

CLIENT ALERT:**OSHA Publishes Large Employer Vaccination Mandate**

By Gregory Paal

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1/7/22 Update – The 6th Circuit recently dissolved an injunction against the Large Employer ETS, allowing it to take effect. The case now goes to the Supreme Court, with oral arguments scheduled for January 7th. OSHA delayed the ETS compliance deadlines while the case is pending.

On November 5, 2021, OSHA published an Emergency Temporary Standard (“ETS”) mandating that employers with one hundred or more employees implement policies supporting COVID-19 vaccinations for their employees and requiring unvaccinated employees to wear face coverings and produce weekly negative COVID-19 tests. The ETS was developed pursuant to a September directive from President Biden and works in conjunction with the federal contractor mandate and the CMS healthcare worker rule to cover approximately one hundred million workers. Relying on its Congressionally-granted authority to identify physical agents that pose a grave danger to workers’ health and safety and develop appropriate countermeasures, OSHA is creating a national policy intended to preempt the inconsistent patchwork of state and local COVID-19-related regulations that has emerged in the wake of the pandemic. OSHA intends to set a floor for COVID-19 safety measures, but the ETS permits employers to impose more rigorous vaccination mandates – e.g., not permitting unvaccinated employees to work in a covered workplace at all – so long as the employer

complies with relevant anti-discrimination laws. Once OSHA begins to enforce the vaccination or testing mandate, it is estimated that approximately seventy-five million employees covered by the ETS will be vaccinated and approximately eight million will either take weekly COVID-19 tests and wear face coverings, or work remotely.

Guidance on religious exemptions to the vaccination mandate is available [here](#). Guidance on the federal contractor mandate is available [here](#). OSHA has published a 30-minute webinar on the ETS, available [here](#).

Covered Employers:

As an emergency order that bypassed notice and comment rulemaking, the ETS is only effective from its publication on November 5, 2021 to its expiration on May 5, 2022. OSHA is advancing the substantive rules of the ETS as a new permanent standard and is currently accepting comments on the proposed rule. The ETS applies to employers with one hundred or more total employees that are not subject to the federal contractor mandate or the now-expired health care worker mandate (“Covered Employers”). **Once an employer qualifies as a Covered Employer, they remain covered for the duration of the ETS even if they drop below the one hundred employee threshold.** All employees count towards the threshold, regardless of whether they are part-time or remote. Independent contractors are not covered by the ETS. Temporary workers do

not count towards the threshold, though the staffing agency employing them could itself be a Covered Employer subject to the ETS.

Covered Employers are required to adopt vaccination support policies, develop policies requiring unvaccinated employees to produce to weekly negative COVID-19 tests, and satisfy recordkeeping and reporting requirements. The ETS is subject to change as the pandemic conditions change and OSHA's understanding of best practices for preventing infection develops, so Covered Employers should stay up to date on updates to federal policy. **Covered Employers must begin implementing vaccine-support policies by January 10, 2022, and the vaccination deadline is February 9, 2022.**

Covered Employees:

Though all employees count towards the ETS's one hundred employee threshold, not all employees are subject to the vaccination or mask-and-test rules. **Employees are covered by the vaccination or mask-and-test rules if they do more than minimal work in an indoors worksite where they will encounter other employees, customers, or members of the public** ("Covered Employees"). This exempts workers who work in isolation at a work site where they will not share indoor space with any other person. An employee's home is not considered a work site even if they work from home, so employees who exclusively work remotely are also outside the scope of the ETS. Similarly, evidence suggests that outdoor transmissions of COVID-19 are exceedingly rare, so outdoors workers are excluded from the ETS. An employee may go indoors (e.g., going inside for bathroom

breaks) and still be considered an exclusively outdoor worker so long as the cumulative time spent in enclosed spaces throughout the day is minimal. **Covered Employers are required to have policies supporting vaccination even if their workforce is exclusively made up of exempted workers.**

Employees are considered fully vaccinated two weeks after the final shot of their COVID-19 vaccine, whether it is a one-shot or two-shot vaccine. Covered Employees must receive their final shot by February 9, 2022, but do not have to be fully vaccinated by that date. Covered Employees who receive a religious or medical exemption to the vaccination requirement should be treated as any other Covered Employee who is not fully vaccinated.

Vaccination or Mask-and-Test:

Covered Employees must either be vaccinated, or wear face masks and produce a negative COVID-19 test to their employer at least once every seven days. The ETS is designed to encourage employees to choose to be vaccinated, so employers are charged with developing policies to support vaccination. After January 10, 2021, Covered Employers are required to provide employees up to four hours of paid time at their regular rate of pay to allow any of their employees – not just Covered Employees – to get vaccinated. Employees of Covered Employers are also entitled to a reasonable amount of paid sick leave to recover from the side effects of vaccination. **OSHA does not define the meaning of a "reasonable" amount of paid leave for recovery, but suggests that two days would generally be reasonable.** Covered Employers can require

employees to use sick leave that has actually been accrued to get the vaccine, and they can require employees to use personal time if their company policies do not distinguish between vacation leave and sick leave. If an employee lacks sufficient leave time to receive and recover from the vaccine, the Covered Employer cannot withhold subsequently accrued leave time or treat the leave time actually taken as negative leave hours. Covered Employers are required to offer this leave for the duration of the ETS even if no employee is a Covered Employee under the ETS. Proof of prior infection of COVID-19 is not an acceptable substitute for a vaccine under the ETS.

In contrast to the Covered Employer's obligations to support vaccination, there is no obligation for employers to pay for an unvaccinated employee's weekly tests or face masks. While other laws or agreements could require the employer to cover them, the ETS does not independently impose that requirement. Instead, the employee must pay the cost of being tested at least once every seven days. The test must be approved by the FDA (including tests given an Emergency Use Authorization), must be properly administered, and cannot be both self-administered and self-read by the employee unless the test is observed by the employer or a telehealth proctor. Antibody tests are not acceptable for the purposes of the ETS. A Covered Employee who does not produce a negative test within seven days of their most recent test must be barred from entering the work site. Employers cannot prevent customers or employees from masking voluntarily, regardless of their vaccination

status, unless their masking would be hazardous.

Any employee, unvaccinated or otherwise, who is diagnosed with or tests positive for COVID-19 must be removed from the work site immediately. Employees should only be allowed to return to the work site when the following conditions are met:

- at least ten days have passed since their symptoms started;
- the employee has not had a fever for twenty-four hours without using fever reducing medication; *and*
- their symptoms, other than loss of taste and/or smell, are improving.

An employee can also return to work when a licensed healthcare provider gives a return-to-work recommendation. Employees who have been diagnosed with COVID-19 should not be tested for ninety days from the date of their positive test or diagnosis.

Documentation Requirements:

Covered Employees must submit an acceptable proof of vaccination to be treated as fully vaccinated. The ETS allows for a range of acceptable proofs of vaccination, including:

- 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; or

- a copy of any official document showing 1) the type of vaccine administered, 2) the date of administration, and 3) the name of the provider or clinic administering the vaccine.

If a Covered Employee is unable to produce any acceptable vaccination record, the employee may attest to their vaccination status with a signed affidavit stating whether the employee is fully or partially vaccinated, providing as many details as possible concerning the type of vaccine administered, the date of administration, where the vaccine was administered, and who administered it. The statement must aver that the Covered Employee has lost or is otherwise unable to produce acceptable proof of vaccination, and must contain 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.

Employees who falsify or misrepresent their vaccination status and employers who knowingly accept fraudulently submitted proof of vaccination can be subject to criminal penalties that include fines and imprisonment.¹ Covered Employees who do not provide adequate documentation are considered not fully vaccinated and are therefore subject to masking and testing. New hires should be treated as not fully vaccinated

until they can provide adequate proof of vaccination.

Covered Employers are required to keep records showing a roster of employees that includes their vaccination status and a copy of their proof of vaccination or copies of their weekly negative COVID-19 tests if they are unvaccinated. **Records of the roster of employees, each employees' vaccination status and their proof of vaccination, and records of any weekly negative tests produced are not subject to OSHA's thirty-year record retention rule once the ETS expires.**² However, they must otherwise be maintained in accordance with OSHA's medical records regulations and other applicable federal laws while the ETS is in effect.³ The records must therefore be secured separately from other parts of the employee's file and can only be disclosed to as required by the ETS or as otherwise required by state and federal law.

Miscellaneous Employer Obligations:

Covered Employers must develop a written policy laying out safety procedures, testing procedures, the employer's record keeping rules, the employer's vaccine-support policies, and the employee's rights under the ETS. Covered employers should have policies for both vaccinated and unvaccinated employees contained in a single written document. **OSHA has published sample policies, which are available [here](#).**

Employers have an obligation to inform OSHA of work-related hospitalizations

¹ 18 U.S.C. 1001(a) (providing for imprisonment and fines for perjury); 29 U.S.C. § 666(g) (providing for up to \$10,000 in fines and six months imprisonment).

² 29 CFR 1910.1020(d)(1)(i)

³ 29 CFR 1910.1020

within twenty-four hours and work-related fatalities within eight hours. The ETS extends this obligation to hospitalizations and fatalities caused by COVID-19 when it is contracted in the workplace. OSHA is sensitive to the difficulty of identifying where an employee contracted a virus, so the ETS makes it clear that Covered Employers should engage in reasonable efforts to make good faith determinations regarding whether an employee's illness is work-related. Covered Employers can report by telephone to the OSHA Area Office nearest to the site of the incident, the OSHA central office, or online on OSHA's public website.

Covered Employers are also required to provide information about the ETS to employees in a language and literacy level the employee understands. Covered Employers must provide employees with written COVID-19 policies and inform the employees that they are entitled to take paid leave to get COVID-19 vaccinations and deal with side effects. Covered Employers must also tell employees about what procedures to follow in the event of a positive COVID-19 test. Covered Employers are obligated to inform employees about their right to request their own medical records and that they are protected against retaliation for getting vaccinated under the OSH Act.⁴ Employees may request a copy of their own COVID log entry, but they cannot request the medical records of another employee. However, Covered Employers must disclose the total number of employees at the workplace and the aggregate number of vaccinated employees at the workplace upon the request

of an employee. Covered Employers must fulfill such a request by the end of the next business day. Employees must also be told about the aforementioned criminal penalties for misrepresenting their vaccination status. Finally, Covered Employers must educate employees about COVID-19 vaccine efficacy, safety, and benefits by providing the OSHA document titled "Key Things to Know About COVID-19 Vaccines," available [here](#).

Looking Ahead:

Employers with one hundred or more employees will be required to begin implementing vaccine-support policies by January 10, 2022, while Covered Employees must have the final shot of their vaccine by February 9, 2022. Litigation has repeatedly delayed implementation of the ETS and has generated confusion over compliance requirements. Employers should stay alert regarding the legal challenges to the ETS and adjust their policies accordingly, as the Supreme Court may strike down or uphold some or all of the ETS's provisions in the coming days. OSHA has stated that it will not issue penalties against employers making good faith efforts to comply, but employers should be prepared to implement the ETS's recordkeeping requirements and vaccine support policies for unvaccinated workers by next week, should the Court uphold the ETS.

Below is a checklist summarizing compliance requirements for the ETS. [Please visit our website](#) for additional information and guidance on what employers need to know about the federal COVID-19 response.

⁴ 29 C.F.R. 1904.35(b)(1); 29 U.S.C. § 660(c).

OSHA ETS COMPLIANCE CHECKLIST

I. Policies Employers must develop by the January 10, 2022 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 February 9, 2022

- Covered Employees must take their final dose of their primary vaccine by January 4, 2022. February 9, 2022.
 - Employees taking Pfizer must have their first shot by January 9, 2022.
 - Employees taking Moderna must have their first shot by January 12, 2022.
 - Employees taking Johnson & Johnson must have their dose by February 9, 2022.

- The ETS does not require booster shots.

- Employees who take their final primary shot by February 9, 2022 do not have to be tested even though they are not considered fully vaccinated until February 23, 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 February 9, 2022 and do not produce a negative COVID-19 test dated within 7 days of February 9, 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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