



# **EMA REGULATORY ALERT**

*November 5, 2021*

---

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

---

**Mark S. Morgan, EMA Regulatory Counsel: [mmorgan@emamerica.org](mailto:mmorgan@emamerica.org)**

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

Yesterday, OSHA released a final emergency temporary standard (ETS). The ETS mandates employers with 100 or more employees to require workers to be vaccinated for COVID -19 or produce evidence of a negative covid-19 test once per week. The ETS is expected to cover 80 million private sector workers nationwide. Employers must develop a clearly written company policy for compliance with ETS detailing procedural requirements for employee vaccination or weekly testing and consequences for noncompliance. The ETS is already facing numerous legal challenges in federal court which may delay implementation of its requirements. The following Q&A explains the key provisions of the emergency standard that affect energy marketers with over 100 employees. EMA will follow-up with a more comprehensive compliance bulletin.

#### **100-EMPLOYEE COMPLIANCE THRESHOLD:**

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

- *All full time and part time employees must be counted, including those working remotely. Independent contractors are not counted towards the 100-employee threshold. 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.*

***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:**

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

- *Employees must be **fully vaccinated** or undergo weekly testing for COVID-19. Employees who are fully vaccinated are not required to wear face coverings. Employees who are not vaccinated at all or not fully vaccinated, must undergo weekly testing and wear face coverings in the workplace. Employees working remotely are not required to be vaccinated or tested so long as they do not enter the workplace. Once an employee is fully vaccinated, a face covering is not required.*
- *Under the ETS, “**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.*

#### ***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 a point of care (pharmacy, health care provider) are valid.*

#### ***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.*

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

- Employers **are not** required to pay for either vaccination or testing.

**Must employers pay employees for the time away from work to get vaccinated or tested?**

- Employers **are not** required to pay an employee for time away from work getting **tested**.
- However, 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 offset by any other leave the employee has accrued, such as sick leave and vacation leave.

**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. For purposes of compliance with the ETS, 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.

**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 or is diagnosed with COVID-19 by a licensed healthcare provider. Employers must immediately remove from the workplace any employee, regardless of vaccination status, who receives a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider.
- 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.

**What if an employee refuses to vaccinate or test?**

- If an employee refuses to vaccinate or provide the result of a COVID-19 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.*

- *Accommodations for disability or religious beliefs are not required if there is no reasonable accommodation available or the accommodation would cause an undue hardship to the employer.*

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

#### ***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; or 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 generally 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:**

#### ***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.*

### **PENALTIES FOR NONCOMPLIANCE:**

#### ***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:**

##### ***When does the emergency temporary standard take effect?***

- *The ETS is effective immediately in the 28 states 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.*
- *Employers must have their compliance program in place by December 5, 2021.*
- *Employees not fully vaccinated must begin testing by January 5, 2022.*

##### ***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.*