

# OSHA Issues Much-Anticipated Emergency Temporary Standard

OSHA issued its much awaited Emergency Temporary Standard (ETS) on COVID-19 vaccination and testing for large employers on November 4, 2021, and will publish the ETS in the Federal Register on November 5, 2021. This alert focuses on some of the key requirements and most pressing questions for employers.

## Coverage

The ETS generally applies to employers in all workplaces that are under OSHA's authority and jurisdiction with a total of at least 100 employees as of November 5, 2021.

In determining whether your workforce is covered, you must include all employees across all of your U.S. workplaces, regardless of employees' vaccination status or where they perform their work (even if fully remote). The count should be done at the employer level (firm or corporate-wide), not the individual location level. Part-time employees are included in the 100-employee threshold.

If an employer meets the 100-employee threshold as of November 5, 2021, but subsequently drops below the threshold, the employer will continue to be covered by the ETS as long as it is in effect. In addition, if at any time after November 5, 2021 an employer meets the 100-employee threshold, then it will be subject to the ETS for the duration of the ETS.

Certain categories of employees are not subject to the ETS' substantive requirements but should still be considered by employers when determining whether the employer is covered by the ETS. Those categories are:

- Employees who do not report to a workplace where other individuals are present;
- Employees working from home; and
- Employees who work exclusively outdoors.

The following workplaces are excluded from coverage under the ETS:

## POSTED:

Nov 4, 2021

## RELATED PRACTICES:

### [Corporate Law](#)

<https://www.reinhartlaw.com/practices/corporate-law>

### [Labor and Employment](#)

<https://www.reinhartlaw.com/practices/labor-and-employment>

### [Banking and Finance](#)

<https://www.reinhartlaw.com/practices/banking-and-finance>

## RELATED SERVICES:

### [Food and Beverage](#)

<https://www.reinhartlaw.com/services/food-and-beverage>

## RELATED PEOPLE:

### [Shannon M. Toole](#)

<https://www.reinhartlaw.com/people/shannon-toole>

- Workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors;
- Settings where any employee provides health care services or health care support services when subject to the requirements of the Healthcare ETS (§ 1910.502); and
- Workplaces of employers who have fewer than 100 total employees.

## **Primary Responsibilities of Covered Employers**

The following is a list of primary responsibilities of employers covered by the ETS:

- Develop, implement and enforce either a mandatory COVID-19 vaccination policy or a policy allowing employees to either get vaccinated or undergo weekly COVID-19 testing and wear a face covering at the workplace.
- For employers that elect to allow employees to choose between vaccination and testing, implement a weekly testing program that complies with the ETS.
- Determine the vaccination status of each employee, obtain acceptable proof of vaccination from vaccinated employees, maintain records of each employee's vaccination status and maintain a roster of each employee's vaccination status.
- Support employee vaccinations by providing employees reasonable time, including up to four hours of paid time off, to receive each primary vaccination dose, and reasonable time and paid sick leave to recover from any side effects experienced following each primary vaccination dose. The ETS does not specify the amount of paid sick leave that is required for recovery from side effects, but OSHA has indicated that providing two days per dose would be compliant.
- Require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19.
- Immediately remove from the workplace any employee who is diagnosed with or tests positive for COVID-19 and keep the employee out of the workplace until return to work criteria are met.
- Provide employees with required information, including, but not limited to, information about the ETS, workplace policies and procedures established to implement the ETS, vaccine efficacy, safety, and the benefits of being vaccinated, protections against retaliation and discrimination; and laws that



provide for criminal penalties for knowingly supplying false statements or documentation (including proof of vaccination).

- Report work-related COVID-19 fatalities to OSHA within eight hours of learning about them, and work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization.

## **Interaction with State and Local Laws and State OSHA Plans**

OSHA has stated that the ETS should preempt and invalidate any state or local requirements that ban or limit an employer's authority to require vaccination, face covering or testing.

[22 states](#) have assumed responsibility for development and enforcement of occupational safety and health standards. These states—which include Minnesota, Iowa, Michigan and Indiana—are not covered by federal OSHA. However, these states must, within 30 days, implement a standard covering private employers that is equivalent to or more protective than the ETS. Employers in these states should prepare to comply with similar or more restrictive rules issued by their state.

## **Deadline for Compliance**

Covered employers must comply with all requirements, except the testing requirements, by December 5, 2021. The deadline to comply with the testing requirements is January 4, 2022.

## **Impact of Potential Legal Challenges**

Numerous state attorneys' general have indicated they intend to challenge OSHA's ETS. These challenges will likely focus on whether the vaccination and testing requirement satisfies the procedural and substantive requirements of an ETS. Even if a legal challenge is filed within the coming days or weeks, employers must comply with the ETS until a court determines the rule is unenforceable or enjoins its enforcement. Failure to comply with the ETS could result in substantial monetary penalties.

Employers should determine if they are covered by the ETS and begin to prepare policies and procedures as soon as possible to ensure they meet the compliance deadlines.

If you have questions regarding whether your workplace is covered by the ETS, or



if you would like assistance developing and implementing policies and procedures that comply with the ETS, contact Brittany Lopez Naleid, [Shannon Toole](#) or your Reinhart attorney.

*These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.*