

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ANNOUNCES VACCINATION AND TESTING EMERGENCY TEMPORARY STANDARD



On November 4, 2021, the Occupational Safety and Health Administration (OSHA), with input from the Health and Human Services Administration (HHS) and the Department of Labor (DOL), announced the anticipated Emergency Temporary Standard (ETS) regarding COVID-19 infection in the workplace. The ETS directly affects private employers with 100 or more employees and requires them to implement a mandatory vaccination policy or a policy that requires all unvaccinated employees working in-person begin wearing face masks by December 5, 2021 and provide a negative weekly COVID-19 test beginning January 4, 2022. Under this ETS, employers must establish a written

COVID-19 policy inclusive of vaccination requirements and maintain record of proof of vaccination and/or testing based on the policy the employers has chosen to establish.

There are several legal challenges that have already been made to this ETS and others expected. Notably, the Fifth Circuit Court of Appeals ordered a temporary stay on the ETS on November 6, 2021 that effectively prevents enforcement of this ETS until a final decision regarding the legality of this standard is published. As these challenges are litigated, covered employers need to understand the ETS requirements and begin to implement them into their Human Resources policies and procedures.

What employers are subject to the ETS?

- All private employers with 100 or more employees (full-time, part-time or temporary) at any time are subject to the ETS.

The requirements do not apply to:

- Employees that exclusively work outside or work remotely
- Workers covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors
- Settings where employees provide healthcare services or healthcare support services subject to the requirements of the Healthcare ETS

How do employers determine vaccination status of their employees?

Surveying employees on their vaccination status is a critical first step to compliance, along with determining what type of COVID-19 policy the employer should establish. Employers with fewer vaccinated employees may choose a policy that allows for weekly testing, but employers with many unvaccinated employees may find offering a testing option too logistically challenging. Other requirements should be clearly articulated in the policy, including required documentation for vaccination or testing time frames for current employee and new hire compliance, procedures for religious and/or disability accommodations, and consequences for non-compliance and falsifying records. In any event, employer maintenance of vaccination and testing records is critical in administration of the ETS.

[Continued from previous page]

November 11, 2021

What would a COVID-19 vaccination or written testing policy look like?

There are many questions to consider in establishing a vaccination and/or testing policy. The ETS allows employers to have a weekly testing policy for any employee that chooses to be unvaccinated or mandate vaccination entirely and only allow for vaccination exceptions based upon religious or disability reasons.

If an employer chooses a testing option in their policy, employers will need to consider many factors, including time, location (onsite or offsite), cost and who is responsible for the cost, and the type of test accepted (rapid or PCR). It is important to note that the Families First Coronavirus Response Act (FFCRA) does not require free testing for general employment purposes; however, other state and federal laws may apply which mandate employers to pay for employment-related testing costs.

What other considerations should employers take into account in their policies and procedures?

The ETS requires employers to offer up to four hours of paid time off to receive the vaccine during normal working hours. They are also required to provide a reasonable amount of paid sick time off to deal with side effects from the vaccine.

How should the new policies be communicated?

Open and clear communication regarding a company's vaccination policy should be established as soon as possible to help employees understand what is required of them. Employers should be prepared for some employees opting to leave employment rather than comply with the vaccination requirement and plan staffing accordingly.

For additional information regarding the ETS:

- [OSHA COVID-19 Vaccination ETS FAQs](#)
- [How to Provide Comments on the OSHA Vaccine and Testing Mandate](#)
- [COVID-19 Vaccination and Testing ETS Fact Sheet](#)
- [Reporting COVID-19 Fatalities and In-Patient Hospitalizations to OSHA](#)
- [Information for Employees on Penalties for Supplying False Vaccination Information](#)
- [Mandatory Vaccination Sample Policy AND/OR Vaccination or Testing and Face Covering Sample Policy](#)
- [Employer Obligations and the COVID-19 Vaccination Mandate Infographic](#)

Cowden helps with understanding OSHA's ETS and the potential impact on your organization. Please consult your Cowden team for an all-in-one vaccination tracker to help in your ETS compliance efforts and with any questions or assistance that you may need.



Jessica B. Grande, MBA
Consultant
jessicag@cowdenassociates.com
412.394.9303
cowdenassociates.com



Brooke J. Reynik
Analyst
brooker@cowdenassociates.com
412.394.9993
cowdenassociates.com

