

[Latham & Watkins Executive Compensation, Employment & Benefits Practice](#)

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10 Employer Obligations Required by OSHA's COVID-19 Vaccine-or-Test Mandate

Employers with 100 or more employees may wish to begin preparing for the emergency temporary standard's imminent deadlines, despite pending legal challenges.

Key Points:

- The emergency temporary standard (ETS) requires covered employers to be in compliance with most obligations of the ETS by December 6, 2021, which includes having a written COVID-19 vaccination policy and a roster and proof of vaccination status of employees.
- A covered employer's vaccination policy must either (i) mandate employees to be fully vaccinated against COVID-19 or (ii) allow employees either to be fully vaccinated or to wear a face covering and provide proof of regular COVID-19 testing.
- The ETS gives covered employers until January 4, 2022, to be in compliance with COVID-19 testing requirements.
- The requirements of the ETS do not apply to some workplaces, settings, and employees.
- The ETS preempts inconsistent state and local requirements, including bans or limitations on any employer's authority to require COVID-19 vaccinations, face coverings, or COVID-19 testing.
- Although the ETS is temporary, it serves as a proposal for a regular standard, and the ETS or something similar to it may remain in effect indefinitely.
- The ETS is currently stayed and subject to numerous legal challenges. A court will ultimately decide if the ETS violates constitutional or statutory limitations.

On November 5, 2021, the US Occupational Safety and Health Administration (OSHA) published an [ETS](#) that requires covered employers to take affirmative steps to address COVID-19 safety, including adopting a policy that requires employees to be fully vaccinated from COVID-19 or that gives employees a choice between being vaccinated from COVID-19 or being subject to COVID-19 testing and face covering requirements. The ETS was effective immediately, and has a deadline of December 6, 2021 for many substantive requirements.

However, on November 12, 2021, in an action brought by several states and private parties, the US Court of Appeals for the Fifth Circuit stayed enforcement of the ETS pending a ruling on a permanent injunction. While that stay is pending, OSHA cannot take any steps to implement or enforce the ETS. On November 16, 2021, pursuant to a lottery conducted by the Judicial Panel on Multidistrict Litigation, that action and other pending actions around the country challenging the legality of the ETS were consolidated into one action in the US Court of Appeals for the Sixth Circuit. Some members of Congress are also separately attempting to block the ETS' implementation.

Despite the ETS' legal challenges, given the many requirements set forth in the ETS, covered employers may wish to start planning immediately so that they will be in a position to comply with the ETS mandates if the challenges to the ETS are not successful.

Which Employers Are Covered by the ETS?

The ETS applies to all private employers with 100 or more employees. Some public employers with 100 or more employees may also be covered. Employers in states that have OSHA-approved State Plans will technically be covered by their states' OSHA-approved State Plans, but such State Plans must, by December 6, 2021, either include an ETS identical to the OSHA ETS or have requirements that are at least as effective as OSHA's ETS.

The ETS does not specify who is an "employee" for purposes of determining whether an employer is covered by the ETS. However, OSHA issued [FAQs](#) that state that both full-time and part-time employees are counted as employees for such purposes, as are employees to whom the ETS does not apply (as discussed in the next question), but that independent contractors are not counted. The FAQs strongly support the conclusion that only employees in the US must be counted.

The FAQs also state that once an employer is subject to the ETS, it remains subject to the ETS, even if its headcount drops to less than 100 employees.

Do the Requirements of the ETS Apply to All of a Covered Employer's Workplaces and Employees?

The requirements of the ETS do not apply to:

- Workplaces that are covered under the [Safer Federal Workforce Task Force's COVID-19 Workplace Safety Guidance for Federal Contractors and Subcontractors](#) issued by the White House on September 24, 2021;
- Settings where any employee provides healthcare services or healthcare support services when subject to [OSHA's ETS for healthcare and healthcare support service workers](#) dated June 21, 2021;
- Employees who do not report to a workplace where other individuals, such as coworkers or customers, are present;
- Employees while working from home; or
- Employees who work exclusively outdoors.

What Must Employers Do to Comply With the ETS?

The ETS contains a number of significant requirements for covered employers. To be in compliance with the ETS if the legal challenges against it are not successful, covered employers must:

1. Adopt and Enforce a Written, Compliant Vaccination Policy

Covered employers must establish, implement, and enforce a written, compliant vaccination policy that:

- Requires all employees to be fully vaccinated against COVID-19, including all covered new employees, as soon as practicable, but excluding employees (i) for whom a vaccine is medically contraindicated, (ii) for whom medical necessity requires a delay in vaccination, or (iii) who are legally entitled to a reasonable accommodation under federal civil rights laws because they have

a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement; or

- Allows employees to choose either to be fully vaccinated against COVID-19 or to provide proof of regular testing for COVID-19 and wear a face covering.

OSHA's FAQs state that an employer may choose to have a mandatory vaccination policy for one subset of employees and an optional vaccination policy with testing and face coverings for another subset of employees. Employers may also have to provide reasonable accommodations for the COVID-19 testing and face covering obligations due to disabilities and sincerely held religious beliefs. Employers with unionized employees may also have to bargain over which policy to implement and the effects of such a policy.

According to OSHA's FAQs, a vaccination policy should include information that addresses employers' obligations under the ETS (excluding obligations regarding reporting and making certain information available for inspection and copying), as well as relevant information regarding the policy's effective date, who the policy applies to, deadlines (such as those for submitting vaccination information and for getting vaccinated), and procedures for compliance and enforcement. OSHA has published two template policies that employers can customize and use — one that requires vaccinations and one that does not — both of which can be found at [OSHA's informational page about the ETS](#).

The ETS requires employers to be in compliance with the obligations relating to COVID-19 vaccination policies by December 6, 2021.

2. Determine, Record, and Require and Preserve Proof of Each Employee's COVID-19 Vaccination Status

Covered employers must determine and record each employee's COVID-19 vaccination status, including if an employee is partially or fully vaccinated, and require and preserve acceptable proof of vaccination status of all employees who are vaccinated, including if they are partially or fully vaccinated.

An employee is considered fully vaccinated against COVID-19 if at least two weeks have passed since the employee:

- Completed all primary doses of a COVID-19 vaccine (with at least the recommended time interval between doses, where applicable) that: (i) has been approved or authorized for emergency use by the US Food and Drug Administration (FDA); (ii) is listed for emergency use by the World Health Organization (WHO); or (iii) was administered as part of a clinical trial at a US site, if the employee is documented to have received primary vaccination with the active (not placebo) COVID-19 vaccine candidate for which vaccine efficacy has been independently confirmed or is listed for emergency use by the WHO; or
- Received the second dose of any combination of two doses of a COVID-19 vaccine that is approved or authorized by the FDA or listed as a two-dose series by the WHO, with the second dose not being received earlier than 17 days after the first dose.

Acceptable proof of COVID-19 vaccination status includes the original or a copy (including a digital copy) of any of the following:

- The record of immunization from a healthcare provider or pharmacy;
- A US Centers for Disease Control and Prevention (CDC) [COVID-19 Vaccination Record Card](#);
- Medical records documenting the vaccination;

- Immunization records from a public health, state, or tribal immunization information system; and
- Any other official documentation that contains the type of vaccine administered, date(s) of administration, and name of the healthcare professional(s) or clinic site(s) administering the vaccine(s).

If an employee claims to be vaccinated but cannot produce a record of vaccination, an employer can accept a signed and dated statement as to their vaccination that: (i) attests to their vaccination status (fully vaccinated or partially vaccinated); (ii) attests that they have lost and are otherwise unable to produce acceptable proof; and (iii) includes the following language:

“I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.”

However, OSHA’s FAQs state that such an attestation is acceptable only after the employee has attempted to secure alternate forms of documentation, and should include information, to the best of the employee’s recollection, as to the type of vaccine administered, the date of administration, and the name of the healthcare professional(s) or clinic site(s) that administered the vaccine.

If a covered employer has determined employee vaccination status prior to November 5, 2021, through a form of attestation or proof, and retained records of that determination, then the employer does not need to recollect vaccination information for employees whose fully vaccinated status was documented prior to November 5, 2021, even if the employer’s records do not conform to the ETS requirements.

Records and proof of vaccination are considered medical records under the ETS. As such, they must be maintained as medical records under OSHA while the ETS is in effect, and must not be disclosed except as required or authorized under the ETS or other federal law.

The ETS requires covered employers to be in compliance with the obligations relating to determining and maintaining employee vaccination status by December 6, 2021.

3. Maintain a Roster of Each Employee’s Vaccination Status

Covered employers must maintain rosters that indicate, for each employee, whether they are fully or partially vaccinated or not vaccinated at all. OSHA’s FAQs state that an employer must note if an employee is not fully vaccinated because of a medical or religious accommodation or because they have not provided acceptable proof of vaccination status.

The employee roster is considered a medical record under the ETS. As such, it must be maintained as a medical record under OSHA while the ETS is in effect, and must not be disclosed except as required or authorized under the ETS or other federal law.

The ETS requires covered employers to be in compliance with the obligations relating to an employee roster by December 6, 2021.

4. Provide Time Off for Vaccination and Recovery from Side Effects

If an employee receives a primary COVID-19 vaccination dose or doses (i.e., not a booster or other additional dose) during work hours, a covered employer must provide the employee with reasonable time off for the vaccination, including up to four hours of paid time off at the employee’s regular rate of pay. OSHA’s FAQs state that such time off cannot be offset by accrued paid leave, such as sick or vacation

leave. If the employee requires more than four hours of time off to receive the vaccination, the additional time is unpaid, protected leave. If the employee chooses to receive a COVID-19 vaccination outside of work hours, then the time is not paid.

Covered employers must also provide employees reasonable time off and paid sick leave to recover from any side effects experienced following a primary COVID-19 vaccination dose. The OSHA FAQs state that employers may set a reasonable cap on the amount of paid sick leave available to an employee to recover from any such side effects and that OSHA generally will presume an employer that provides at least two days of paid sick leave per vaccination dose to be in compliance with the requirement. The FAQs also state that, unlike the time off for primary COVID-19 vaccination doses, if an employee already has accrued paid sick leave, an employer may require the employee to use that paid sick leave to recover from any side effects from a primary dose of a COVID-19 vaccine.

Employers are not obligated under the ETS to reimburse employees for their transportation costs to receive a COVID-19 vaccination, but other laws may require it.

The ETS requires covered employers to begin providing time off for primary doses of COVID-19 vaccines and time off and paid sick leave to recover from any side effects from primary doses of COVID-19 vaccines on December 6, 2021.

5. Require Regular Testing for Employees Who Are Not Fully Vaccinated

A covered employer must require an employee who is not fully vaccinated to be tested for COVID-19, as follows:

- If an employee who is not fully vaccinated reports, at least once every seven days, to a workplace where other individuals (such as coworkers or customers) are present, the employee must be tested for COVID-19 at least once every seven days and must provide documentation of the most recent COVID-19 test result to the employer no later than the seventh day following the date on which the employee last provided a test result to the employer; and
- If an employee who is not fully vaccinated does not report, during a period of seven or more days, to a workplace where other individuals are present, the employee must be tested for COVID-19 within seven days prior to returning to the workplace and must provide documentation of the negative test result to the employer upon returning to the workplace.

An employee's COVID-19 test must be:

- Cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the FDA to detect current infection with the SARS-CoV-2 virus (e.g., a viral test);
- Administered in accordance with the authorized instructions; and
- Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

Examples of tests that satisfy the ETS' test requirements are tests with specimens that are processed by a laboratory, proctored over-the-counter tests, point-of-care tests, and tests where specimen collection and processing is either done or observed by the employer. Additional detailed information about employee testing can be found in OSHA's FAQs.

Covered employers must maintain records of the test results submitted by employees or obtained during tests conducted by the employer for the duration that the ETS is in effect, and such records must be

treated as medical records and not disclosed except as required or authorized under the ETS or other federal law.

The ETS does not require that employers pay for COVID-19 testing, but state or local laws may require it. In addition, paying for testing may be part of a reasonable accommodation for employees who are not vaccinated for religious or medical reasons. If COVID-19 testing conflicts with an employee's sincerely held religious belief, practice, or observance, the employee may be entitled to a reasonable accommodation.

If an employee who is not fully vaccinated has received a positive COVID-19 test result, or has been diagnosed with COVID-19 by a licensed healthcare provider, the employer cannot require that employee to undergo COVID-19 testing as set forth above for 90 days following the date of the employee's positive test or diagnosis.

The ETS requires covered employers to be in compliance with the testing requirements by January 4, 2022.

6. Require Face Coverings for Employees Who Are Not Fully Vaccinated

A covered employer must ensure that all employees who are not fully vaccinated wear face coverings 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;
- For a limited time for identification purposes in compliance with safety and security requirements;
- When an employee is wearing a respirator or facemask (both of which are defined terms in the ETS); or
- If the employer can show that the use of the face covering is infeasible or creates a greater hazard that would excuse compliance with the requirement.

A face covering is defined in the ETS to be a covering that:

- Completely covers the nose and mouth;
- Is made with two or more layers of a breathable fabric that is tightly woven (i.e., fabrics that do not let light pass through when held up to a light source);
- Is secured to the head with ties, ear loops, or elastic bands that go behind the head (gaiters are acceptable if they have two layers of fabric or are folded to make two layers);
- Fits snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and
- Is a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings.

The definition of a face covering also includes clear face coverings or cloth face coverings with a clear plastic panel that, despite the non-cloth material allowing light to pass through, otherwise meets the definition of a face covering and which may be used to facilitate communication with people who are deaf or hard of hearing or others who need to see a speaker's mouth or facial expressions to understand speech or sign language.

Additionally, employers:

- Are required to ensure that face coverings worn by employees who are not fully vaccinated fully cover the employees' noses and mouths and are replaced when wet, soiled, or damaged;
- May not prevent any employee from voluntarily wearing a face covering or facemask unless the employer can demonstrate that doing so would create a hazard of serious injury or death, such as interfering with the safe operation of equipment;
- Must permit an employee to wear a respirator instead of a face covering;
- May not prohibit customers or visitors from wearing face coverings; and
- May have to provide reasonable accommodations regarding face coverings to employees who require such accommodations due to disabilities or sincerely held religious beliefs, practices, or observances.

The ETS requires covered employers to comply with the obligations regarding face coverings by December 6, 2021.

7. Require Employees to Promptly Report Positive COVID-19 Tests or Diagnoses

Covered employers must require employees to promptly notify the employer when the employees receive a positive COVID-19 test result or are diagnosed with COVID-19 by a licensed healthcare provider. OSHA's FAQs state that promptly notifying the employer of a positive COVID-19 test result or COVID-19 diagnosis means notifying the employer:

- As soon as practicable before the employee is scheduled to start their next shift or return to work, if the employee is not at the workplace when they receive the positive COVID-19 test result or diagnosis; and
- As soon as safely possible while avoiding exposing any other individuals in the workplace, if the employee is in the workplace when they receive the positive COVID-19 test result or diagnosis.

The ETS requires covered employers to comply with the obligations regarding reporting of positive COVID-19 test results and diagnoses by December 6, 2021.

8. Remove Employees Who Fail to Comply With Testing or Are Infected

Covered employers must remove from the workplace:

- Employees who are not fully vaccinated against COVID-19 and have not provided documentation of a COVID-19 test result as required under the ETS; and
- Employees who have tested positive for or received a diagnosis of COVID-19 from a licensed healthcare provider.

Employees who are removed from the workplace due to a positive COVID-19 test result or diagnosis of COVID-19 infection may not be permitted to return to the workplace until:

- The employee receives a negative result on a COVID-19 nucleic acid amplification test following a positive result on a COVID-19 antigen test (the most common screening test);
- The employee meets the return-to-work criteria set forth in the CDC's [Isolation Guidance](#); or
- The employee receives a return-to-work recommendation from a licensed healthcare provider.

Employers are not required under the ETS to provide paid time off for the period of time that an employee is removed from the workplace, but other laws may require payment.

The ETS requires covered employers to comply with the removal obligations regarding employees who test positive for or receive a diagnosis of COVID-19 by December 6, 2021, and to comply with the removal obligations regarding employees who are not fully vaccinated and do not comply with testing obligations by January 4, 2022.

9. Provide Certain Notice to Employees

Covered employers must inform each employee, in a language and at a literacy level the employee understands, of:

- The ETS' requirements;
- Any employer policies and procedures established to implement the ETS;
- COVID-19 vaccine efficacy, safety, and the benefits of vaccination, by providing the CDC document [Key Things to Know About COVID-19 Vaccines](#);
- Prohibitions on retaliation, including discharging or in any manner discriminating, against an employee for reporting a work-related injury or illness, filing an occupational safety or health complaint, exercising rights under or as a result of actions that are required by the ETS, or otherwise exercising any rights afforded by the Occupational Safety and Health Act (OSH Act); and
- The criminal penalties under the OSH Act associated with knowingly supplying false statements or documentation.

The ETS requires compliance with its notice obligations by December 6, 2021.

10. Report or Make Available Certain Information for Inspecting or Copying

Covered employers are required to report to OSHA:

- Each work-related COVID-19 fatality, within eight hours of the employer learning about the fatality;
- Each work-related COVID-19 in-patient hospitalization, within 24 hours of the employer learning about the in-patient hospitalization;
- A copy of the employer's written COVID-19 vaccination policy and the aggregate numbers of fully vaccinated employees and total number of employees at the workplace, within four business hours of a request from OSHA; and
- A copy of all other records and documents required to be maintained by the employer under the ETS, by the end of the next business day after a request from OSHA.

Covered employers must also make available to each employee, by the end of the next business day after receipt of a request from the employee or anyone having written authorized consent of that employee:

- The employee's COVID-19 vaccine documentation and any COVID-19 test results maintained by the employer for such employee; and
- The aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

How Does the ETS Impact Inconsistent Laws?

By its terms, the ETS preempts state and local laws that ban or limit employers' authority to require vaccination, face covering, or COVID-19 testing — without regard to the number of employees the employer has.

What Happens When the ETS Expires?

OSHA states in its FAQs that it expects the ETS to be in effect for six months from the date of publication. However, the ETS serves as a proposal under Section 6(b) of the OSH Act for a final standard, meaning that, if approved as a final standard, it will not expire. Thus, the ETS, or a similar standard, could be in effect for much longer than six months.

What Action Should Covered Employers Take Now?

Despite the Fifth Circuit stay of the ETS' enforcement and other challenges noted above, covered employers should take steps to be in compliance with the ETS by its deadlines in the event the legal challenges are not successful, including to:

- Determine if they will mandate COVID-19 vaccines for all employees or offer employees the option between vaccines or regular COVID-19 testing and wearing a face covering.
- Establish how they will determine, record, and collect proof of each employee's vaccination status and make necessary accommodations.
- Decide if they will offer COVID-19 testing on site. If they will not offer testing on site, they should confirm how employees who are not fully vaccinated will have access to testing. Although the ETS does not require testing until January 4, 2022, planning for on-site testing or ensuring there are off-site locations reasonably available to employees will be critical to implementing a policy that permits testing.
- Draft a compliant vaccination policy.
- Prepare a notice to employees that includes the information required by the ETS. Such notice may need to be tailored for individual employees, as it must be in a language and at a literacy level that each employee will understand.
- Review state and local laws concerning reimbursement of expenses and time off to determine if they must be paid by the employer.

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