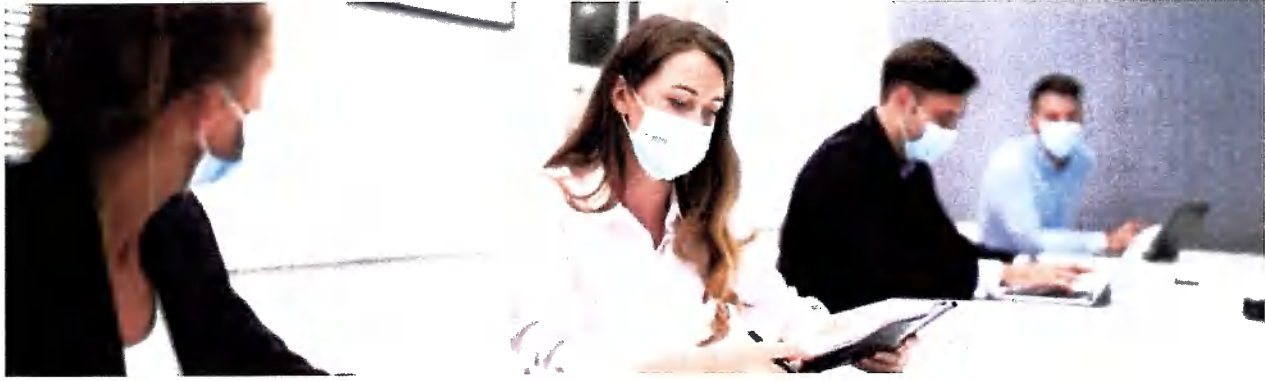


OSHA VACCINE REQUIREMENTS: ETS COVID GUIDELINES FOR BUSINESSES



In September, the Biden administration announced its intention to expand OSHA's COVID-19 vaccine requirement from the healthcare sector to all larger businesses. In mid-October, OSHA sent a draft of the ETS to the White House for review.

That means changes are coming soon.

Will these requirements apply to your business? If so, what do you need to do and when?

Most importantly, how do you prepare?

WHAT DO WE KNOW ABOUT OSHA'S NEW COVID-19 VACCINE REQUIREMENTS?

The current ETS draft of OSHA's vaccine requirements isn't available to the public, so details are speculative. However, the Biden administration made a few things pretty clear in an attempt to help employers prepare.

OSHA has confirmed that the new mandate will:

- Apply to businesses with 100 or more employees
- Require all employees either become fully vaccinated or submit weekly rapid tests
- Provide paid time off (PTO) to employees for vaccination and recovery from any ill effects

Note that this isn't a "mandatory COVID vaccine" rule – OSHA's new vaccine guidelines will allow for a testing alternative. However, the agency has indicated that they intend to make it possible for individual employers to mandate COVID vaccination.

Everything else we "know" about the expanded OSHA vaccine requirements should be taken with a grain of salt until the ETS is published in the Federal Register.

However, once that happens, requirements will take effect quickly, so you need to make some preparations now – even based on

WHEN WILL OSHA'S EMERGENCY TEMPORARY STANDARD FOR COVID VACCINATION TAKE EFFECT?

Potentially, any day now.

OSHA sent a draft of the new coronavirus ETS to the White House on October 12 for review and approval by the Office of Information and Regulatory Affairs (OIRA).

Normally, an OIRA review would take months, but because this is an emergency temporary standard, OIRA is empowered to complete an expedited review in as little as a day. It's been two weeks so that's obviously not the case here, but it does mean that approval could come at any time.

When it comes, OSHA can publish the new vaccine requirements immediately.

Publication typically puts a standard into effect right away, with a short leeway period for compliance. OSHA's vaccine requirement for the healthcare sector gave employers 14 days to comply with most provisions (with full compliance after 30 days). This will probably be the case for the new ETS, as well.

In certain states, you may have an extra month's lead time. If you do business in a jurisdiction where private sector employers are regulated by a State Plan, you're not subject to the federal ETS right away. Instead, your state will have 30 days to come up with a comparable plan that will apply to you.

The downside? State Plans must be "equally protective" to the federal standard, and your state is allowed to make it *more* restrictive, if they wish.

Speaking of State Plans, several Republican-controlled states have already announced their intention to tie the new vaccine requirements up in litigation. So that could delay implementation for some or all of the workforce.

WHAT ELSE COULD APPEAR IN THE NEW OSHA REQUIREMENT FOR COVID VACCINATION?

The 100-employee threshold, paid time off for vaccination, and the vaccination-or-weekly-screening requirements are the only provisions we know for sure will appear in the broader OSHA requirements.

However, the healthcare ETS contains several other mandates that may appear (in some form) in the broader ETS. Candidates include:

- **A COVID-19 Plan.** It's likely the broader ETS will also require employers to develop and implement a written plan to protect employees from COVID infection, including a workplace-specific hazard assessment, policies and procedures to minimize transmission, and a designated safety coordinator with the authority to ensure compliance.
- **Reporting.** Similar to the healthcare version, it's likely that employers will have to report *work-related* COVID-19 fatalities within 8 hours and in-patient hospitalization within 24 hours of learning about the incident.
- **Recordkeeping.** OSHA has been ambivalent about COVID being recordable for the broader workforce. However, the healthcare ETS requires employers to log all employee instances of COVID-19 even when they may not be work-related. Recordable work-related instances would be middle ground for the new ETS.
- **Training.** It's very likely that employers will have to ensure that each employee receives training on disease transmission, risky tasks and situation, and relevant policies and procedures.
- **Anti-Retaliation.** It's very likely that employers will have to inform employees of their right to protection under the [OSHA anti-retaliation provision](#).
- **Cost.** It's possible but not a sure thing that the broader OSHA vaccination requirement will make employers pay for testing - the healthcare version did.

Other requirements from the healthcare ETS cover transmission control, screening, and disinfection. Since the healthcare version of these requirements are specifically tailored to patient care situations, it's unlikely they'll be adopted as-is for general workplace settings. However, some version of [OSHA's COVID prevention guidelines](#) could become requirements in the new COVID ETS.

WHO WILL BE AFFECTED BY OSHA'S COVID UPDATE?

OSHA officials have indicated that the new federal ETS will affect any company with 100 or more employees *total*, company-wide. The White House estimates that this will impact 80 million US workers.

It's unclear whether or not fully remote workers will be counted or held to the same standard under the new OSHA requirement.

Employers with less than 100 employees nationwide are encouraged to adopt similar precautions, but they'll function more like voluntary OSHA guidelines, not a vaccine-or-testing requirement.

HOW CAN YOUR BUSINESS PREPARE FOR THE NEW OSHA VACCINE REQUIREMENT?

How can you prepare for a policy that may kick in somewhere between two weeks from now and litigation-o'clock?

There are some things you can do:

- **Survey Employees** for how many are already vaccinated (and by what measure)
 - Note: this may not be lawful in every jurisdiction
- **Determine Cost & Feasibility of Weekly Testing** to inform both your budget and your policy on whether to require mandatory COVID vaccination
- **Consider Logistical Policies** like:
 - whether to sponsor on-site vaccination and/or testing
 - how to [source and supply test kits](#) (if you intend to)
 - how to cover the cost of test kits (if required)
 - how your policy affects on-site contractors
 - the mechanism for distributing required PTO
 - what vaccine and testing documentation will be required
 - the process for submitting required documentation
 - what happens when someone tests positive
 - procedures for requesting religious or disability accommodation
 - how to distribute information about the policy changes
 - how to provide mandatory training
 - how to maintain records in full compliance
 - and so on.
- **Draft a Written Policy/Plan.** You can find the [healthcare ETS's version of a sample plan](#) already, which will give you something to go on. Without knowing the specifics of the new ETS, it's best to focus most of your time on the pieces that are within your control. Start nailing down procedures and consequences for non-compliance and some of the logistical policies listed above.

- **Know State and Local Laws** that will impact your policies regardless of what OSHA decides. This may include regulations affecting vaccination status disclosure, the burden of various costs, the confidentiality of health records, paid sick leave, termination protections, and more.

As you plan, keep in mind what we don't know what OSHA's requirements will say about:

- Who is affected
 - Will fully remote workers count towards the total employee threshold?
 - Will fully remote workers need to comply with vaccine-or-testing requirements?
 - Will there be requirements for on-site contract workers?
- What counts as vaccinated
 - What evidence of vaccination, if any, must employers require?
 - How does the ETS define "fully" vaccinated?
 - What are the ETS's requirements for medical and religious exemptions?
- How to comply with testing
 - What type of testing is required or accepted?
 - How (and by whom) can testing be carried out?
 - When must negative test results be submitted in relation to a work schedule?
 - What is required in the case of a positive COVID test result?
 - Under what circumstances do employers have to pay for tests?
- What recordkeeping is necessary
 - What, if any, requirements are there for keeping proof of vaccination or testing?
 - Will COVID-19 cases be considered recordable? Under what circumstances?
 - If work-related instances are reportable or recordable, what counts as work-related?

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State or local laws may inform some of these answers as well. You can, of course, start drafting internal policies on many of these points before OSHA finalizes their requirements – just keep in mind that you'll need to be flexible.