

CLIENT ALERT

OSHA Publishes Vaccine Requirements for Employers with 100 or More Employees

November 4, 2021

On November 4, 2021, the Occupational Safety and Health Administration (“OSHA”) released its much-anticipated COVID-19 Vaccination and Testing Emergency Temporary Standard (“ETS”) requiring employers with 100 or more employees to ensure that their employees are either vaccinated by January 4, 2022, or submit to weekly testing. According to OSHA, employees who are unvaccinated face a “grave danger” from COVID-19, including the more contagious Delta variant. The ETS notes that COVID-19 is highly transmissible—particularly in workplaces where multiple people interact throughout the day often for extended periods of time—and exposure to COVID-19 can result in death or illness, with some individuals experiencing long-term health complications. OSHA has determined that vaccination is the most effective way to protect these employees.

The ETS took effect immediately upon publication in the Federal Register on November 5, 2021. The ETS applies in those states where OSHA is responsible for regulating workplace safety and health. Per OSHA regulations, states that have their own OSHA-approved occupational safety and health plans will have 15 days to notify OSHA of the action they will take and 30 days to adopt the ETS or promulgate standards that OSHA considers at least as effective as its ETS.

The OSHA ETS is part of a sweeping policy of the Biden Administration to get more American workers vaccinated. In addition to this ETS, the Centers for Medicare & Medicaid Services (“CMS”) released today a Vaccination Interim Final Rule (“IFR”) requiring workers at healthcare facilities participating in Medicare or Medicaid to be fully vaccinated. Both the OSHA and CMS actions follow on the heels of Executive Order 14042 mandating that certain federal contractors and subcontractors require their covered employees to receive vaccinations against COVID-19, with limited exceptions for those who cannot be vaccinated for legally-protected reasons, and OSHA’s June 2021 Healthcare ETS directed toward protecting healthcare workers in particular from COVID-19. Our previous alert on OSHA’s June 2021 ETS is available [here](#), and our alerts regarding Executive Order 14042 are available [here](#). OSHA excludes from coverage under the ETS workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors and settings where any employee provides healthcare services or healthcare support services when subject to the requirements of the Healthcare ETS. Additionally, senior Biden Administration officials have stated that the ETS will not apply to workplaces covered by the CMS IFR.

Although the ETS is very detailed—490 pages in all—the key takeaways and deadlines for compliance are below.

Vaccine and Testing Mandate

- The ETS applies to all employers within OSHA’s jurisdiction (e.g., manufacturing, retail, delivery services, warehouses, meatpacking, agriculture, construction, logging, and maritime) with 100 or more employees.
 - When counting employees, employers must account for both full-time and part-time employees—but not independent contractors—across all of their U.S. locations, regardless of an employee’s vaccination status or where the employee performs his or her work. Thus, even if an employee works from home, he or she would still count towards the employer’s total number of employees.

- An employer with 100 or more employees is subject to this ETS for the duration of the ETS even if its headcount is subsequently lowered to below 100 employees.
- Workplaces subject to Executive Order 14042 requiring COVID-19 vaccinations for federal contractors and settings where any employee provides healthcare services or healthcare support services when subject to the requirements of the Healthcare ETS are not required to comply with the ETS’s provisions. Senior Biden Administration officials have stated workplaces covered by the CMS IFR are also exempt from compliance with the ETS’s provisions.
- Similarly, employees who do not work where other individuals are present, employees who work from home, and employees who work exclusively outdoors are not required to comply with the ETS’s provisions (though, again, they count for purposes of determining coverage under the ETS).
- By January 4, 2022, covered employers must ensure that their employees (1) have the necessary shot(s) to be fully vaccinated—either two doses of Moderna or Pfizer or one dose of Johnson & Johnson—against COVID-19 or (2) produce negative COVID-19 tests on at least a weekly basis.

Vaccinated Employees

An employee is considered fully vaccinated two weeks after he or she has received his or her vaccination that is:

- a. approved or authorized for emergency use by the U.S. Food and Drug Administration (“FDA”);
- b. listed for emergency use by the World Health Organization (“WHO”); or
- c. administered as part of a clinical trial at a U.S. site, if the recipient received the “active” (not placebo) COVID-19 vaccine candidate, for which vaccine efficacy has been independently confirmed, or (e.g., by a data and safety monitoring board), or if the clinical trial participant from the U.S. site had received a COVID-19 vaccine that is neither approved nor authorized for use by FDA but is listed for emergency use by the WHO.

For purposes of complying with this ETS’s testing requirement, employees who have completed the entire primary vaccination by January 4, 2022, but who have not completed the two-week waiting period to be considered “fully vaccinated,” do not have to be tested. For a vaccine regimen requiring two doses, such as the Pfizer and Moderna vaccines, an individual is deemed to have completed the primary vaccination only after receiving the second dose. For vaccines that require two doses, individuals may not receive the second dose earlier than 17 days after the first dose.

The ETS places certain requirements on employers to ensure employees have the necessary information and time to get vaccinated. Starting December 6, 2021, covered employers must:

- Develop, implement, and enforce a mandatory COVID-19 vaccination policy, unless the employer is permitting employees to conduct weekly testing;
- Provide all employees with information on:
 - a. This ETS, its requirements, and the employer’s workplace policies and procedures in response to the ETS, including how the employer will determine vaccination status and request records, information on paid leave to receive the vaccination and recover from any side effects, and procedures to follow if an employee tests positive for COVID-19;
 - b. COVID-19 testing and face covering requirements for unvaccinated employees;

- c. A copy of the U.S. Centers for Disease Control and Prevention (“CDC”) document, “[Key Things to Know About COVID-19 Vaccines](#);”
 - d. 29 CFR 1904.35(b)(1)(iv) and section 11(c) of the OSH Act protecting employees “from retaliation for engaging in activities protected by OSHA statute and regulation;” and
 - e. in 18 U.S.C. 1001 and Section 17(g) of the OSH Act providing criminal penalties for knowingly supplying false statements or documents.
- Provide up to four hours of paid leave for employees to receive each vaccination dose; and
 - Provide a reasonable amount of paid sick leave, if necessary, for employees to recover from vaccine side effects that prevent the employee from working.

Employers that have already provided information and established procedures regarding vaccines, testing, and face coverings should review the ETS to ensure they are in compliance with this ETS’s specific guidance.

Unvaccinated Employees

If an employer permits an employee to remain unvaccinated and the employee reports at least once every seven days to a workplace where other individuals are present, the employee must:

- **Wear a face mask while indoors at the workplace or in a vehicle with another person for work-related purposes.** Note that this requirement applies regardless of a particular state’s face mask requirement. Even if a state does not require an employee to wear face masks in the workplace, employers must require unvaccinated employees to wear face masks to comply with this ETS. Similarly, employers may not prevent employees from voluntarily wearing face masks, regardless of vaccination status, unless it creates a serious workplace hazard.
- **Produce a negative COVID-19 test on at least a weekly basis.** If an employee tests positive for COVID-19, regardless of vaccination status, they are not permitted in the workplace until they meet criteria for returning to work. Employers are not required to provide or pay for the tests under this ETS. However, if employers are required to provide or pay for testing because of other laws or collective bargaining obligations, then they should continue to abide by those requirements.

COVID-19 tests include any tests cleared, approved, or authorized by the FDA to detect a COVID-19 infection. Antibody tests, which detect antibodies produced in response to COVID-19, are not permitted. All permissible tests must be administered in accordance with authorized instructions and cannot be “both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.” Thus, an employee must obtain some type of independent confirmation of the test result. The employer has the discretion to select the testing scenario by which its employees must abide.

*Of note, the CMS rule does not similarly allow for a testing option. The Biden Administration has determined that as there is a higher bar for compliance for healthcare workers, healthcare employees must get vaccinated, unless they fall under an exemption outlined in the IFR. Similarly, Executive Order 14042 does not provide for a testing alternative to vaccination.

Reporting and Recordkeeping

In addition to reiterating existing workplace reporting and record-keeping requirements, the ETS requires employers to:

- Determine and obtain proof of the vaccination status of all employees;
- Maintain, but only for the duration of the ETS, records and a roster of all employees' vaccination statuses and COVID-19 test results as though they are employee medical records;
- Maintain and make available its written policies in accordance with this ETS to the Assistant Secretary of Labor for Occupational Safety and Health within four business hours of a request;
- Maintain and make available all other records and documents required by the ETS to the Assistant Secretary of Labor for Occupational Safety and Health by the end of the next business day after a request;
- Make certain COVID-19-related records are available without charge to employees, employee representatives, and OSHA.

Legal Challenges and Enforcement

The ETS explains that OSHA's intent with this ETS is "to preempt all inconsistent State and local requirements that relate to issues addressed by this ETS" and a senior Biden Administration official stated in announcing the rule that OSHA will enforce this ETS in the same manner it enforces other requirements (*e.g.*, by inspection or in response to a complaint), with the standard penalty for a single violation of \$14,000.

In its rationale for issuing the ETS, OSHA noted that "an increasing number of states have promulgated Executive Orders or statutes that prohibit workplace vaccination policies that require vaccination or proof of vaccination status, thus attempting to prevent employers from implementing the most efficient and effective method for protecting workers from the hazard of COVID-19," and cited executive orders and statutes in Texas, Montana, Arkansas, and Arizona. Several states, including Alabama, have stated they will not comply with the ETS, and still other states have already filed suit, or announced plans to sue to block the OSHA ETS and the Administration's broader suite of vaccine mandates. On November 6, 2021, the United States Court of Appeals for the Fifth Circuit stayed enforcement of the ETS pending further review by the court.

We anticipate more states and possibly other groups will file lawsuits, or join existing lawsuits, in the coming days and we will continue to update the alert as more information becomes available.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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