



Occupational Safety and Health Administration's Emergency Temporary Standard

On November 5, 2021, the Occupational Safety and Health Administration (OSHA) published the highly-awaited Emergency Temporary Standard (ETS), which generally requires private employers with 100 or more employees to mandate vaccinations for all employees, or in lieu of a vaccination mandate, require unvaccinated employees to undergo weekly testing and wear facemasks when indoors. This standard, which will affect approximately two-thirds of all private-sector workers, “preempt[s] inconsistent state and local requirements relating to...the requirements that ban or limit employers’ authority to require vaccinations, face coverings, or testing, regardless of the number of employees.” While the ETS is effective immediately upon publication, employers have until December 5, 2021, to comply with most requirements, and employees have until January 4, 2022, to receive all requisite dose(s) of a vaccine or otherwise undergo weekly testing and wearing a face covering.

OSHA has the authority to issue a standard such as this when it “determines that employees are subject to a grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and the ETS is necessary to protect employees from such danger.” OSHA explains in the preamble of the ETS that unvaccinated employees face grave danger from exposure to COVID-19 in the workplace, and it is necessary to implement vaccination requirements, testing, and masking requirements to protect these employees. OSHA further assured the ETS is feasible—meaning it can be accomplished and is economically practical.

The ETS functions as a proposed rule and remains in effect for six months. While the rule is in effect, OSHA has the authority to revise or update the ETS in light of new information as it relates to the workforce and COVID-19.

To date, the Fifth Circuit Court of Appeals has issued a nationwide injunction prohibiting enforcement of the ETS. Other legal challenges are pending across the country. Given the cases pending across several circuit courts, it is likely these cases will be consolidated and heard by one federal court, which could ultimately be appealed to the United States Supreme Court. Overall, given the uncertainty of the outcome of these appeals, it is recommended that employers prepare for compliance with the ETS while monitoring these legal developments.

This white paper explains the ETS in an effort to help employers determine whether its employees are covered. It also explains employees’ rights, obligations, and compliance deadlines¹ under the ETS.

Employers Covered by the ETS

For purposes of the ETS, the 100 employee threshold is determined by the number of employees across all U.S. locations, regardless of an employee’s vaccination status or work location. In other words, the count should be done company-wide and includes remote employees. To illustrate the employee count, OSHA’s FAQ explains that if a company has 150 employees, 100 of whom entirely telework and 50 that work in the office, the company would be within the purview of the ETS because its cumulative employee count, which includes remote and non-remote workers, exceeds the 100 employee threshold.¹ Additionally, part-time, minors, and temporary/seasonal employees (if not hired from a temporary staffing agency) count for purposes of the 100 employee threshold; however, independent contractors do not count. Moreover, employers covered by the Healthcare ETS,² as well as the Federal Contractor mandate, are not covered by the ETS.

¹ COVID-19 Vaccination and Testing ETS - Frequently Asked Questions | Occupational Safety and Health Administration ([osha.gov](https://www.osha.gov)).

² Healthcare ETS 29 CFR 1910.502.

An employer should refer to its employee count on the effective date of the ETS—November 5, 2021—to determine whether it employs the requisite number of employees. If an employer has 100 employees as of this date, it will be required to comply with the ETS until it expires. Accounting for fluctuations in employee numbers, the ETS states that if at any point a company's employee count reaches the 100 employee threshold, it will be covered by the ETS and will continue to be within the ETS's reach and obligated to comply, even if employee count subsequently falls below the requisite threshold.

In the following circumstances, employers should count employees in the manner described below:

1. *Multi-employer Worksites* (e.g., constructions sites). When multiple employers have employees on a single worksite, each employer should only count their *own* employees. If an employer has employees across several worksites, it would nevertheless need to count all of its employees, regardless of the employees' worksite locations, to determine if it meets the 100 employee threshold.
2. *Franchises*. When the franchisee is independently owned and operated, the franchisee and franchisor would be separate entities for purposes of the employee count (i.e., the franchisee would only count its employees at its franchise).
3. *Staffing Agencies*. When an employee is jointly employed by a staffing agency and host employer, the employee is only counted by the staffing agency for purposes of the 100 employee threshold.
4. *Two or More Entities Handling Safety Matters as One Company*. If two or more entities handle any safety matters as one company, the entities will be considered a single employer for purposes of the ETS, and accordingly, the employees across all entities will be counted together to determine whether this single employer (i.e., all the entities that handle safety matters as one company) meet the threshold.

The ETS provided the following examples to illustrate how employees are counted for purposes of the ETS:

1. If an employer has 75 part-time employees and 25 full-time employees, the employer is within the scope of this ETS because it has 100 employees.
2. If an employer has 150 employees, 100 of which work from their homes full-time and 50 of whom work in the office at least part of the time, the employer is within the scope of this ETS because it has more than 100 employees.
3. If an employer has 102 employees and only 3 ever report to an office location, that employer is covered.
4. If an employer has 150 employees, and 100 of them perform maintenance work in customers' homes, primarily working from their company vehicles (i.e., mobile workplaces), and rarely or never report to the main office, that employer also falls within the scope.
5. If an employer has 200 employees, all of whom are vaccinated, that employer is covered.
6. If an employer has 125 employees, and 115 of them work exclusively outdoors, that employer is covered.
7. If a single corporation has 50 small locations (e.g., kiosks, concession stands) with at least 100 total employees in its combined locations, that employer is covered even if some of the locations have no more than one or two employees assigned to work there.
8. If a host employer has 80 permanent employees and 30 temporary employees supplied by a staffing agency, the host employer would not count the staffing agency employees for coverage purposes and therefore is not covered. (So long as the staffing agency has at least 100 employees, however, the staffing agency would be responsible for ensuring compliance with the ETS for the jointly employed workers.)
9. If a host employer has 110 permanent employees and 10 temporary employees from a small staffing agency (with fewer than 100 employees of its own), the host employer is covered under this ETS and the staffing agency is not.

10. If a host employer has 110 permanent employees and 10 employees from a large staffing agency (with more than 100 employees of its own), both the host employer and the staffing agency are covered under this standard, and traditional joint employer principles apply.

Employees Covered by the ETS

The ETS applies to all employees, except those employees who work alone, working from home, or work exclusively outdoors.

1. *Employees working alone.* When an employee works in a solitary location, where he or she does not interact with other employees or customers, the employee does not need to adhere to the ETS's requirements.
2. *Employees working from home.* When an employee works from home, he or she is also exempt from the ETS's requirements; however, this only applies when working remotely. Should this employee be unvaccinated and visit the workplace,³ he or she would need to adhere to the employer's vaccination policy or submit a negative COVID-19 test seven days prior to visiting the workplace and wear a mask indoors.
3. *Employees working outdoors.* To be categorized as an outdoor employee, the employee must work exclusively outdoors. The ETS does not consider an employee to be working outdoors when working in partially completed structures or trailers with others, routinely sharing work vehicles with others, or working some days outdoors and other days indoors.

Employers must distinguish *employer* coverage from *employee* coverage. While an employer may be covered by the ETS for reason of having 100 or more employees, all or some of its employees may be not subject to the requirements of the ETS. For example, if an employer has 150 employees, who all are entirely remote, the employer would be subject to the requirements of the ETS as it surpasses the 100 employee threshold, but because all of its employees are remote, the employees would not be covered under the ETS.

Requirements of the ETS

For employers who reach the 100 employee threshold, the ETS sets forth many requirements for which it must comply.⁴ These requirements are described below.

1. Employer Policy on Vaccination

- a. Employers must develop, implement, and enforce one of two policies: (1) a mandatory vaccine policy; or (2) a policy that requires employees to be vaccinated, or for those who chose not to get vaccinated, to submit weekly COVID-19 test results and wear a face covering in accordance with the ETS.
 - i. As defined by the ETS, a mandatory vaccination policy requires "each employee to be fully vaccinated."⁵ For a policy to constitute a mandatory vaccination policy, the policy

³ The ETS defines "workplace" as: a physical location (e.g., fixed, mobile) where the employer's work or operations are performed. It does not include an employer's residence.

⁴ The requirements a covered employer must follow are listed in paragraphs (d)-(m) of the ETS.

⁵ The ETS defines "fully vaccinated" as: (1) A person's status 2 weeks after completing primary vaccination with a COVID-19 vaccine with, if applicable, at least the minimum recommended interval between doses in accordance with the approval, authorization, or listing that is: (i) Approved or authorized for emergency use by the FDA; (ii) Listed for emergency use by the World Health Organization (WHO); or (iii) Administered as part of a clinical trial at a U.S. site, if the recipient is documented to have primary vaccination with the active (not placebo) COVID-19 vaccine candidate, for which vaccine efficacy has been independently confirmed (e.g., by a data and safety monitoring board) or if the clinical trial participant at U.S. sites had received a COVID-19 vaccine that is neither approved nor authorized for use by FDA but is listed for emergency use by WHO; or (2) A person's status 2 weeks after receiving 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

must require all existing employees, and new employees as soon as practicable, to be vaccinated, with the exception of those employees:

1. For whom a vaccine is medically contraindicated;
 2. For whom medical necessity requires a delay in vaccination; or
 3. 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 vaccine requirement.
- b. Employees may be entitled to a reasonable accommodation under federal law, including the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964. If an employee cannot be vaccinated and/or wear a face covering due to an ADA-defined disability, the employee may be entitled to a reasonable accommodation. Similarly, if an employee's sincerely held religious belief conflicts with receiving a vaccination and/or testing for COVID-19 and/or wearing a face covering, the employee may be entitled to a reasonable accommodation.
- c. Employers can choose to implement different policies for different subsets of their workforce, provided their policy meets the requirements for both types of acceptable policies. Likewise, when employers have vaccinated and unvaccinated employees in their workforce, whether that be to some employees having a reasonable accommodation for a disability under a mandatory vaccination policy, or because the employer adopted the policy that provides a testing option and employees are unvaccinated or cannot verify vaccination status, it will need to develop and include relevant procedures for both vaccinated and unvaccinated employees (e.g., testing and face covering requirements).
- d. Employers must create a written record of the policy and make it readily available to all employees.
- e. The ETS indicates that the policy should address all applicable requirements,⁶ including:
- i. Requirements for COVID-19 vaccinations;
 - ii. Applicable exclusions from the written policy (e.g., medical contraindications, etc.);
 - iii. Information on determining an employee's vaccination status and how this information will be obtained;
 - iv. Paid time and paid sick leave for vaccination purposes;
 - v. Notification of positive COVID-19 tests and temporarily removal of employees who test positive or are diagnosed with COVID-19 from the workplace;
 - vi. Information that is required to be provided to employees and the method of providing that information;
 - vii. Disciplinary action for employee's noncompliance;
 - viii. Other relevant information: effective dates, who the policies apply to, deadlines, and applicable procedures; and
 - ix. When applicable, testing requirements for unvaccinated employees and procedures related to the same⁷ as well as face covering requirements.
- f. How employers will handle new employees (i.e., collecting their vaccination status, when a new employee must be vaccinated) should also be included in the policy.

(i.e., a heterologous primary series of such vaccines, receiving doses of different COVID-19 vaccines as part of one primary series). The second dose of the series must not be received earlier than 17 days (21 days with a 4-day grace period) after the first dose.

⁶ All applicable requirements that should be included in the policy will be in paragraphs (e)-(j) of the ETS.

⁷ The testing procedures may be different for subsets of the workforce (i.e., those employees who report to work regularly and those who infrequently report to work. When this occurs, employers' policies need to address the procedures applicable to subsets of the workforce.

- g. For employers with existing policies regarding COVID-19 vaccinations, and testing, they will only need to update or otherwise supplement and disseminate those changes and additions to their employees to ensure the policies comply with the ETS.

2. Determination of Employee Vaccination Status

- a. For all partially or fully vaccinated employees, employers must collect proof of vaccination. Acceptable proof of vaccination⁸ includes:
 - i. Immunization record from healthcare provider or pharmacy;
 - ii. Copy of the COVID-19 Vaccination Record Card;
 - iii. A copy of medical records noting the vaccination;
 - iv. A copy of immunization records from a public health, state, or tribal immunization information system;
 - v. A copy of any other 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); or
 - vi. An attestation of the employee's vaccination status
 - 1. *Attesting to Vaccination status.* An employee who has attempted, but failed to obtain and/or produce proof of vaccination, can attest to having been vaccinated. Employees must attest to:
 - a. Their vaccination status, whether that be partially or fully vaccinated;
 - b. That they have lost and are otherwise unable to produce proof required by this section; and
 - c. Include the following language in their attestation: "I declare 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."
 - d. Employees should also include, to the best of their recollection: (1) type of vaccine administered; (2) date of administration; and (3) the name of the healthcare professional(s) or clinic site(s) administering the vaccine.
- b. An employee who fails to show acceptable proof of vaccination or provide a qualifying attestation will be considered unvaccinated for purposes of the ETS.
- c. The employer must maintain, in accordance with applicable law⁹:
 - i. Proof of vaccination (or, where proof is not available under the circumstances described above, an employee's vaccination attestation);¹⁰
 - 1. The employer must retain a copy of the vaccination documentation. Seeing the documentation, without retaining it, or only retaining a QR code, without retaining the information obtained from scanning the code, would not comply with the requirements of the ETS.
 - ii. Record of each employee's vaccination status; and

⁸ A document that constitutes an acceptable proof of vaccination should generally include the employee's name, type of vaccine administered, date(s) of administration, and the name of the health professional(s) or clinic site(s) administering the vaccine.

⁹ The proof of vaccination, record of the employee's vaccination status, and employee roster of vaccination are considered to be employee medical records, and accordingly, must be maintained in a confidential matter. In addition, these records need to be treated as medical records under § 1910.1020 and kept in accordance § 1910.1020, which provides employees the right of access to exposure and medical records; however, these records are exempt from the 30 year retention requirement under § 1910.1020(d)(1)(i) and access timeframes in § 1910.1020(e). Furthermore, these records cannot be disclosed, unless otherwise required by federal law or the ETS.

¹⁰ If an employer has collected proof of vaccination, and maintained proof of that vaccination, prior to the effective date of the ETS, the employer is exempt from determining vaccination status and collecting proof of vaccination, but only for *Fully Vaccinated* employees.

- iii. A roster of each employee's vaccination status (indicating whether the employee is vaccinated, partially vaccinated, not vaccinated, and not vaccinated due to a religious or medical reason)

3. Employer Support for Employee Vaccination

- a. Under the ETS, employers are required to pay for the costs associated with the employees' vaccination, but not the costs associated with testing; testing costs can fall to the employee.
- b. Employers must provide support for the cost associated with vaccination in two ways:
 - i. *Provide paid time to receive the vaccine.*¹¹ Employers must provide employees reasonable time, up to 4 hours of paid time at the employee's regular rate, to receive each dose of a qualifying vaccine under this standard.¹² Events that would qualify under this paid time include any time spent related to the appointment, at the vaccination site, and traveling to the vaccination site; however, travel expenses are *not* included. If an employee receives the vaccine outside work hours, he or she is *not* entitled to paid time,¹³ nor is an employee entitled to more than four hours of paid leave if the vaccination administration exceeds four hours (although any time exceeding four hours would be protected leave, unless the amount of time was unreasonable).
 - ii. *Provide leave to recover from the vaccine's side effects.* Employers must provide reasonable time and paid sick leave for employees to recover from vaccine side effects. Employers can cap this leave, as long as it is reasonable. The ETS states that two days' leave per dose is reasonable. Unlike leave to receive the vaccine, employers can require employees to use accrued sick leave or general leave (if paid sick leave and vacation leave are not differentiated), or if sick leave is not otherwise provided, the employer must provide it to employees for recovery purposes.¹⁴ Note: other laws, regulations, and agreements may require employers to provide additional paid time.
- c. An employer's obligation to provide support for employees to receive vaccinations is irrespective of the policy form it chooses—mandatory vaccination policy or testing policy—and it cannot prevent employees from getting vaccinated.

4. COVID-19 Testing for Employees Who Are Not Fully Vaccinated¹⁵

- a. An employer must make certain employees who are not fully vaccinated are tested in accordance with the following:
 - i. Frequency of testing:
 - 1. Employees, including new hires, who report to a workplace where other individuals are present, at least once every seven days, must be tested at least once every seven days, and present documentation of the negative test result no later than the seventh day from their last result.¹⁶
 - 2. If an employee infrequently visits the workplace (e.g., teleworks for extended periods), the employee must be tested for COVID-19 within seven days prior to

¹¹ Paid time off must be provided to employees, even if the employer chooses to provide vaccines at the workplace.

¹² This paid time cannot be offset by employer's accrued leave, such as paid sick leave or vacation time.

¹³ While an employee who receives a vaccination outside work hours is not entitled to paid leave, the employee is entitled to paid sick leave to recover from the side effects of the vaccine.

¹⁴ Employers cannot require employees use future leave (i.e., have negative leave) for purpose of vaccine recovery.

¹⁵ As stated in Section 1 of this White Paper, employers should include the testing requirements and procedures (i.e., how testing will be conducted, the requisite frequency of testing, and how employees will submit their results) outlined in this section in their policies when this Section is applicable to their workforce.

¹⁶ This provision applies to employees who are not Fully Vaccinated, regardless of their work schedules (e.g., part-time employees who only work a few days in the workplace).

- returning to the workplace and present the documentation reflecting the negative COVID-19 test result upon arrival.
3. An employee is exempt from producing a negative COVID-19 result for 90 days following the date of the positive test or diagnosis for COVID-19.
 - ii. Testing results must include: identification of the employee, the collection date, type of test, entity issuing the result, and test result.
 - iii. The ETS defines a COVID-19 test (i.e., an acceptable test for purposes of this ETS) as:
 1. Cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the U.S. Food and Drug Administration (FDA) to detect current infection with the SARS-CoV-2 virus (e.g., a viral test);
 2. Administered in accordance with the authorized instructions; and
 3. Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. Examples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens¹⁷), proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer.
 - iv. When the employee fails to produce a test result in accordance with the ETS, the employer must ensure the employee does not enter the workplace.
 - b. An employer must maintain records of employees' tests for the duration of the ETS. Because the test result documentation is considered a medical record, it must be kept confidential and in accordance with this ETS and applicable law.
 - c. Employees may be entitled to a reasonable accommodation for COVID-19 testing due to their sincerely held religious beliefs.

5. Employee Notification to Employer of a Positive COVID-19 Test and Removal

- a. ETS requires all employees—vaccinated and unvaccinated—to “promptly” notify employers of a positive COVID-19 test result or diagnosis and for employers to temporarily remove that individual from the workplace. The ETS explains “promptly” to mean before the worker reports to work or if at work, notifying the employer as soon as possible without compromising the safety of others. To ensure prompt removal of an infectious employee, thereby mitigating transmission, the ETS recommends employers implement and communicate to employees the process to notify employers of a positive COVID-19 test or diagnosis. The employee may return to work when: (1) a negative result on a COVID-19 nucleic acid amplification test (NAAT) after a positive COVID-19 antigen test (2) satisfying the criteria of the CDC’s “Isolation Guidance”¹⁸ or (3) a licensed healthcare official recommends the employee can return to work.
- b. For purposes of the ETS, the time the employee is removed due to a positive COVID-19 test result is not paid time; however, the employer should allow employees to use any accrued leave under the employer’s policies or paid time off the employee is otherwise entitled under applicable law (e.g., workers compensation). The employer is also free to pay the employee during his or

¹⁷ Pooling testing, which the ETS defined as “combining the same type of specimen from several people and conducting one laboratory test on the combined pool of specimens to detect SAR-CoV-2,” is an acceptable means to administer testing under the ETS, as long as employers are using tests authorized for pooled testing. Documentation of a negative result would meet the requirements if the ETS for all employees included in the pool testing. When pooling results reflect a positive result, all employees included in the pooling testing must be individually tested.

¹⁸ COVID-19: Isolation If You Are Sick; Separate yourself from others if you have COVID-19, updated February 18, 2021, IBR approved for §§ 1910.501(h) and 1910.502(l).

her removal if it pleases. Assuming the employee is not too ill to work, the employer may request the employee to telecommute, or if telecommuting is not practical given the employee's position, reassigning the employee to a position where telework is feasible for the period of the employee's removal.

- c. A positive COVID-19 test result is the minimum showing for removal. Employers may consider removing employees based on COVID-19 symptoms or exposure to an individual who tested positive for COVID-19.
- d. If the positive COVID-19 result is work-related, employers should record that on the OSHA Forms 300, 300A, and 301, if required under 29 CFR part 1904.¹⁹

6. Face Coverings

- a. The ETS distinguishes between face coverings, face masks, and respirators. It defines each separately:
 - i. A "face covering" means a covering that: (1) completely covers the nose and mouth; (2) 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); (3) is secured to the head with ties, ear loops, or elastic bands that go behind the head. If gaiters are worn, they should have two layers of fabric or be folded to make two layers; (4) fits snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and (5) is a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings. This definition 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 meet this definition 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, respectively. Face coverings can be manufactured or homemade, and they can incorporate a variety of designs, structures, and materials. Face coverings provide variable levels of protection based on their design and construction.
 - ii. A "facemask" means a surgical, medical procedure, dental, or isolation mask that is FDA-cleared, authorized by an FDA EUA, or offered or distributed as described in an FDA enforcement policy. Facemasks may also be referred to as "medical procedure masks."
 - iii. A "respirator" is a type of PPE that is certified by NIOSH under 42 CFR part 84 or is authorized under an EUA by the FDA. These specifications are intended to ensure some consistent level of testing, approval, and protection and to prevent the use of counterfeit respirators that will not offer adequate protection, which is important because respirators are intended to protect the wearer when directly exposed to hazards. Respirators protect against airborne hazards by removing specific air contaminants from the ambient (surrounding) air or by supplying breathable air from a safe source. Common types of respirators include filtering facepiece respirators (e.g., N95), elastomeric respirators, and powered air-purifying respirators (PAPRs). Face coverings, facemasks, and face shields are not respirators.
- b. The ETS requires that all unvaccinated employees wear a face covering, as defined above, when "indoors or when occupying a vehicle with another person for work purposes," unless:
 - i. the employee is "alone in a room with floor to ceiling walls and a closed door"

¹⁹ The ETS explains, "[u]nder 29 CFR part 1904, COVID-19 is a recordable illness and employees are responsible for recording cases of COVID-19 if: (1) the case is a confirmed case of COVID-9 as defined by the Centers for Disease Control and Prevention (CDC); (2) the case is work-related as defined by 29 CFR part 1904.5; and (3) the case involved one or more of the general recording criteria in set forth in 29 CFR part 1904.7 (e.g., medical treatment beyond first aid, days away from work).

- ii. when eating or drinking or verifying the employee's identity for security purposes
 - iii. when wearing respirator or facemask
 - iv. when wearing a face covering is not feasible or creates a greater hazard²⁰
- c. For those employees who are required to wear face coverings, the employer should ensure that face coverings fully cover the employee's nose and mouth and are replaced when wet, soiled, or damaged (e.g., ripped, has holes, or has broken ear loops). Despite not being required under this ETS, employees may voluntarily wear face coverings, and employers cannot prevent them from doing so unless it would create a hazard of serious injury or death. Likewise, employers cannot prevent customers or visitors from wearing face coverings and must permit employees to wear a respirator instead of a face covering.
- d. Employees are responsible for the costs of face coverings unless applicable law provides otherwise. However, employers are free to cover the costs of face coverings should they please.

7. Information Provided to Employees

- a. Employers must provide, in a language and at a literacy level employees can understand, the requirements of the ETS and the employer's policies and procedures to implement the same.²¹ This includes:
 - i. The employer's vaccination/testing policy;
 - ii. Processes to determine vaccination status;
 - iii. Paid time/sick leave available to receive vaccinations and recover from side effects;
 - iv. Procedures to follow when testing positive for COVID-19;
 - v. Procedures for requesting records; and
 - vi. For unvaccinated employees, provide information regarding face coverings and COVID-19 testing.
- b. Information about the efficacy, safety, and benefits of COVID-19 vaccines (this can be satisfied by providing the document "Key Things to Know About COVID-19 Vaccines"²²).
- c. Inform employees of their protections against retaliation and discrimination for reporting a work-related injury or illness or exercising rights under 29 CFR 1904.35(b)(1)(iv) and section 11(c) of the OSH Act.
- d. Inform employees of the criminal penalties for supplying knowingly false information or documentation under 18 U.S.C. 1001 and section 17(g) of the OSH Act.

8. Reporting COVID-19 Fatalities and Hospitalizations to OSHA

- a. *When to report COVID-19 in-patient hospitalizations and fatalities.* Employers are required to report work-related COVID-19 fatalities and hospitalizations after learning about either incident within 8 or 24 hours, respectively. Employers should follow the requirements in 29 CFR part 1904.39, except for 29 CFR part 1904.39(a)(1) and (2) and (b)(6).
- b. *Determining the illness was work-related.* To determine whether the illness was work-related, employers should apply the criteria in 29 CFR 1904.5. The ETS explains that close contact with a person known to be infected with COVID-19 would likely constitute a work-related exposure. For absent close contact, the employer should evaluate the employee's duties and working

²⁰ The ETS explains this situations include where it is important to see the employee's mouth or wearing the face covering is not practical or otherwise creates a risk of serious injury or death to the employee.

²¹ An employer may provide in this information in whatever mean it chooses (e.g., printed fact sheets, email, or during a regularly scheduled meeting). The ETS also recommends the employer designate a point-of-contact person for employees to seek more information regarding the standard. To the extent that an employer has previously developed and implemented a policy that meets some or all of the requirements in this section, it will not need to create a new policy; rather, it should ensure the policy is compliant or supplement it with the elements it lacks under the ETS and provide the additions to employees.

²² This document is available at: <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>

conditions to determine whether it is more likely than not that the employee was exposed during the course of his or her employment.²³

- c. *How to report COVID-19 fatalities and in-patient hospitalizations.* Employers must report these events in accordance with 29 CFR 1904.39. Generally, employers have three options for reporting: (1) by telephone to the OSHA area office that is nearest to the site of the incident; (2) by telephone to the OSHA toll-free central telephone number, 1-800-321-OSHA (1-800-321-6742); or (3) by electronic submission using the reporting application located on OSHA's public website at www.osha.gov. Employers should additionally provide the following information: the establishment name, the location of the work-related incident, the time of the work-related incident, the type of reportable event (i.e., fatality or in-patient hospitalization), the number of employees who suffered a fatality or inpatient hospitalization, the names of the employees who suffered a fatality or in-patient hospitalization, the employer's contact person and his or her phone number, and a brief description of the work-related incident.

9. Availability of Records

- a. An employer must make vaccination records available to an employee (or their representative) or an OSHA representative for inspection or copying.²⁴ The requirements for each request depend on the requester.
 - i. *An employee's request.* When an employee, his or her representative²⁵, or former employee request vaccination documents, an employer has until the end of the next business day to provide the employee or his or her representative the total number of employees and the number of vaccinated employees as well as the employee's vaccine documentation and any COVID-19 test results.
 - ii. *OSHA representative's request.* When an OSHA representative requests vaccination documents, within four hours of the request, the employer must make available: the employer's policy, the number of employees vaccinated and total number of employees. Employers have until the next business following the request to provide all other documents that the ETS requires employers to maintain.

10. Dates

- a. By December 6, 2021 (30 Days after publication of the rule) employers must:
 - i. Establish a vaccine policy;
 - ii. Ascertain employees' vaccination status, collect and maintain qualifying proof of vaccination, and create a roster of vaccination status;
 - iii. Provide support for employee vaccinations (i.e., reasonable paid time off to receive the vaccination and recover from side effects);
 - iv. Ensure employees promptly notify the employer of a positive COVID-19 test result and remove those employees who test positive;
 - v. Require unvaccinated employees to wear face coverings indoors or while sharing a vehicle with another employee for work purposes; and

²³ The ETS provides the following factors that would be relevant to consider: the type, extent, and duration of contact the employee had at the work environment with other people, particularly the general public; Physical distancing and other controls that impact the likelihood of work-related exposure; the extent and duration of time spent in a shared indoor space with limited ventilation; whether the employee had work-related contact with anyone who exhibited signs and symptoms of COVID-19.

²⁴ Employees, former employees, and their representatives are entitled to one free copy of records available under the ETS.

²⁵ The ETS defines representative as an employee's personal representative, designated in writing, a legal representative of a deceased or legally incapacitated employee, or a representative defined as an authorized collective bargaining agent of one or more employees working at the employer's worksite.

- vi. Provide employees with information regarding the ETS, the employer's policies regarding the same, vaccination information, protections against retaliation and discrimination, and criminal penalties for falsifying information or documentation.
- b. By January 4, 2022 (60 days after publication) employers must:
 - i. Require unvaccinated employees produce a COVID-19 test result on a weekly basis or 7 days prior to returning to the workplace.
 - 1. If an employee has received the requisite doses for the vaccine, but has not completed the two-week waiting period after the final dose at the 60-day mark, the employee is exempt from producing a weekly test.

Please contact a member of the [MMM Employment Team](#) with any questions about the ETS or complying with its requirements.