

Private Employer Vaccine or Testing Requirement Released by OSHA

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Today, the Occupational Safety and Health Administration (OSHA) released its new emergency temporary standard (ETS) which generally mandates that private employers of 100 or more employees require employees either to receive a COVID-19 vaccination or obtain weekly COVID-19 testing if unvaccinated.

Key components of the ETS include the following for covered employers:

- Employers must require all unvaccinated workers to begin wearing masks by December 5, 2021, and provide a negative COVID-19 test on a weekly basis beginning January 4, 2022;
- Employers are not required to pay for or provide the tests unless they are otherwise required to by state or local laws or in labor union contracts.
- Employers must pay employees for the time it takes to get vaccinated and recover from any side effects that prevent them from working.

The ETS has been anticipated since September 9, 2021, when the Biden administration first announced a plan to address COVID-19 that was “focused on reducing the number of unvaccinated Americans by using regulatory powers and other actions to substantially increase the number of Americans covered by vaccination requirements.”

The ETS will become effective immediately upon publication in the *Federal Register*, where it will be codified at 29 CFR § 1910.501. Official publication is anticipated tomorrow, November 5, 2021, with its requirements taking effect either 30 days (masks and the other ETS requirements) or 60 days (tests) thereafter.

A more detailed look at what the ETS entails follows:

Employers Covered by the ETS

The ETS applies to all private employers with 100 or more employees, including part-time employees. Workplaces exempt from the ETS are those governed by the COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (published by the Safer Federal Workforce Task Force) and those providing healthcare services or healthcare support services which are subject to the first COVID-19 emergency temporary standard issued by OSHA in June 2021, and codified at 29 CFR § 1910.502.

Covered employers must develop, implement, and enforce a written COVID-19 vaccination policy that allows employees to fully vaccinate or to elect weekly testing and face-covering at the workplace.

Employees Not Covered by the ETS

Although included within the 100-person threshold, the ETS does not apply to employees who: (1) do not report to a physical workplace where other individuals are present (such as coworkers or customers); (2) work from home; or (3) work exclusively outdoors.

Vaccination or Testing + Face Covering Requirement

Within 60 days of publication of the ETS (i.e., no earlier than January 4, 2022), the ETS requires covered employers to require that all employees be fully vaccinated for COVID-19 or, if not fully vaccinated, to: (1) submit a negative COVID-19 test result at least once a week, and (2) wear a face covering in the workplace. While the ETS does not require covered employers to pay for the cost of weekly COVID-19 testing (unless required by other laws, regulations, or collective bargaining agreements), employers may choose to do so, nevertheless.

Employees choosing to undergo testing must provide documentation of their most recent COVID-19 test result to their employer at least weekly. Those who report to the workplace at least once a week must provide documentation of their most recent COVID-19 test result on or before the 7th day after the date they last provided a test result to their employer.

Employees who do not report to the workplace for one (1) week (or more) must be tested within seven (7) days before returning to the workplace and must provide documentation of their negative test upon returning to the workplace. Employees who fail to provide test documentation must be kept out of the workplace until they provide a negative test result.

Employees who test positive for COVID-19 or are diagnosed with COVID-19 may not be required to undergo COVID-19 testing for 90 days after the date of their positive test or diagnosis.

Face coverings must be made of two or more layers of breathable fabric and must cover the mouth and nose without any valves or other openings. They should be worn when indoors and when in a vehicle with another person for work purposes. Some exceptions include if the employee: (1) is alone in a room with floor to ceiling walls and a closed door; (2) is eating or drinking, and only for a limited time; (3) for identification purposes, and only for a limited time. For further inquiry as to other exceptions, employers should consult with employment counsel. Note that under the ETS, employers may not prohibit customers or visitors from wearing face coverings.

Of course, the ETS does not prohibit employees from requesting a reasonable accommodation under the Americans with Disabilities Act (ADA) or Title VII of the Civil Rights Act of 1964 (Title VII) because the employee cannot be vaccinated and/or wear a face covering because of a disability or a sincerely held religious belief, practice, or observance.

Employer Support of Vaccination

Employers must support COVID-19 vaccination of employees by providing employees a reasonable amount of time to receive each of their primary vaccine doses (but not, at this time, booster doses), including providing up to four (4) hours paid time, including travel time, at the employee's regular pay rate for each primary vaccination dose.

Employers must also provide recovery time to employees by providing reasonable time and paid sick leave for an employee to recover from any side effects experienced following each of the primary vaccination doses. If an employee has accrued paid sick leave, the employer may require the employee to use that paid sick leave when recovering from side effects (but may not force the employee to use accrued vacation leave if the employer provides multiple types of leave, such as sick leave and vacation leave).

Employers may cap paid sick leave available to recover from any side effects, but the cap must be reasonable. OSHA presumes offering up to two (2) days of paid sick leave per primary vaccination dose for side effects is reasonable and complies with the recovery time requirement.

Vaccination Status and Record Keeping Requirement

Employers must maintain a record of each test result provided by each employee (or obtained during tests conducted by the employer) and treat such records as medical records subject to 29 CFR § 1910.1020, which addresses access to employee exposure and medical records. These records must be maintained for as long as the ETS remains in effect.

Employers must determine the vaccination status of each of their employees and keep a record of each employee's vaccination status, including preserving acceptable proof of vaccination for partially and fully vaccinated employees, as well as a roster of each employee's vaccination status.

Employees must provide acceptable proof of vaccination status, defined as either: (1) the immunization record from a health care provider or pharmacy; (2) a copy of the COVID-19 Vaccination Record Card; (3) a copy of medical records documenting vaccination; (4) a copy of immunization records from a public health, state, or tribal immunization information system; or (5) a copy of any other official documentation that contains the type of vaccine administered, dates of administration, and the name of the health care professional or clinical site administering the vaccine.

If none of these five proofs of vaccination status are available from the employee, the employee must sign and date an attestation that details the employee's vaccination status, states that they have lost or are otherwise unable to provide one of the acceptable proofs of vaccination, and declares that their statements are true and accurate and subject to criminal penalties. Failure of an employee to provide proof of vaccination status means the employee cannot be treated as fully vaccinated under the ETS.

For those fully-vaccinated employees whose vaccination status an employer had already ascertained prior to the effective date of the ETS through another form of attestation or proof, and for whom the employer retained records of that ascertainment, the employer need not redetermine the vaccination status nor require one of the five (5) acceptable proofs of vaccination status outlined above for such employees. Further, the employer's records of ascertainment of vaccination status for each such fully vaccinated employee will be acceptable proof and record of vaccination.

General Notification Requirement of COVID-19 Status for All Employees

Employers must require all employees, fully vaccinated or not, to promptly notify the employer if they test positive for, or are diagnosed with, COVID-19. The employer must immediately remove employees who test positive for, or are diagnosed with, COVID-19 from the workplace until the employee receives a negative result on a COVID-19 nucleic acid amplification test (NAAT test); meets the criteria to return to work in the CDC’s “Isolation Guidance”; or receives a recommendation to return to work from a licensed healthcare provider.

The ETS does not require that employers provide paid time off to employees prohibited from working as a result of a positive COVID-19 test or diagnosis, though paid time off may be required by other laws, regulations, or collective bargaining agreements.

Notifying Employees

Employers must inform each employee, in a language and at a literacy level the employee likely understands, about the requirements of the ETS as well as the employer’s policies and procedures for implementing the ETS. The employer must also share the CDC’s document, “Key Things to Know About COVID-19 Vaccines.”

Further, the employer must share the requirements of 29 CFR §1904.35(b)(1)(iv) with the employee, as well as the prohibitions of 18 U.S.C. §1001 and the prohibitions of section 17(g) of the Occupational Safety and Health Act.

Reporting Requirements

The ETS also establishes reporting requirements for work-related COVID-19 fatalities (within eight (8) hours of learning about the fatality) and work-related COVID-19 in-patient hospitalizations (within 24 hours of learning of the hospitalization), as well as a duty to make records available within certain timeframes upon request by OSHA.

CONCLUSION

The ETS establishes an ambitious and comprehensive framework for imposing new requirements on private employers with 100 or more employees concerning COVID-19 vaccination of employees or a testing and masking regimen, along with record keeping requirements and notification and reporting duties. The ETS will certainly come under attack by several states that had already vowed to oppose the ETS even before it was published. While those challenges play out in court, compliance is necessary.

If you have you have questions about implementing COVID-19 policies and procedures in line with the ETS and your duties and responsibilities thereunder, you should consult with your employment law counsel at Lowndes.