

OSHA's ETS Requiring Vaccines Or Testing Means Big Changes Ahead For Many Employers

By Jessica Summers

On November 4, OSHA released the text of its much-anticipated Emergency Temporary Standard (ETS) setting forth new requirements for COVID-19 vaccines and testing in the workplace. As we previously reported, in early September, President Biden rolled out his "Path Out of the Pandemic" action plan. The action plan included an instruction to OSHA to issue emergency rules to mandate that employers with 100 or more employees require that their employees either get vaccinated or submit to regular testing. This ETS is the result. It is estimated that the ETS will cover 84 million employees.

As detailed below, the ETS will require that employers with 100 or more employees mandate their employees be vaccinated or submit to weekly COVID testing and implement other COVID safety policies and procedures.

In rolling out the ETS, OSHA has put together a helpful website that includes the text of the ETS along with an extensive set of FAQs, educational materials and sample policies.

The majority of the ETS's provisions will go into effect on December 5. However, the requirement that unvaccinated employees must submit to weekly testing will not go into effect until January 4, 2022. In conjunction with the release of the ETS, the White House announced that it is bumping back the deadline for federal contractors to get their covered workers vaccinated to January 4, 2022. This aligns the federal contractor vaccination deadlines with the January 4 deadlines set forth in the ETS and CMS rule on vaccines for workers at health care facilities participating in Medicare or Medicaid (which was released at the same time as the ETS). Bottom line – January 4, 2022 will be a big day for compliance deadlines. The Administration estimates that after that date two-thirds of U.S. workers will be covered by a COVID vaccination policy.

Taking a deeper dive into the most important elements of the ETS –

Which employers are covered by the ETS?

The ETS applies to employers with 100 or more employees. All employees are counted for the purposes of this headcount threshold. This includes seasonal or temporary employees. Thus, employers that are on the cusp of the threshold or whose workforce fluctuates over the course of the year, will be covered by the ETS for any periods during which they are employing 100 or more employees. For businesses with multiple locations, all employees across all locations are counted towards the threshold.

Independent contractors or workers supplied and employed by a staffing agency, will not be counted towards the 100 employee threshold.

It is important to note that, while rules set forth by the ETS currently only apply to employers with 100 or more employees, this might change. With the release of the ETS, OSHA opened up the notice and comment period to start the process of issuing a final rule. OSHA has indicated that it is exploring, and seeking comments on, whether the final rule should extend these requirements to employers with less than 100 employees.

We are a covered employer, what do we need to do and by when?

While the vaccine or test requirement is the centerpiece of the ETS, it is not the only requirement that covered employers need to comply with.

Effective December 5, 2021, covered employers will be required to do the following:

- **Identify the vaccination status of all of their covered employees.** The ETS identifies the types of documents that employers can allow employees to use to prove their vaccination status. Employees who fail to provide proof of vaccination must be treated as unvaccinated. For employers that have already asked employees about their vaccination status and documented the responses, the ETS does not require the employer to go back and ask employees again even if the employees weren't required to provide one of the proof documents identified by the ETS (for example, if employees simply filled out a form prepared by the employer). As with all other medical records, employees' proof of vaccinations status (which employers must maintain) must be stored separate and apart from the personnel file.
- **Provide employees with up to 4 hours of paid leave (at the employee's regular rate of pay) to receive each dose of the COVID vaccine.**
- **Provide employees with "reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination dose to each employee for each dose."**
- **Implement a policy to require employees to provide notice if they are diagnosed with, or test positive for, COVID-19 and to remove such employee from the workplace until certain return to work criteria are met.** The policy must prohibit such employees from returning to the workplace until they have had a negative COVID test, met the CDC's "Isolation Guidance" or been cleared by a licensed health care provider. Employers are not required to pay employees for time that they cannot work due to being excluded from the workplace after a positive COVID test or diagnosis.
- **Require that all unvaccinated employees wear face coverings when they are indoors or sharing a vehicle with another person for work purposes.** Exceptions to this requirement may be made when: (i) the employee is alone in an enclosed room with the door closed, (ii) the employee is eating or drinking, (iii) the employee needs to show his or her face for safety or security purposes, (iv) the employee is wearing a respirator or facemask, or (v) using a face covering is infeasible or presents a hazard.
- **Report work-related COVID fatalities to OSHA within 8 hours of the employer learning of the death.** Employers are only required to report deaths where the employee's COVID was the known result of a work-related exposure.
- **Report work-related COVID hospitalizations within 24 hours of the employer learning of the hospitalization.** Like with deaths, employers are only required to report hospitalizations where the employee's COVID was the known result of a work-related exposure.
- **Effectively communicate with employees about the ETS and related policies.** Specifically, the ETS provides that each employer must "[p]rovide each employee with information, in a language and at a literacy level the employee understands, about the requirements of the ETS and workplace policies and procedures established to implement the ETS; vaccine efficacy, safety, and the benefits of being vaccinated (by providing the CDC document 'Key Things to Know About COVID-19 Vaccines'); protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false statements or documentation."

As of January 4, 2022, covered employers will also be required to do the following:

- **Require that employees who are not fully vaccinated get tested for COVID-19 at least once a week.**

For unvaccinated employees who only come to the workplace occasionally, the employer need only require that the employee submit proof of a negative COVID test taken within the last 7 days before entering the workplace. Employers do not need to require testing for unvaccinated employees who have tested positive for, or been diagnosed with, COVID within the last 90 days and have cleared to return to work.

The ETS makes it clear that, while employers can choose to do so, employers are not required to pay for testing for unvaccinated employees or provide paid or unpaid leave time for employees to get tested. The ETS does not address whether this is the case for employees who are not vaccinated for disability or religious reasons, but note that other laws might require employers to cover the cost of testing. We expect that the EEOC may weigh in further to clarify this issue from an ADA and Title VII accommodation perspective.

As long as the ETS is in effect, Employers must keep copies of the test results provided by each unvaccinated employee. As with the proof of vaccination, these are considered medical records and must be kept separate and apart from the personnel file.

Does the vaccine or testing requirement need to apply to all employees?

No, the ETS does not require employers to apply a vaccine or testing policy to the following types of employees (though employers are free to do so if they choose):

- Employees who do not report to a workplace where there is anyone else present (i.e. employees who work from a location where they are the only person there).
- Employees who work exclusively from home and never enter the workplace.
- Employees who work exclusively outdoors.

What about where the ETS clashes with state or local laws?

The ETS is very clear that its requirements preempt any inconsistent state or local laws. This would include state or local laws that ban or limit employers from implementing vaccine mandates or requiring unvaccinated employees to wear masks or submit to testing. As a number of jurisdictions have such laws currently in place, we anticipate that there will still be some legal scuffles around this, but that the OSHA ETS will ultimately prevail.

Can we implement requirements that go above and beyond the ETS?

Yes. The ETS is very clear that its rules are the floor not the ceiling. For example, while the ETS allows employers to opt for a policy of allowing employees to remain unvaccinated if they submit to regular testing, the ETS not only allows but encourages employers to go a step further and mandate vaccines for all employees that do not qualify for a disability or religious accommodation.

On the flip side, the ETS provides that, an employer cannot prevent any employee (including vaccinated employees) or visitor to the workplace from voluntarily electing to wear a facemask, unless the employer can show that this would create a hazard.

In conclusion, there are many of questions and issues that covered employers will need to work through to ensure that they are in full compliance by the key Dec. 5 and Jan. 4 deadlines. Please don't hesitate to contact the Paley Rothman employment law team if you have any questions or need assistance navigating the new rules.