

Another Emergency Webinar for OSHA's Emergency Standard: What Employers Need to Know About the New Vaccine or Testing Workplace Safety Rules

Todd B. Logsdon | Louisville, KY | tlogsdon@fisherphillips.com
J. Hagood Tighe | Columbia, SC | htighe@fisherphillips.com
Travis W. Vance | Charlotte, NC | tvance@fisherphillips.com
Kristin White | Denver, CO | kwhite@fisherphillips.com

December 21, 2021

Overview

- Sixth Circuit **Lifts** Fifth Circuit Stay Order
- OSHA's COVID-19 Vaccine or Testing **Emergency Temporary Standard**
- Steps for Complying with Upcoming Deadlines and Avoiding Potential **Citations.**

ETS Legal Challenges

- Over a dozen legal challenges to OSHA's vaccine or testing ETS after its November 5 effective date.
- Fifth Circuit issues order blocking the ETS from taking effect on a nationwide basis.
- Sixth Circuit selected to hear consolidated claims after Multidistrict Litigation Panel process.
- December 17: Sixth Circuit lifts Fifth Circuit's stay of ETS.

Deadlines

Effective January 10, 2022: All requirements of ETS are **in effect now**, other than the COVID-19 testing requirements for those not fully vaccinated, including the requirement that unvaccinated employees wear masks.

Effective February 9, 2022: COVID-19 testing requirements for those not fully vaccinated come into effect.

Note: OSHA can issue citations today for noncompliance with all but the testing requirements of ETS, but will give employers a grace period until January 10 if exercising reasonable, good faith efforts to come into compliance with the ETS during this interim period.



What Can You Do to Demonstrate “Good Faith”?

- **Draft written policy by 1/9/22**
- **Inform employees by 1/9/22**
- **Adopt Procedures for Determining Employees’ Vaccination Status**
 - Maintain confidential records of employee vaccination status.
 - EEOC has indicated it is lawful to ask employees about COVID-19 vaccination status, but this should end your inquiry.
 - ETS requires that you collect proof of vaccination.
 - Otherwise, create a confidential list of vaccinated workers.
 - Review state laws regarding confidentiality and privacy of medical records.
- **Have roster ready by 1/9/22**

Vaccine or Testing Mandate

OSHA's COVID-19 Vaccine or Testing Emergency Temporary Standard (ETS) takes effect **immediately**.

- Rule takes the form of an ETS.
 - Allows the agency to enact regulations it can enforce immediately if a “grave danger” to worker safety is present.
- The ETS will have immediate effect in the 29 states where federal OSHA has jurisdiction.
- Covered employers who ignore the standard could face OSHA citations and penalties of up to nearly \$14,000 per violation.
- The ETS can remain in place for six months before it must be replaced by a permanent OSHA standard.
- OSHA is granting employers a limited “grace period” to comply with the ETS’ requirements.

State-Plan States

- The ETS initially provided that in states where the federal government does not have jurisdiction over workplaces safety, the state agencies will have to adopt the ETS or “just-as-effective measures” within 30 days and notify OSHA of their intentions within 15 days.
 - Still applicable?
- State OSHA plans (private-sector and local and state government workers): Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

What If My State “Banned” Vaccine Mandates?

The ETS (29 CFR 1910.501(a)) preempts states from adopting vaccine bans:

Purpose. This section is intended to establish minimum vaccination, vaccination verification, face covering, and testing requirements to address the grave danger of COVID-19 in the workplace, and 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.

What If My State “Banned” Vaccine Mandates? Cont’d.

- If you operate in a state where Federal OSHA has jurisdiction, then it is likely that the OSHA ETS preempts any contrary state law and therefore trumps the state’s prohibition.
- What about those states that operate their own OSHA plans (state plan states)?
 - If you operate in a state plan state with other vaccine-related restrictions, such as Tennessee or Utah, we recommend you follow that state’s law until it takes action on the ETS.
 - If you operate in one of the other state plan states, such as California, we recommend you stay alert for what action it takes, which could be to adopt something more stringent than the Federal OSHA ETS.

OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard Subpart U

Which employers will be covered?

- ALL employers covered by the OSH Act with 100 or more employees must comply with the ETS.
- Includes many office-based employers who do not regularly interact with OSHA.
 - Financial institutions;
 - Insurance companies;
 - Law firms;
 - Other professional and technical work environments.



Which employers are not covered?

The ETS **does not** apply to:

- Workplaces subject to the Federal Contractor Mandate; or
- Settings where any employee provides healthcare services or healthcare support services under the requirements of 29 CFR 1910.502 (OSHA's Healthcare ETS).



shutterstock

Which *employees* are not covered?

The ETS does not apply to the following employees of covered employers:

- Employees who do not report to a workplace where other individuals, such as coworkers or customers, are present;
- Employees who work from home full time;
 - An employee who switches back and forth from teleworking to working in a setting where other people are present (e.g., an office) is covered by the ETS and must be vaccinated if required by the employer, or have a negative test within 7 days of returning to the workplace.
- Employees who work exclusively outdoors.

COVID-19 Vaccine and Testing ETS Requirements

The COVID-19 Vaccine or Testing ETS contains the following requirements in 29 CFR 1910.501, Subpart U:

- The employer must establish, implement, and enforce a written mandatory vaccination policy that requires each employee to be fully vaccinated against COVID-19

OR

- The employer must implement a policy that allows employees to choose between being fully vaccinated or both tested and wearing a face covering.

Vaccine Mandates- Accommodation Considerations

- An employee **may** be entitled to exemption from “required” vaccines:
 - due to an ADA-covered disability or other medical circumstances (e.g., those to whom a vaccine is contraindicated or those to whom medical necessity requires a delay in vaccination)
 - based on sincerely-held religious beliefs, practices, or observances
- In any case – “interactive process” is critical
- Employer must consider reasonable accommodations (i.e., remote work, testing/masking)
- Document communications with employee
- Employer’s rights to make medical and religious inquiries are limited
- “Process” may be as important as the final accommodation decision
- Supervisor training is vital – avoid inadvertent medical inquiries
- Sample forms available at the FP Vaccine Resource Center

Vaccine Mandates- Accommodation Considerations



The Interactive Process

- (1) Review employee requests for exemption from the vaccine requirement to determine if the request falls under the ADA or Title VII obligations for employers;
- (2) Consult with the employee with a disability or sincerely held religious belief to ascertain what, if any, accommodations may be needed;
- (3) If appropriate, consider consulting with health care provider or religious leader;
- (4) Determine whether the individual has a disability under the ADA or a sincerely held religious belief;
- (5) Determine if the accommodation poses a direct threat or creates an “undue hardship;”
- (6) Notify the employee and document process.



Medical, Temporary or ADA Requests for Accommodation

- Medical conditions or disabilities that could exempt persons from COVID-19 vaccinations might include allergic reactions to vaccinations, pregnancy conditions, or certain chronic illnesses or other disabilities as determined by an employee's health care provider.
- There are some situations when a COVID vaccine may need to be temporarily deferred. For example, if employee has an acute illness with a fever of 38.5°C or over.
 - This would usually be for a short period only and wouldn't require the employee to obtain a written temporary medical exemption.
- There are also some "acute major medical illnesses" where people may be able to get a temporary exemption form.
 - This needs to be assessed and given by a medical provider, and only temporarily exempts you from a COVID vaccine.

Religious Requests for Accommodation

Factors to Consider

The EEOC identified the following factors that might undermine the credibility of an employee's claim:

- The employee has acted inconsistently with the professed belief. However, the EEOC said, "employees need not be scrupulous in their observance."
- The employee is seeking a "particularly desirable" accommodation that is likely to be sought for nonreligious reasons.
- The timing of the request is suspicious. For example, the employee may have recently requested the same benefit for secular reasons and been denied.
- The employer otherwise has reason to believe the accommodation is not sought for religious reasons.
- While prior inconsistent conduct is relevant to determining the sincerity of an employee's beliefs, the EEOC cautioned that an employee's beliefs (and degree of adherence to such beliefs) may change over time.
- "An employer should not assume that an employee is insincere simply because some of the employee's practices deviate from the commonly followed tenets of the employee's religion, or because the employee adheres to some common practices but not others," the agency said.

The Testing Alternative

The ETS requires employers to ensure that employees who are not fully vaccinated and who report at least once every seven days to a workplace where other individuals such as coworkers or customers are present are:

- (1) tested for COVID-19 at least once every seven days; and
- (2) provide documentation of the most recent COVID-19 test result to the employer no later than the seventh day following the date the employee last provided a test result.

Employers must also ensure that employees who are not fully vaccinated and do not report during a period of seven or more days to a workplace where other individuals are present are:

- (1) tested for COVID-19 within seven days prior to returning to the workplace; and
- (2) provide documentation of that test result upon return to the workplace.

Who pays for testing?

- ETS does not require employers to pay costs of testing for employees who “choose not to be vaccinated.”
 - OSHA notes that the ETS does not prohibit the employer from paying for costs associated with testing required.
- Some workers and/or their representatives will negotiate the terms of payment.
- Some employers may choose to pay for some or all of the costs of testing as an inducement to keep employees in a tight labor market.
- Several states have laws predating COVID-19 requiring employers to pay for mandatory medical tests or reimburse employees for any such testing.



Not so fast...must employers pay employees for time spent getting tested?

- No clear answer for all employees – safest to pay for the time.
- Generally, time spent by employees receiving employer-required tests should be treated as compensable
 - If the testing is required during the workday or
 - If necessary to perform the job safely and effectively.



Must employers pay employees for time spent getting vaccinated?

- The employer must:
 - (i) provide a reasonable amount of time to each employee for each of their primary vaccination series dose(s); and
 - (ii) provide up to 4 hours paid time, including travel time, at the employee's regular rate of pay for this purpose.
- The employer must provide "reasonable time and paid sick leave" to recover from side effects experienced following any primary vaccination series dose to each employee for each dose. (OSHA presumes that 2-days is a reasonable time for recovery).
- Employers can require that employees use existing accrued paid sick leave to recover from side effects, but cannot require that employees use vacation pay or future, unaccrued, paid sick leave.



Additional ETS Requirements

- Employers must determine employee vaccination status, and must require that any employees who are not vaccinated be tested for COVID-19 at least once every 7 days.
- Employers must provide specified information to employees regarding COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated in a written vaccination plan.
- Employers must maintain a record of:
 - Employees' COVID-19 vaccination status;
 - Proof of vaccination;
 - Copies of employee COVID-19 test results; and
 - The aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

Written Vaccination Policy

To ensure compliance with ETS the written policy should address:

- Requirements of the ETS and other workplace policies and procedures;
- Requirements for COVID-19 vaccination and vaccine efficacy;
- Information on determining an employee's vaccination status and how this information will be collected (paragraph (e));
- Paid time and sick leave for vaccination purposes (paragraph (f));

Written Vaccination Policy cont'd

- Notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace (as described in paragraph (h));
- Information to be provided to employees pursuant to paragraph (j) (e.g., how the employer is making that information available to employees); and
- Mask policy for unvaccinated workers
- Disciplinary action for employees who do not abide by the policy.

Proof of Vaccination

Employers must require employees to provide an acceptable proof of vaccination status, including whether they are fully or partially vaccinated.



Proof of Vaccination

Acceptable proof of vaccination status is:

- 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 health care professional(s) or clinic site(s) administering the vaccine(s).
- A signed and dated employee attestation is acceptable in instances when an employee is unable to produce proof of vaccination. Must state that their vaccination status and that they have lost and are otherwise unable to produce proof. Must require that employees declare that the statement of their vaccination status is true and that they understand providing false information may subject them to criminal penalties.

Facial Coverings

All employees who are not fully vaccinated must wear a face covering when indoors and when occupying a vehicle with another person for work purposes, except:

- when an employee is alone in a room with floor to ceiling walls and a closed door;
- for a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements;
- when employees are wearing respirators or face masks; or
- where the employer can show that the use of face coverings is infeasible or creates a greater hazard.



What Records to Maintain?

- Employers must maintain a record and a roster of each employee's vaccination status and testing records.
- This information is subject to applicable legal requirements for confidentiality of medical information.
- These records must be preserved while the ETS is in effect.

The standard 30-year record retention requirements do not apply.



Reporting COVID-19 Fatality or In-Patient Hospitalization

Employers must report:

- (i) Each work-related COVID-19 fatality within 8 hours of the employer learning about the fatality.
- (ii) Each work-related COVID-19 in-patient hospitalization within 24 hours of the employer learning about the in-patient hospitalization.

When reporting COVID-19 fatalities and in-patient hospitalizations to OSHA in accordance with paragraph (j)(1) of the ETS, the employer must follow the requirements in 29 CFR part 1904.39, except for 29 CFR part 1904.39(a)(1) and (2) and (b)(6).



Penalties for Non-Compliance

- **Employee penalties:** Penalties for employee could include criminal penalties for knowingly providing false information to their employer attesting to their vaccination status (fully vaccinated or partially vaccinated); and attesting that they have lost and are otherwise unable to produce proof required by the ETS.
- **Employer penalties:** OSHA has adopted its “egregious violation” policy to impose sufficiently large penalties that achieve appropriate deterrence against bad actor employers who willfully disregard their obligation to protect their employees when certain aggravating circumstances are present, such as a large number of injuries or illnesses, bad faith, or an extensive history of noncompliance.



Will unionized employers be required to bargain over the decision of how to comply with the ETS?

- Unclear to what extent unionized employers will be compelled to bargain over the decision on how to comply with the ETS (or at least the discretionary aspects with respect to vaccines vs. weekly testing).
- At a minimum, be prepared to bargain over the effects of compliance with the ETS.
- Non-union employers should consider the practical implications of compliance from a labor relations perspective.

What About the Other Vaccine Mandates?

- OSHA's vaccine or test ETS specifically exempts workplaces covered by the OSHA Healthcare ETS and the Executive Order 14042 (commonly known as the Federal Contractor mandate).
- The CMS mandate for certain healthcare companies has been enjoined in about half the states and cleared for enforcement in the other half.
- The Federal Contractor Vaccine Mandate has been blocked nationwide by a federal court.

What Should You Do?

- **Determine if you will mandate the vaccine or allow unvaccinated employees to be tested weekly.**
 - For some employers, collecting and tracking weekly test results may burden them such that they decide to adopt a mandatory vaccination policy.
 - ETS allows employers to require vaccinations without providing the alternative for weekly testing (subject to accommodations)
 - If planning for weekly testing, think through the logistics:
 - Onsite or through designated vendors?
 - Payment for testing
 - Payment of time for testing

What Should You Do?

- **Have a plan for addressing noncompliance by employees.**
 - What happens to an employee who does not get tested?
 - What happens to an employee who refuses to get vaccinated?

What Should You Do?

- **Develop a plan for handling accommodation requests.**
 - Employees may request accommodations for disabilities or for religious reasons under federal or state laws.
 - Develop a robust and clear reasonable accommodation policy to address religious and disability issues.
 - Communicate and administer the accommodation process thoughtfully, emphasizing individualized, confidential consideration of each request.
 - Be prepared for employees to request an accommodation from the weekly testing requirement.

What Should You Do?

- **Prepare for OSHA Complaints and Inspections**

- The vaccination ETS will not displace current compliance duties related to COVID-19 prevention and mitigation.
- OSHA will likely ask for your COVID-19 response plan and training records.
- Develop a COVID-19 policy and communicate its requirements to your employees.
- Train managers and supervisors on what to do and say if OSHA arrives for an inspection.

Questions?

Todd B. Logsdon | Louisville, KY | tlogsdon@fisherphillips.com
J. Hagood Tighe | Columbia, SC | htighe@fisherphillips.com
Travis W. Vance | Charlotte, NC | tvance@fisherphillips.com
Kristin White | Denver, CO | kwhite@fisherphillips.com

Thank You.

Todd B. Logsdon | Louisville, KY | tlogsdon@fisherphillips.com
J. Hagood Tighe | Columbia, SC | htighe@fisherphillips.com
Travis W. Vance | Charlotte, NC | tvance@fisherphillips.com
Kristin White | Denver, CO | kwhite@fisherphillips.com