

CLIENT ALERT: **Large Employer Mandate Compliance Checklist**

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The Large Employer Emergency Temporary Standard (“ETS”) published in the Federal Register on November 5, 2021 comes into effect in two phases and stays in effect for six months. Employers with one hundred or more employees (“Covered Employers”) must adopt a written policy that either requires mandatory vaccinations for their workers or allows their workers to choose between vaccination or taking weekly COVID-19 tests. Covered Employers must also, among other requirements, establish vaccine support policies mandated by the ETS. The deadline for Covered Employers to be in compliance with the ETS is December 6, 2021. The ETS also gives a second deadline, January 4, 2022, for employee vaccination. Employees of Covered Employers who do not exclusively work remotely, outdoors, or in isolation (“Covered Employees”) must either supply proof that they received a full set of primary shots for their vaccine or begin producing weekly negative COVID-19 tests by the second deadline.

Workplaces that are already covered by the healthcare worker ETS issued in June or the Safer Federal Workforce Task Force’s COVID-19 Workplace Safety Guidance for Federal Contractors published in September are excluded from the ETS. More information about the Task Force’s Guidance is available [here](#). A more in-depth analysis of the Large Employer ETS is available [here](#).

Though the ETS is facing a series of legal challenges and its enforcement is currently enjoined by court order, Covered Employers are nevertheless encouraged to be prepared to put the mandated policies in place by December 6. It is difficult to predict how the courts will rule on the order, and it is possible that some or all of the ETS will be permitted to go into effect. The following checklist lists the key requirements that Covered Employers and their employees must satisfy by their respective deadlines.

OSHA ETS COMPLIANCE CHECKLIST

I. Policies Employers must develop by the December 6, 2021 Deadline

- **Written Policies** laying out the information in the remainder of part I and either:
 - mandating that all Covered Employees be vaccinated as a condition of employment, or
 - permitting Covered Employees to either be vaccinated or produce a negative COVID-19 test once every seven days
 - Employees are not Covered Employees subject to the vaccination-or-test rules if they work exclusively outdoors, at a worksite with no other employees or members of the public, or from home.
 - Whether an employer adopts a mandatory vaccination policy or a vaccination or mask-and-test policy is a threshold question that shapes the employer's compliance with the ETS's requirements.
 - Employers can adopt different policies for different sets of employees, so long as each policy meets the ETS's minimum requirements
 - **Template policies and educational materials for employees are available on OSHA's website [here](#)**

- **Safety procedures**, including:
 - procedures for employees to notify the employer that they are experiencing COVID-19 symptoms or have tested positive for COVID-19
 - procedures for immediate removal from the workplace of employees who test positive for or are diagnosed with COVID-19
 - procedures ensuring that employees who have been removed from the workplace do not return until they get a return-to-work authorization from a healthcare provider or meet return-to-work criteria, which are:
 - at least ten days have passed since their symptoms began,
 - the employee has not had a fever for 24 hours without using fever reducing medication, *and*
 - their symptoms are improving (excluding loss of taste/smell)
 - ensuring that unvaccinated employees wear a mask at all times indoors unless:
 - they are actively eating or drinking;
 - they are lowering their mask for identification purposes; or
 - they are working alone in an area with floor-to-ceiling walls and a closed door, or in a vehicle with no other passengers

- ensuring that employee required to wear a facemask have their mask replaced if it is damaged, soiled, or gets wet

- **Testing procedures**, describing acceptable COVID-19 tests for employees who are not fully vaccinated – meaning at least two weeks have passed since their last dose of their primary (not booster) vaccine – including requirements that:
 - employees get tested at least once every seven days and provide the results of that test to the employer for documentation
 - unvaccinated employees who have been out of the work site for more than seven days produce a negative test within seven days of returning to work
 - the employee uses an FDA-approved test (tests approved under an Emergency Use Authorization are acceptable) that is not both self-administered *and* self-read by the employee
 - employees who have tested positive for COVID-19 should not be tested again for 90 days from the date of their positive test or diagnosis

- **Record Keeping policies**, including:
 - creating a complete roster of employees that shows their vaccination status
 - collecting a copy (digital copies are acceptable) of proof of vaccination for each vaccinated employee. The list of acceptable proof of vaccination is:
 - vaccination records from a healthcare provider or pharmacy;
 - a copy of the employee’s COVID-19 vaccination record card;
 - a copy of medical records documenting vaccination;
 - a copy of immunization records from a public health, state, or tribal immunization information system;
 - Massachusetts employees can request a copy of their immunization record [here](#).
 - a copy of any official document showing the type of vaccine administered, the date of administration, and the name of the provider or clinic administering the vaccine; or
 - if the employee is unable to produce any record of vaccination despite good faith efforts to do so, the employee may produce a signed statement attesting to their vaccination status and giving as many details as possible about the vaccination (e.g. whether they are fully/partially vaccinated, when and where they were vaccinated, the type of vaccine they received, and who provided it). The statement must include the following language:

I declare 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.

- Vaccination records are not subject to OSHA’s 30-year record requirement once the ETS expires, but must be treated as confidential medical records
- Covered Employers must report work-related hospitalizations within 24 hours and fatalities within 8 hours of becoming aware of the event. This applies to COVID-19 infections that occur in the workplace.

- **Vaccine Support Policies** that encourage employees to choose to be vaccinated and to shift the burden of getting vaccinated to the employer, including:
 - crediting all employees up to four hours of paid working time at their regular rate of pay to get each vaccination shot
 - granting employees a reasonable amount of paid sick leave to recover from the vaccine. The ETS states that two days is generally reasonable.
 - Employers can require employees to take already-accrued sick or personal time off to get the vaccine, but cannot require employees to use more time than they have actually accrued or hold leave time taken by employees for vaccination against subsequently accrued leave time.
 - Employers do not have to compensate employees who are vaccinated before December 6, 2022
 - The ETS does not require employers to pay for weekly testing, though the employer might otherwise be obligated to do so

- **Employee Education Policies** that inform employees, in the language and literacy level the employee understands, of the above information, *and*:
 - the employee’s right to request information showing the total number of employees and the aggregate number of vaccinated employees
 - the employee’s rights under OSHA’s anti-retaliation and non-discrimination provisions
 - the criminal penalties an employee could face for knowingly supplying false information or documentation required by the ETS to their employer (e.g., providing a falsified vaccine card)
 - the CDC document titled “Key Things to Know About COVID-19 Vaccines,” which is available [here](#) or on the CDC’s website
 - the employee’s right to wear a mask regardless of vaccination status

II. Employees must be vaccinated or tested by January 4, 2022

- Covered Employees must take their final dose of their primary vaccine by January 4, 2022.
 - Employees taking Pfizer must have their first shot by December 4, 2021.
 - Employees taking Moderna must have their first shot by December 7, 2021.
 - Employees taking Johnson & Johnson must have their dose by January 4, 2022.
- The ETS does not apply to booster shots.
- Employees who take their final primary shot by January 4, 2022 do not have to be tested even though they are not considered fully vaccinated until January 18, 2022.
 - Covered Employees who do not produce adequate proof of vaccination must be treated as not fully vaccinated.
- Covered Employees who have not received their final primary dose by January 4, 2022 and do not produce a negative COVID-19 test dated within 7 days of January 4, 2022 must be barred from the work site until they produce a negative test.
- Covered employees may claim a religious or medical exemption to mandatory vaccination rules. Employees who claim such an exemption or who otherwise have a health condition preventing them from taking a COVID-19 vaccine must be treated as any other employee who is not fully vaccinated. Guidance on handling religious exemption requests to mandatory vaccination rules is available [here](#).

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