

EMPLOYEE BENEFIT ALERT



NOVEMBER 5, 2021

OSHA RELEASES EMERGENCY TEMPORARY STANDARD (ETS) REGARDING COVID-19 VACCINATION MANDATE

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) released its highly anticipated emergency temporary standard (ETS) requiring businesses with at least 100 employees to mandate that their employees get vaccinated against the coronavirus or wear a mask and test for COVID-19 on at least a weekly basis.

Additionally, the White House announced the following details in a Fact Sheet:

- All unvaccinated workers must begin wearing masks by **Dec. 5** and provide a negative COVID-19 test on a weekly basis beginning **Jan. 4**.
- The deadline for federal contractors to comply has been pushed back to **Jan. 4**.
- Companies are not required to pay for or provide the tests unless they are otherwise required to by state or local laws or in labor union contracts.

The standard does not apply to workplaces covered under the *Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* or in settings where employees provide healthcare services or healthcare support services subject to the requirements of the Healthcare ETS. The standard also does not apply to employees who work remotely or employees who work exclusively outdoors.

STEP 1. DETERMINE EMPLOYER COVERAGE.

All private employers with 100 or more employees will be subject to the federal ETS or a state standard that meets

or exceeds the requirements of the standard. The 100-employee threshold is based upon a companywide headcount rather than the number of employees at a particular worksite.

Employers should count all employees individually, whether they are full time, part time or working on a temporary basis. Independent contractors and leased employees (where the client employer is not the employer of record) are not counted.

STEP 2. SURVEY CURRENT EMPLOYEES ON VACCINATION STATUS.

Understanding how many unvaccinated workers an employer has will help inform the best compliance approach for the organization. For example, an employer with only 10 unvaccinated workers might allow those employees to choose either vaccination or weekly testing, whereas a company with 100 unvaccinated workers may find the logistics of collecting weekly testing documentation too difficult, and therefore decide not to offer the testing option.

STEP 3. RESEARCH TESTING

Whether an employer will offer the option of weekly testing to unvaccinated workers or only use testing as a religious or disability accommodation, understanding the logistics of testing should be reviewed before determining the employer's compliance approach.

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Accessibility

Questions to consider:

- Are there testing locations near the workplace? What are their hours and procedures for testing? How long does it take to get testing results there? Contact these locations to determine which vaccines they offer and what their capacity is for handling your employee testing.
- Is onsite testing a more convenient option?
- What day(s) of the week will the employer require testing? Will local testing locations be open and available to test all impacted workers?
- Which test will the employer accept?

Home testing kits are widely available at pharmacies and online, some with mail-in options for results (PCR), while others give results in about 15 minutes (rapid antigen test). The ETS allows for the use of OTC self-tests that are observed by employers or authorized telehealth providers. Self-administered and self-read rapid tests are not acceptable under the ETS.

Cost

The ETS does not require employers to pay for any costs associated with testing. However, employers should consider the following:

- Are there current state laws that would require employers to pay for employment-related costs? **For example, states that require the reimbursement to employees for necessary business expenses** would apply here.
- What are the projected costs for both the employee and employer for testing? Contact local suppliers to compare pricing, including organizations providing onsite testing services. The IRS has stated that in-home tests would be reimbursable under flexible benefits plans such as flexible spending accounts and health savings accounts, which may help employees manage costs.

- Will the cost of testing, if paid for by the employee, bring the employee's weekly pay below minimum wage? Both the Fair Labor Standards Act (FLSA) and some state laws would not allow this.
- Will an employer's budget allow for employer-paid testing for as long as the ETS is in place (which would be six months to start, then it could be extended for another six months or made a permanent standard)? Or is mandatory vaccination, which is free, the better option?

STEP 4. CONSIDER PAID-TIME OFF REQUIREMENTS

The ETS requires employers to provide employees with up to four hours of paid time off to receive the vaccine during normal work hours. This includes time spent scheduling the vaccine appointment, completing paperwork, receiving the vaccine, and traveling to and from the vaccination site.

Employers are not required to offer paid time off to employees who choose to receive the vaccine outside of their regular work hours.

Employers must also provide a reasonable amount of paid sick leave to recover from side effects experienced following vaccination; however, employers may require employees to use paid sick leave benefits already provided by the employer.

For employers who include a testing option for unvaccinated workers, the time spent obtaining a COVID-19 test may be considered hours worked depending on the circumstances, such as directing employees to use a specific provider at specific times. Employers may also be able to require the use of PTO for workers who are unable to get tested outside of work hours. This would not be a popular option from a worker's perspective but could potentially induce them to choose vaccination over weekly testing.

STEP 5. ADDRESS REMOTE WORKER REQUIREMENTS

If an employer has remote workers who will never come into the office, employers may also be able to use remote work as an option for unvaccinated workers.

An employer may choose to consider a full-time remote-work option, determine how many employees this would apply to, what the employee-eligibility requirements would be, what the associated costs with long-term telecommuting might be and any other data meaningful to the company.

STEP 6. DETERMINE A COMPLIANCE APPROACH AND CREATE A WRITTEN POLICY

Under the ETS, an employer must establish, implement and enforce a written mandatory vaccination policy which requires the following:

- All new and existing employees to be fully vaccinated other than employees with medical contraindications, for whom medical necessity requires a delay in vaccination, or who are legally entitled to a reasonable accommodation (disability or sincerely held religious belief).

OR an employer must establish, implement and enforce a written vaccination policy permitting each employee to choose between vaccination or providing proof of regular testing and wearing a face covering.

A clearly written policy should detail the requirements the employer has decided upon and the consequences for noncompliance.

- COVID-19 Vaccination, Testing and Face Covering Policy Template

- Large Employer COVID-19 Vaccination Policy
- Mandatory Vaccination Policy Template

STEP 7. DEVELOP EMPLOYEE COMMUNICATIONS

Start developing employee communications now. Consider sending a memo to employees that explains the requirements of the ETS and how the ETS impacts current company policies and procedures.

Communicate ahead of time where employees can go to get vaccines near the workplace, or how to find a location near their homes, and keep this information easily accessible. Detail whether or not employees must seek testing outside of work hours.

As always, should you have any questions, please contact your [Parker, Smith & Feek Benefits Team](#). While every effort has been taken in compiling this information to ensure that its contents are totally accurate, neither the publisher nor the author can accept liability for any inaccuracies or changed circumstances of any information herein or for the consequences of any reliance placed upon it.

References and Resources

1. Emergency Temporary Standard (ETS): <https://public-inspection.federalregister.gov/2021-23643.pdf>
2. ETS Fact Sheet: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/>
3. OSHA Webinar on ETS: <https://www.youtube.com/watch?v=ixxkn3Y8z6g>
4. IR-2021-181 (At-Home Covid-19 Tests Reimbursable): <https://www.irs.gov/newsroom/irs-cost-of-home-testing-for-covid-19-is-eligible-medical-expense-reimbursable-under-fsas-hsas>

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