

Frequently Asked Questions: OSHA's COVID-19 Vaccine & Testing ETS

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ILMA has prepared these FAQs to assist those member companies covered by OSHA's COVID-19 emergency temporary standard (ETS) published on Nov. 5, 2021. Because information may change, such as coverage under the ETS for truck drivers, please refer back to these FAQs for updates.

Court challenges to the ETS have resulted in one temporary stay by the U.S. Court of Appeals for the Fifth Circuit. The court challenges likely will be consolidated into a single multi-district case that warrants watching, as OSHA does not have a good track record on judicial review. Of six emergency temporary standards previously challenged in court, only two were upheld in part. Despite the court's temporary stay, ILMA members should continue to make themselves familiar with OSHA's ETS and develop plans to comply if the stay is lifted or if the courts limit the ETS.

What is an emergency temporary standard (ETS)?

Under the Occupational Safety and Health Act, OSHA can issue and immediately enforce an emergency temporary standard (ETS) if the agency determines that (1) employees are subject to "grave danger" from exposure, substances or agents determined to be toxic or physically harmful, and (2) the ETS is necessary to protect workers from such danger. Like previous ETSs, OSHA did not go through the typical notice-and-comment process for permanent rulemakings when issuing its COVID-19 vaccine ETS.

In the past, OSHA has rejected demands from labor groups to issue an ETS and has had ETSs vacated by courts as overreach. Notably, OSHA rejected a 1993 petition from a labor union to issue an ETS for metal removal fluid mists.

As of now, the ETS has been stayed by the Fifth Circuit Court of Appeals while on an expedited review schedule by the court. The ETS has also been challenged in four other circuit courts of appeal. While it is possible that the Fifth Circuit will limit or strike down the ETS entirely, ILMA members should still prepare as if the ETS will remain in place. If upheld, OSHA is unlikely to be patient with its enforcement, so ILMA members should consult be prepared to implement a compliance program.

What are the compliance deadlines in the ETS?

OSHA will begin enforcement on December 5, 2021, for all portions of the ETS other than the testing and vaccination compliance date, which begins January 4, 2022. See the discussion below for OSHA State Plan states.

What are the requirements of the COVID-19 vaccine ETS?

Generally, OSHA's ETS requires [private employers with more than 100 employees](#) (company or firm-wide) to develop, implement and enforce a mandatory COVID-19 vaccination policy, unless they adopt a policy requiring covered employees to choose to either be fully vaccinated against COVID-19 or undergo at least weekly COVID-19 testing and wear a face covering at work. The ETS also requires employers to provide paid time to employees to get vaccinated and to allow paid leave to recover from any side effects from each dose of the vaccine.

The ETS also requires employers to:

- provide certain information to employees on vaccines and on the ETS's requirements;
- obtain and maintain records and a roster of employee vaccination status; and
- comply with certain notice requirements when there is a positive COVID-19 case and report to OSHA when there is an employee work-related COVID-19 fatality or hospitalization.

If an employer has a mandatory vaccine policy that is more restrictive than the ETS, is that sufficient to comply?

Yes, provided the employer [meets all the requirements](#) of OSHA's ETS: developing, implementing and enforcing a written policy on vaccines, testing and face coverings; providing information to employees on vaccines and the requirements of the ETS; providing paid time off to employees to obtain the vaccine and reasonable time and paid sick leave to recover from side effects experienced following each dose of the vaccine; obtaining and maintaining records and a roster of employee vaccination status; and complying with certain notice requirements when there is a positive COVID-19 case and reporting to OSHA when there is an employee work-related COVID-19 fatality or hospitalization.

How long will the ETS remain in effect?

The ETS took effect on November 5, 2021, and it will expire in six months on May 5, 2022. After that time, OSHA must replace the ETS with a permanent standard, which must undergo the typical notice-and-comment period rulemaking. OSHA commenced the rulemaking as part of its [Federal Register notice](#), requesting comment on a range of topics, including existing testing and vaccine programs and whether the standard should be applied to employers with under 100 employees.

What are the penalties for non-compliance with the ETS?

OSHA says covered employers that ignore the ETS could face citations and penalties of up to \$13,653 per violation, as well as additional citations or penalties for willful or egregious failures to comply. The penalty can be applied by OSHA or an OSHA state plan for each facility, an area within a facility, or each employee within a facility. Keep in mind that OSHA can issue citations and penalties for individual whistleblower and retaliation claims potentially asserted by employees.

How does the ETS operate in OSHA State Plan states?

It depends. The [federal OSHA's jurisdiction](#) covers private employers in 29 states, the District of Columbia and American territories, subject to certain exceptions, such as federal worksites and military bases. As discussed below, in the remaining 21 states with OSHA-approved state plans, the state agency enforces safety regulations in that jurisdiction.

- The 29 federal OSHA states and 4 American Territories are: Alabama, American Samoa, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Guam, Idaho, Illinois, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Virgin Islands, West Virginia and Wisconsin, as well as the District of Columbia.
- In the above federal OSHA states (enforced by OSHA), the ETS became effective immediately on November 5, 2021. Covered employers in these states have until December 5, 2021, to comply with most of the requirements in the ETS. January 5, 2022, is the deadline for vaccines and weekly testing of employees to begin.
- The 21 state OSHA plans (enforced by the applicable state agency) are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington and Wyoming, as well as Puerto Rico.
- The above State Plan states have up to 30+ days to adopt the federal OSHA's ETS or alternative regulations or standards that are at least as effective as the ETS.

What if the company has facilities or operations in multiple states?

It will be necessary to comply with the standards and timeframes applicable in each state in which the covered employer operates.

What does the ETS mean for states, like Florida and Texas, that have “banned” vaccine mandates?

This is an important question, as more states may ban vaccine mandates for employers in order to push back against OSHA and the Biden administration. The ETS, except for the OSHA State Plan states, [preempts states](#) from adopting and enforcing workplace requirements related to vaccinations, wearing face coverings and testing for COVID-19. OSHA said its ETS invalidates any state or local requirements that ban or limit an employer's authority to require COVID-19 vaccinations, face coverings or testing.

Employers will be in a gray area concerning vaccines during the period between the issuance of any governor's order banning vaccine mandates and the adoption of OSHA's ETS in State Plan states. Take the road that will eliminate the risk of civil penalties—when you are faced with this limbo situation, comply with the governor's order during the pendency of the directive, but be prepared to change course once the ETS takes effect. It is best to seek the advice of counsel if

you are unclear about the course of action or if you cannot reconcile the differences between applicable federal and state requirements.

Which employers are covered by the ETS?

All private employers with 100 or more employees must comply with the ETS, unless they meet one of the limited exceptions. Federal contractors covered by the federal contractor mandate are not covered by the ETS.

OSHA said it may impose the COVID-19 vaccine mandate on employers with less than 100 employees, including possibly eliminating the testing option.

Why did OSHA choose 100 or more employees as the threshold in the ETS if all workers are in “grave danger” from the novel coronavirus?

OSHA [cites four reasons](#) supporting its 100-employee threshold:

- the ETS is feasible for employers of that size to enact promptly and without undue disruptions;
- the ETS will cover two-thirds of all private sector workers;
- the risk of spread—and the deadliest outbreaks—is greater in large workplaces; and
- the threshold is comparable to size requirements in other regulations.

How does an employer determine whether it has 100 or more employees?

Employers must [count all employees](#), including part-time workers, across all of their U.S. locations, regardless of an employee’s vaccination status or where they perform their work. While independent contractors are not included in the head count, keep in mind the ongoing fights over misclassification employees as independent contractors.

For a [single corporate entity](#) with multiple locations, all employees at all locations are counted for purposes of the 100-employee threshold for coverage under the ETS.

What about related entities under an ownership umbrella?

The ETS provides different standards for these business arrangements.

OSHA [states in the ETS](#) that “two or more related entities may be regarded as a single employer for OSH Act purposes if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted.” The ETS does not give further guidance on what “safety matters” may be considered. Expect OSHA to decide coverage on a fact-specific basis.

Because the ETS is already in effect, employers should also be cautious about making operational changes now to avoid coverage under the ETS.

What happens if the number of employees changes to above or below 100?

An employer with 100 or more employees on [November 5, 2021](#), is subject to the ETS for its six-month duration. If an employer has fewer than 100 employees on November 5, 2021, it has no compliance obligations under the ETS.

If an employer subsequently hires more workers and hits the 100-employee threshold for coverage, then OSHA expects the employer to come into compliance. If an employer is subject to the ETS but then loses employees and falls below the 100-employee threshold, OSHA says the ETS continues to apply for the remainder of the time it is in effect, [regardless of fluctuations](#) in the size of its workforce. So, once in, always in.

How does OSHA define “workplace” in the ETS?

OSHA defines a “[workplace](#)” as a physical location (fixed or mobile) where the employer’s work or operations are performed. It does not include an employee’s residence, even if the employee is teleworking from home. A workplace includes the entire site (including outdoor and indoor areas, a structure or a group of structures) or an area within a site where work or any work-related activity occurs (e.g. break rooms, entering or exiting work). Examples of employees who have mobile workplaces include delivery services and maintenance and repair technicians who go to homes or businesses to provide repair services.

Does the ETS apply to employees who work remotely?

OSHA says that its ETS requirements do not apply to employees who [never work in an office](#) and who never meet with co-workers or customers, even though the agency requires these remote workers to be included in the count to determine the 100-employee threshold.

OSHA provides additional guidance for remote employees: Employees who work remotely some of the time will be required to show proof of vaccination or testing based on when they are at the workplace rather than at home. Specifically, OSHA has said that employers must ensure that employees who enter the workplace or interact with others as part of their job are tested for COVID-19 within seven days prior to returning to the workplace and provide documentation of that test result to the employer upon return.

Does the ETS apply to employees who work outside?

OSHA says that the ETS requirements do not apply to employees who [work exclusively outdoors](#). It is critical that employees have no work time indoors, even if brief. OSHA allows employers to make slight adjustments to employees’ current work practices to ensure that they qualify for the outdoor exemption. Even if these workers do not have to comply with the ETS requirements, they still must be included in the count to determine if the employer meets the 100-employee threshold.

May an employer create different plans for different types of workers?

Yes. OSHA says the ETS allows an employer to create [different partial plans](#) for workers, such as a vaccine and testing mandate for corporate office workers and a vaccine mandate for floor employees. The only requirement is that the plans comply with the ETS.

When must employers comply with the weekly testing requirement?

Employers have until January 5, 2022, to comply with the testing requirements. Employees who have completed the entire vaccination series by that date do not have to be tested (2 weeks after the final shot). Employers must also [keep records](#) of all COVID-19 test results submitted by employees and treat them as employee medical records for purposes of disclosure.

What must employers offer to comply with the vaccine requirement?

Employers must provide workers reasonable time to obtain the vaccine, including [up to four hours of paid time off](#) for each vaccine dose.

Must an employer collect proof of COVID-19 vaccination?

Yes. Employers [must require employees](#) to provide an acceptable proof of vaccination status, including whether they are fully or partially vaccinated. If no proof of vaccination is provided, the employer must treat such employees as unvaccinated. Acceptable proof of vaccination status includes:

- the record of immunization from a health care provider or pharmacy;
- a copy of the COVID-19 Vaccination Record Card;
- a copy of medical records documenting the vaccination;
- a copy of immunization records from a public health, state or tribal immunization information system; or
- a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the healthcare professional(s) or clinic site(s) administering the vaccine(s).

In addition to the foregoing, OSHA will allow an employer to accept a signed and dated employee attestation when an employee is truthfully unable to produce proof of vaccination. The attestation must state the employee's vaccination status and that he or she is unable to produce proof of vaccination.

Employers that have collected proof of vaccination status before the effective ETS date, and who have retained such records, are not required to re-evaluate vaccination status for fully vaccinated employees and are permitted to use any record of response, even if it is not listed as acceptable proof under the ETS.

What are an employer's recordkeeping obligations?

Under the ETS, OSHA requires employers to [maintain a record](#) and a roster of each employee's vaccination status. The employer also must maintain a record of each test result provided by each employee. These records must be maintained as confidential medical records and must not be disclosed except as required or authorized by this ETS or other federal law. The records must be maintained and preserved while the ETS is in effect.

The roster must list all employees and clearly indicate for each one whether they are fully vaccinated, partially (not fully) vaccinated, not fully vaccinated because of a medical or religious accommodation, or not fully vaccinated because they have not provided acceptable proof of their

vaccination status. Although unvaccinated employees will not have proof of vaccination status, the standard requires the employer to include all employees, regardless of vaccination status, on the roster.

Additionally, keep in mind that some state laws define medical records to include vaccination status. Be sure to comply with these state laws.

Are COVID-19 fatalities and hospitalizations still reported?

OSHA removed the 24-hour hospitalization and 30-day fatality reporting requirements. An employer [must report to OSHA](#) any hospitalization or fatality from a work-related COVID-19 case no matter when it occurs.

Are there any other exceptions to the employer mandate?

Yes, OSHA [reminds employers](#) that federal law requires them to consider and possibly accommodate valid medical and religious accommodation requests to be exempted from the vaccination requirement. An employer's policy should explain how employees can request exemptions on the basis of medical or religious reasons:

- The Americans with Disabilities Act (ADA) establishes the federal framework applicable to evaluating accommodation requests based on medical reasons.
- Title VII of the Civil Rights Act of 1964, as amended, provides the basis for requests for reasonable accommodation based on religion.
- State or local laws may provide similar protections.

What are the requirements for the testing option?

Employees who report to a workplace where there are other individuals and who are not vaccinated must be [tested at least once weekly](#). Weekly testing applies to employees who report to the workplace at least once every seven days, and employees must provide documentation of the most recent COVID-19 test result no later than the seventh day following the date the employee last provided a COVID-19 test result. Employees who work exclusively outdoors are not subject to the ETS.

What if an unvaccinated employee has had a prior COVID-19 infection?

Employees who have [tested positive for COVID-19](#) within the immediately preceding 90 days do not have to comply with a testing requirement. Testing positive means the employee received a positive COVID-19 test or has been diagnosed with COVID-19 by a licensed healthcare provider. Unvaccinated employees, regardless of whether they have previously been infected with COVID-19, must still wear a face covering in the workplace.

How long do unvaccinated employees have to submit to weekly COVID-19 testing?

The testing requirement of the ETS applies to unvaccinated employees until they are fully vaccinated or until the ETS is no longer in effect.

In the case of two-dose primary vaccination series (e.g. Pfizer and Moderna), an employee is not considered fully vaccinated until two weeks after the second shot and still needs to comply with

the weekly testing requirement until this date, even within the two-week waiting period. In the case of the one-dose vaccine (Johnson & Johnson), an employee is not considered fully vaccinated until two weeks after the single shot.

Are there limitations for at-home tests?

While at-home tests are authorized, OSHA requires an [independent confirmation](#) of the test to ensure the integrity of the result. If an at-home test is being used, the employer can validate the test through the use of a proctored test that is supervised by an authorized telehealth provider.

Who pays for the tests?

The ETS does not require employers to [pay for the cost of COVID-19 testing](#). However, an employer may be required to pay for COVID-19 testing if required by other laws or regulations or a collective bargaining agreement.

Are employers required to pay for the time employees spend testing?

The ETS does not provide a clear answer on whether employers must pay employees to test, and [states that](#) the “ETS does not require employers to pay for any costs associated with testing.” Under current DOL guidance, employers are required to pay employees for time spent waiting for and receiving medical attention (including COVID-19 testing) at their direction or on their premises during regular working hours under the Fair Labor Standards Act (FLSA). This likely includes required testing occurring on employees’ days off. DOL’s Wage and Hour division will be updating its guidance on the impact of the ETS on federal wage and hour laws.

What if there is a shortage of testing supplies or labs?

OSHA has determined that, as of November 5, 2021, there are sufficient COVID-19 testing supplies and laboratory capacity available to meet the requirements of the ETS. An employer that encounters a shortage of testing supplies or laboratory backlogs should contemporaneously document these events and make every effort to comply until the supply is replenished or the laboratories are no longer backlogged.

What information must employers provide to employees about the ETS?

Employers are required to communicate information about the ETS to employees in the normal way the business conveys workplace policies. The communication must include:

- (a) employer policies created to comply with the ETS, including masking and testing rules;
- (b) how employee records will be requested;
- (c) time and pay for leave to obtain a vaccine and recover from side-effects;
- (d) procedures to follow after a positive COVID-19 test;
- (e) a copy of the CDC fact sheet [about COVID vaccine efficacy, safety and benefits](#);
- (f) informing employees that they cannot be discriminated against or fired for exercising their rights, nor retaliated against for reporting violations of standards to OSHA; and,

- (g) providing a [fact sheet informing workers](#) that it is a criminal offense to submit false statements or documents under the OSH Act.

Additional Resources:

- A. OSHA ETS Policy Templates:
 - i. [Vaccine Mandate Policy Template](#)
 - ii. [Vaccine or Mask and Testing Policy template](#)
- B. [OSHA ETS Fact Sheet](#)
- C. [OSHA ETS Summary](#)
- D. [OSHA Workers' Rights Under the ETS](#)