

OSHA's COVID-19 Vaccination or Weekly Testing Mandate: Legal Status and Employer Next Steps

by Jillian Kornblatt and Jack Sullivan

Employers with 100 or more employees should continue to develop policies requiring workers either to be fully vaccinated against COVID-19 or to submit to weekly testing and other safety requirements, in the expectation that the long-anticipated federal safety rules released last week survive the court challenges filed immediately after their release. While at least one federal court temporarily suspended the new Occupational Safety and Health Administration ("OSHA") Emergency Temporary Standard ("ETS") that set the vaccine-or-test mandate, employers cannot assume that the ETS will be defeated and so should take steps now to comply by the **January 4, 2022** deadline.

(This article focuses on the OSHA ETS, which generally applies across all industries and workplaces, EXCEPT that health care facilities which are subject to the new CMS COVID-19 vaccine mandate are required to comply with the CMS COVID-19 vaccine mandate instead of the OSHA ETS. Dorsey provided an analysis of the new CMS COVID-19 Vaccine Mandate Rules for healthcare facilities on our [Health Law Blog](#).)

BACKGROUND

On November 4, 2021, OSHA issued its ETS for employers with 100 or more employees. The ETS had been expected for weeks and is estimated to apply to 84 million American workers. Under the rules, employers must ensure that their workers are fully vaccinated against COVID 19—defined to mean that two weeks have passed since the employee received the second of a two-shot vaccine regimen or since the employee received a single-dose vaccine—no later than **January 4, 2022**, or must require unvaccinated employees to take and provide proof of a negative COVID-19 test at least once every seven days, also beginning **January 4, 2022**.

The ETS requires that employers comply with several additional requirements—including creating a roster of employees' vaccination status and requiring face coverings—by **December 5, 2021**.

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ETS COVERAGE

The ETS applies to all employers with a total of 100 or more employees, company-wide, at any time the ETS is in effect. Temporary and seasonal employees are counted as “employees” for purposes of ETS coverage, but independent contractors are not. The ETS *does not* apply to healthcare providers covered by the new CMS rules or any federal contractor and subcontractor workplace that is not subject to the FAR Council’s separate vaccine mandate.

Depending on their circumstances, remote employees may not be subject to the requirements. Under the rules, employees who would otherwise be covered but “do not report to a workplace where ... coworkers or customers are present” are not subject to the testing or masking requirements, unless those employees enter a workplace with other employees. Similarly, employees who work exclusively outdoors are not subject to the requirements.

State OSHA departments may choose to adopt more rigorous safety measures than those required by the ETS, including additional testing requirements.

EFFECTIVE DATE AND TIMELINE

As an interim final rule, the ETS goes into effect immediately and will remain in effect for six months (until **May 5, 2022**). Under the Occupational Safety and Health Act (“OSH Act”), the ETS is considered the proposal for a permanent standard and will expire on **May 5, 2022** unless a permanent standard is enacted by that date. The public comment period for the permanent standard will remain open until **December 5, 2021**.

ETS REQUIREMENTS

A. Vaccination Requirements

The ETS contains several additional requirements applying to all employers with 100 or more employees:

1. **Determine Employees’ Vaccination Status.** Employers must determine the vaccination status of each employee, obtain proof of vaccination from vaccinated employees, maintain records of each employee’s vaccination, and maintain a roster of each employee’s vaccination status. These records are considered “medical records” under OSHA regulations, and therefore “must not be disclosed except as required or authorized by this section or other federal law.”
2. **Provide Paid Time Off for Vaccination and Recovery.** Employers must provide employees reasonable paid time off to obtain “each primary vaccination dose,” as well as reasonable paid time off and paid sick leave to recover from each such dose. OSHA is accepting comments as to whether this requirement will extend to booster doses.

B. Testing and Face-Covering Requirements for Unvaccinated Employees

The ETS contains provisions governing testing and facial-covering requirements for

employees who are not fully vaccinated. Broadly speaking, unvaccinated employees must be subjected to regular testing, and must wear face coverings in the workplace.

Specifically, the ETS mandates the following with regard to unvaccinated employees:

1. **Weekly Testing Requirements.** Unvaccinated employees who report to the workplace at least once a week must be tested for COVID-19 at least once a week. Unvaccinated employees who are away from the workplace for a week or longer must be tested within seven days of returning to work. Employers have the discretion to pay all, some, or none of the costs associated with testing, unless otherwise required by state or local law or a collective bargaining agreement. The employer must collect and maintain a record of each test result. The test results are employee medical records and must be maintained for the entire period the ETS is in effect. Compliant tests include: “proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer.” Unvaccinated employees must present proof of a negative test result in order to report for work. If employees refuse to submit to testing in accordance with these requirements, they are not permitted to enter the workplace until they present a negative test result.
2. **Face Covering Requirements.** Employers must ensure that unvaccinated employees wear face coverings over their mouth and nose when indoors or while occupying a vehicle with another person for work-related purposes, except under certain limited circumstances. The ETS defines “face covering” as two or more layers of fabric, secured to the head with straps or ties, covering the nose and mouth, and solid with no slits or holes. Face coverings must be worn unless: (i) the employee is alone in a room with floor to ceiling walls with the door closed; (ii) for a “limited time” while the employee is eating or drinking; (iii) when the employee is wearing a respirator or face mask; or (iv) if the employer can show that wearing a face covering is not feasible or causes a greater hazard (including circumstances where the work requires the employee’s mouth to be uncovered). The ETS does not require employers to pay for face coverings but notes that payment may be required by other laws or collective bargaining agreements.

C. COVID-19 Diagnosis Requirements

1. **Require Employee Notification of COVID-19.** Employers must require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19.
2. **Remove Employees with COVID-19 From the Workplace.** Employers must *immediately* remove any employee who receives a positive COVID-19 test or is diagnosed with COVID-19 from the workplace, regardless of vaccination status. Such employees must be kept out of the workplace until they meet the CDC’s return to work criteria, or receive a recommendation from a healthcare provider allowing a return to the workplace. Employers are not required to provide paid time off to any employee who is removed from the workplace due to a positive test, unless required by a collective bargaining agreement or by law. However, state or local law may contain such a requirement depending on where the employee is located. Employees may also have the right to use paid sick leave if provided by policy, bargaining agreement, or law.

D. Notification Requirements

1. **ETS and Policy Information.** Employers must provide each employee with information about the ETS and workplace policies and procedures established to implement and enforce the ETS, as well as vaccine efficacy, safety, and the benefits of being vaccinated (by providing CDC materials available [here](#)), protections against retaliation and discrimination, and information about the laws providing for criminal penalties for knowingly providing false statements or documentation. Such literature must be offered in a language and at a literacy level the employee understands.

E. Recordkeeping and Reporting Requirements

The ETS contains the following recordkeeping and reporting requirements for employers:

1. **Fatalities.** Employers must report work-related COVID-19 fatalities to OSHA within eight hours of learning that they occurred, and must report work-related COVID-19 hospitalizations within twenty-four hours of learning of the hospitalization.
2. **Record Access.** Employers must make certain records available for examination and copying by employees or employee representative.
3. **OSHA Inspection of Records.** Employers must provide a copy of their written COVID-19 policy requiring vaccination or requiring vaccination and testing records within four hours of a request from OSHA.
Any other written records required by the ETS must be produced to OSHA by the end of the next business day following the request.

OSHA'S AUTHORITY TO ISSUE THE ETS AND CURRENT LEGAL CHALLENGES TO IT

In response to a “grave danger” to employees, OSHA has authority to forego its normal rulemaking process and implement an ETS that remains in place up to six months, by which time OSHA must replace the ETS with a permanent standard adopted via OSHA's normal rulemaking process.

The ETS states that it is intended to “preempt inconsistent state and local requirements relating to these issues, including requirements that ban or limit employers' authority to require vaccination, face covering, or testing, regardless of the number of employees.” It therefore applies to employers in states with laws prohibiting vaccine mandates.

One day after OSHA released the ETS, the U.S. Court of Appeals for the Fifth Circuit issued an order staying OSHA's implementation and enforcement of the ETS while arguments were heard in fast-moving lawsuit challenging the ETS. A coalition of state governments filed a separate lawsuit in the Eighth Circuit and other cases are pending in other courts. While the lawsuits cast uncertainty over the ETS, legal precedent provides insight into how courts might rule in the current cases.

OSHA's use of its ETS authority is infrequent, but not unprecedented, and prior decisions indicate that ETSes. As just one example, in 1978, OSHA issued an ETS to regulate workers exposure to acrylonitrile (“AN”). *Vistron Corp. v. OSHA*, 6 OSHC 1483, 1483 (6th Cir. Mar. 28, 1978). The Sixth Circuit Court of Appeals upheld the ETS not only because there were studies demonstrating that AN caused cancer in rats, but also because “another study by DuPont demonstrate[ed] an excess of cancer cases among

workers exposed to AN at a DuPont textile fibers plant.” *Id.* at 1484. Because human beings were exhibiting increased rates of cancer after exposure to AN, the court held that OSHA satisfied its burden of showing that the ETS was “necessary to protect workers” from a “grave danger.” *Id.* Other cases are in line with the *Vistron* case and indicate that if there is sufficient evidence of permanent or fatal consequences to employees from exposure, an ETS will be upheld. See *Fla. Peach Growers Ass’n v. United States Dep’t of Labor*, 489 F.2d 120, 132 (5th Cir. 1974) (“We reject any suggestion that deaths must occur before health and safety standards may be adopted. Nevertheless, the danger of incurable, permanent, or fatal consequences to workers, as opposed to easily curable and fleeting effects on their health, becomes important in the consideration of the necessity for emergency measures to meet a grave danger.”); see also *Dry Color Mfrs’ Ass’n v. Dep’t of Labor*, 486 F.2d 98, 104 (3d Cir. 1973) (“OSHA need not wait until workers have actually been harmed to issue an emergency temporary standard. . . . However, while the [OSH Act] does not require an absolute certainty as to the deleterious effect of a substance on man, an emergency temporary standard must be supported by evidence that shows more than some possibility that a substance may cause cancer in man.”).

KEY TAKEAWAYS FOR EMPLOYER PLANNING AND IMPLEMENTATION

While the ETS is stayed by the Fifth Circuit’s order and is the subject of other lawsuits (with more expected), because the ETS will likely take effect before such challenges are fully decided and is reasonably likely to be upheld when they are, covered employers should begin developing and implementing policies including a vaccination or testing requirement compliant with the ETS to be enforced no later than **January 4, 2022**.

Covered employers should also work with employment counsel to ensure that all policies comply with the ETS and well as other federal, state, and local law, including paid sick leave requirements and laws governing disability and religious accommodation, including the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964 and similar state and local laws.

DORSEY WEBINAR: OSHA’S COVID-19 “VACCINE OR TESTING” REQUIREMENT: UNDERSTANDING THE NEW RULE AND HOW TO NAVIGATE IT

Dorsey attorneys will be presenting a webinar on Thursday, November 11, 2021 at 10:00 am CT where they will discuss best practices to navigate and comply with the COVID-19 “vaccination or testing” rule and other requirements of OSHA’s emergency temporary standard (“ETS”). For more information about the webinar or to register, click [here](#).