

November 4, 2021

Mandatory COVID-19 Measures Have Arrived for Employers With 100 or More Employees

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Human Resources & Employment

On November 4, 2021, OSHA announced its emergency temporary standard (ETS) requiring employers with 100 or more employees to implement a policy that *either* (a) mandates COVID-19 vaccination, *or* (b) requires a choice between vaccination or weekly testing (along with wearing a face covering at work). OSHA has provided sample policy templates for both and other information about the ETS (including FAQ), available at <https://www.osha.gov/coronavirus/ets2>

Critically, the ETS preempts any contrary state or local requirements (like banning employers from requiring vaccination, face covering, or testing). While we can expect legal challenges to the ETS, as it stands, covered employers face these upcoming deadlines:

- By December 5, 2021 (i.e., 30 days after publication of the ETS), employers must:
 - Adopt either the mandatory vaccination or the vaccination or testing policy *in writing* and provide it to employees. Such policy must contain information about the requirements of the ETS and workplace policies and procedures, the CDC document “[Key Things to Know About COVID-19 Vaccines](#),” information about protections against retaliation and discrimination, and information about criminal penalties for knowingly supplying false statements or documentation.
 - Determine vaccination status of each employee, obtain “acceptable” proof of same and maintain a roster of vaccination status (which must be kept as confidential medical records for the duration of the ETS).
 - Require unvaccinated employees to wear CDC-approved face coverings at the workplace (including in a vehicle with other employees).
- By January 4, 2022 (i.e., 60 days after publication), employers must:
 - Begin testing employees who have not received all doses required for a primary vaccination (e.g., two doses of Pfizer/Moderna; one dose of J&J).
 - Testing is required at least once every seven days (if the employee is in the workplace at least once every seven days) or within seven days before returning to work (if the employee is away from the workplace for a week or longer)
 - The employer must maintain test results as medical records for the duration of the ETS
 - The employer is not required to pay for testing under the ETS (but may be required to through other law or collective bargaining agreement)

Notably, the ETS does not apply to employees who either do not report to a workplace where other individuals such as coworkers or customers are present or who work remotely.

Other highlights of the ETS include:

- The ETS applies to employers with 100 or more employees (including part time) overall, not per location.
- Employers must provide four hours of paid time (including travel) to obtain each dose of the vaccine. Employers cannot require employees to use personal or sick time.
- Employers must collect acceptable proof of vaccination. Employers are not required to obtain information on boosters.
- Employers must provide “reasonable” paid leave to recover from any side effects from the vaccine (while “reasonable” is left undefined, the FAQs state that OSHA will presume that an employer is in compliance where it offers up to two days of paid sick leave per vaccination dose). This paid leave may be from an already existing sick leave policy or a PTO policy (but not from a vacation policy). If an employee does not have available paid sick time or PTO, then the employer must pay for this time.
- Over-the-counter (OTC) COVID-19 tests may be used but not self-administered and self-read unless observed by the employer or an authorized telehealth proctor.
- Employees must notify their employer as soon as practicable of a positive COVID-19 test or diagnosis, and be removed from the workplace until return-to-work criteria are achieved.
- No testing is required for 90 days after a positive COVID-19 test.
- Employers are required to report to OSHA (by phone or through its website) “work-related” COVID-19 fatalities within eight hours and in-patient hospitalizations within 24 hours. Employers apply the same “work-relatedness” determination criteria as with other OSHA reporting.
- Employers must maintain a record of each test result required to be provided by each employee or obtained during tests conducted by the employer.
- Employers must make available, for examination and copying, to any requesting employee their COVID-19 vaccine documentation and any COVID-19 test results required by the ETS for that particular employee by the end of the next business day after a request.
- Employers must make available, for examination and copying, to any employee upon request, the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at the workplace.
- Employees exempt from vaccination due to a qualified disability or sincerely-held religious belief must still undergo weekly testing unless the testing itself conflicts with their disability or sincerely-held religious belief.

If you would like more information or would like to discuss these issues further, please contact a member of Gould & Ratner's [Human Resources and Employment Practice](#).