

OSHA'S VACCINATION/TESTING ETS

Current Status and What It Means for You

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Overview

- OSHA Emergency Temporary Standard
 - Current Status
 - What's in it: Who is covered? What do I have to do?
 - What's next?
 - Q&A

OSHA ETS Timeline

- September 9: President announces OSHA will issue an emergency COVID rule “within weeks.”
- November 5: OSHA publishes the rule in the Federal Register.
- November 5: Lawsuits filed (Fifth, Seventh, Eighth, Eleventh, DC Circuits)
- November 6: Fifth Circuit stays the rule, citing “grave statutory and constitutional issues,” orders expedited briefing.
- November 8: OSHA issues notice of multidistrict litigation – lottery expected Nov. 16
- Expect (attempted) action by Congress under Congressional Review Act (within 60 days; fast track)

Overview: What Does the ETS Require?

- Either mandate vaccinations or weekly testing by Jan 4, 2022
- By Dec 6, 2021 (12/5 is a Sunday)
 - Policy – containing requirements and procedures
 - Other information to distribute (can be part of policy)
 - Reporting of positive tests and removal
 - Masking for unvaccinated employees
 - Vaccination status collection
 - Start providing up to 4 hours of paid time off per shot AND reasonable paid time off for recovery from each shot

Which Employers Are Covered?

- Those with 100+ employees EXCEPT:
 - Those worksites covered by the federal contractor mandate
 - Those covered by the OSHA Healthcare ETS

100

Which Employers Are Covered?

- How do you count employees?
 - Company-wide, not site-specific
 - Part-time employees count
 - Count ALL employees, even if will not be required to receive vaccine or test
 - Temp employees provided by a staffing agency do NOT count
- When do you count employees?
 - As of November 5
 - If reach 100+ after November 5, applies from that date forward
 - If drop below 100, still applies

Which Employees Are Covered?

- ALL employees unless
 - Working entirely remotely
 - At workplace with no other people (employees, customers, etc.)
 - Working “exclusively outdoors”
 - Only de minimis time indoors (bathroom, admin building) excluded
 - Time spent indoors in a day will be added up, cumulatively
 - Time spent together with others in a vehicle is indoor time

Vaccination

- Can be mandatory or optional
- Any vaccination authorized by FDA or WHO or administered as part of clinical trial
- “Fully-vaccinated” by Jan 4
- No exception for those who have had COVID-19
- Must provide legally required exemptions (medical and religious)

Testing Option

- How Often?
 - Every 7 days if employee comes to workplace regularly
 - 7 days before report to workplace if does not report at least once ever 7 days
 - Cannot require employee to be tested for 90 days after COVID-positive (due to false positives)
- What is an Acceptable Test?
 - Any test approved by FDA (including EUA)
 - Self-administered is okay, and self-read is okay, but not both (telehealth proctor or employer observation)

Testing Option

- Who pays?
 - Employer option
 - Unless required by law or collective bargaining agreement
- When must testing start?
 - Jan 4, 2022
 - For those who have not received last dose on or before Jan. 4
- Any other exceptions?
 - Medical
 - Religious



Written Policy and Communication

- Detailed Written Policy
 - Mandatory vaccinations or choice between vaccination and testing
 - Must inform employees of the requirements of the ETS (paid time off, how to obtain exemption, masking, requirement to notify of positive test, etc.)
- Other Information
 - Give *Key Things to Know About COVID-19 Vaccines*, available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
 - No retaliation
 - Notice of criminal penalties for false statements

Track Vaccination Status

- Traditionally acceptable documentation
 - Record from a health care provider or pharmacy
 - Copy of CDC card
 - Copy of medical records documenting the vaccination
 - Copy of immunization records from a public health, state, or tribal immunization information system
 - 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(s) or clinic site(s) administering the vaccine(s)

Track Vaccination Status

- If lost or otherwise unable to produce after unsuccessfully attempting to secure alternate forms of documentation, can provide signed and dated attestation:
 - Attesting to vaccination status (fully vaccinated or partially vaccinated);
 - Attesting that has lost and is otherwise unable to produce proof; and
 - Includes the following language: “I declare (or certify, verify, or state) 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.”
- If collected information prior to Nov 5, method of collection OK

Track Vaccination Status



- Must maintain a copy
- Documentation not provided = unvaccinated
- Keep confidentially
- Keep “roster”
- Records and roster kept while ETS in effect
- May not invite or facilitate fraud, but not required to monitor for or detect fraud

Paid Time Off for Vaccination

- Provide paid time off for vaccination doses
 - 4 hours of paid time, during the workday
 - If employee gets vaccinated on own time, no pay (unless do not allow during workday)
- CANNOT be offset by sick or vacation time.

Paid Time Off for Recovery

- “Reasonable” paid time off for recovery from each dose
 - Not defined, but OSHA will approve if at least 2 days for each dose.
- Recovery time CAN be offset by some buckets of time:
 - Sick or PTO may be used.
 - BUT if sick time and vacation time are tracked separately, then can only require use of sick time NOT vacation time
 - Cannot require employee to have a negative balance
 - If no paid time available, must provide

Removal from Workplace

- Require reporting of positive test/diagnosis
- Remove from workplace until...
 - Negative test
 - When OK to return to workplace under CDC guidance (symptomatic versus asymptomatic), or
 - Healthcare provider approves return to the workplace

Face Coverings

- Required for Unvaccinated Employees
 - Double gaiters acceptable; no valves
 - Unless alone in enclosed room, eating, or other situations where not safe
 - Must be clean and in good condition (not ripped, etc.)
- Cannot prevent any employee from voluntarily wearing a mask unless hazardous/unsafe
- Cannot prevent any visitor or customer from voluntarily wearing a mask

Other Recordkeeping

- Access to employee or designated representative to own records (by end of next business day)
- Make available to employees or representatives, by end of next business day:
 - Aggregate number of fully vaccinated employees at a workplace
 - Total number of employees at that workplace
- Report to OSHA work-related COVID-19 fatality within 8 hours and work-related COVID-19 hospitalization within 24 hours
- Provide to OSHA on request copies of policies and aggregate #s (w/i 4 hours) and other information and records required to be kept or provided (by end of next business day)

Fines for Non-Compliance



- Up to \$13,653 per violation
- If willful or repeated, up to \$136,532 per violation

Key Questions Raised

- Key questions about Constitutionality:
 - Does Congress have this power under the Commerce Clause? Remember ACA individual mandate and debate about whether it was a “tax”?
 - If Congress had power, did it delegate it to OSHA in 1970?
 - Justice Scalia, famously said that Congress “does not, one might say, hide elephants in mouseholes.”
- Can parts of the ETS survive?

Key Questions Raised

- Does OSHA have the power via emergency rulemaking, instead of “notice and comment” rulemaking? Only if there is a “grave danger” that necessitates an emergency rule.
 - OSHA acted slowly: 11 months since vaccination rollout; 2 more months to comply
 - Employers <100 also in “grave danger” but rules do not apply
 - 6 of 10 ETSs issued in 30 years were challenged; 1 survived.
- Does OSHA have the power to put testing costs on employees?
- Does OSHA have the power to create a paid time off benefit?

What To Do Now?

- Get vaccination info and create roster
- Decide if you will mandate or test, so you are ready to roll out if no injunction or limited injunction
- Watch for court/congressional action

Questions?

