screening tests. Antibody tests do not meet the definition of COVID-19 screening test under the ETS. Over the counter screening tests are acceptable. However, any test that is self-administered and self-read is valid only if observed by the employer or an authorized telehealth proctor. Screening tests conducted at a pharmacy or health care provider are valid.*

**Q3. How often must employee testing take place?**

- *Employees must be tested once every seven days regardless of work schedule.*
- *Teleworkers must be tested seven days before returning to work.*

**Q4. Can an unvaccinated employee come to work without testing but wearing a mask?**

- **NO!** *If an employee does not provide a COVID-19 test result, the employer must keep the employee removed from the workplace until one is provided. In addition to being tested for COVID-19 on a weekly basis, unvaccinated employees must also wear a face covering at the workplace.*

**Q5. How often must employee testing take place?**

- *Employees must be tested once **every seven days** regardless of work schedule.*
- *Teleworkers must be tested seven days before returning to work.*

**Q6. Must employers pay for employee vaccination and/or testing?**

- **No!** *Employers are not required to pay for either vaccination or testing.*

**Q7. Must employers pay employees for the time away from work to get tested?**

- **No!** *Employers **are not** required to pay an employee for time away from work getting tested.*

**Q8. Must employers pay employees for time away receiving each vaccination dose?**

- **Yes!** *Employers **must pay** an employee up to 4 hours of paid time to receive each primary vaccination dose. The four hours of paid time off **may not** be off-set by any other leave the employee has accrued, such as sick leave and vacation leave.*

**Q9. Must employers provide paid time off to an employee with side-effects from vaccination?**

- **No!** *However, the employer must provide “reasonable time” for each employee to recover from side effects experienced following any vaccination dose. “Reasonable time” means up to 2 days. Employers may require employees to use paid sick leave benefits otherwise provided by the employer to offset these costs, but only if available. If an employee has no accrued sick time, employers are required to provide 2 days off for vaccination side effects but, are not required to compensate the employee for the time taken. Also, an employer cannot require an employee to accrue negative paid sick leave or borrow against future paid sick leave to recover from vaccination side effects.*

**Q10. What must an employer do if an employee tests positive for COVID?**

- *Employers must require each employee to promptly notify the employer when the employee receives a positive COVID-19 test.*
- *Employers must immediately remove from the workplace any employee, regardless of vaccination status, who receives a positive COVID-19 test.*
- *The ETS does not require employers to provide paid time to any employee for removal from the workplace as a result of a positive test.*

### **Q11. What if an employee refuses to vaccinate or test?**

- *If an employee refuses to vaccinate or test, the employer must keep the employee removed from the workplace until the employee complies.*
- *Under the Americans with Disability Act, employers may need to **make reasonable accommodations** for employees with disabilities. If a disabled employee is unable to be vaccinated a reasonable accommodation may be that only testing and face covering is required for that employee.*
- *When an employee refuses to vaccinate based on religious reasons it must be for **sincerely held religious belief, practice or observance** which prevents them from receiving the vaccine. Under federal law, sincerely held religious beliefs **include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.** However, an employee's objection to vaccinate cannot be solely based on their political, sociological or philosophical beliefs. A reasonable accommodation for refusal to vaccinate based on religious reasons may be weekly testing and face coverings for that employee.*

### **PROOF OF VACCINATION OR TESTING:**

#### **Q1. What documents must employers collect as evidence of employee vaccination or testing?**

- *Examples of acceptable proof of vaccination and testing include any of the following:*
  - *Employee record of vaccination from a health care provider or pharmacy.*
  - *A copy of the U.S. CDC 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 or clinic site administering the vaccine.*
- *To be acceptable as proof of vaccination, any documentation should include the employee's name, type of vaccine administered, date of administration, and the name of the health care professional or clinic site administering the vaccine. Hardcopy or digital records including the use of QR codes are all acceptable. HPPA and ADA privacy laws apply to these records. Employees who lost and cannot replace verification may attest in writing to vaccination.*
- *Employers must retain a copy of vaccination and testing records for the duration of the ETS and keep a roster of all employees and their vaccination status.*

### **REPORTING REQUIREMENTS:**

#### **Q1. What Covid-19 Related Information must employers report to OSHA?:**

- *The ETS requires covered employers to report each **work-related** COVID-19 fatality to OSHA within 8 hours of the employer learning about the fatality, and each work-related COVID-19 in-patient hospitalization to OSHA within 24 hours of the employer learning about the in-patient hospitalization. Work related COVID-19 infections must be recorded on OSHA 300 Logs.*
- *Determining whether covid infection is work related is difficult and only reasonable inquiries are required based on known facts involving workplace activity.*

#### **Q2. What are the written company policy requirements under the ETS?**

- See attached policy template.

**PENALTIES FOR NONCOMPLIANCE:**

**Q1. What is the penalty for non-compliance?**

- Civil penalties of up to \$14,000 per violation and \$136,532 for willful or repeated violations.
- Criminal penalties include possible imprisonment of up to 5 years for any person knowingly and willfully” engages in any of the following: falsifies, conceals or covers up a material fact; makes any materially false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

**COMPLIANCE DEADLINES:**

**Q1. When does the emergency temporary standard take effect?**

- The ETS is effective immediately in the [28 states](#) (states in light blue) where OSHA has program authority.
- The remaining [22 states with delegated OSHA authority](#) have up to thirty days to adopt a rule that is no less stringent than the ETS. The 30-day clock began on November 5, 2021.

***Employers must comply with the following beginning January 10, 2022***

- Establish company policy on vaccination.
- Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status.
- Provide support for employee vaccination Paid time off.
- Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis.
- Remove any employee with positive COVID-19 test or COVID-19 diagnosis.
- Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes.
- 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.
- Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours.
- Make certain records available.

***Employers must comply with the following beginning January 10, 2022***

- Weekly testing for employees who are not vaccinated or not fully vaccinated must begin. Testing also must be done within 7 days before returning to work (if away from the workplace for a week or longer).

**Q1. How long will the emergency temporary standard last?**

- *The ETS can remain in place for six months. After that time, it must be replaced by a permanent OSHA standard, which must undergo a formal rulemaking process involving a typical notice-and-comment period.*

**ADDITIONAL INFORMATION:**

Click [here](#) for additional compliance information and guidance on OSHA ETS.