

NOVEMBER 8, 2021

COVID-19 Update: OSHA Issues Emergency Temporary Standard Requiring Employers with 100+ Employees to Mandate COVID-19 Vaccination or Weekly Testing

On November 4, 2021, the Occupational Safety and Health Administration (“OSHA”) announced an Emergency Temporary Standard (“ETS”) requiring that all employers with 100 or more employees (1) ensure that their workforce is fully vaccinated or (2) require any workers who remain unvaccinated to undergo weekly COVID-19 testing and wear a face covering at the workplace (the “Employer ETS”). The Employer ETS was issued in response to President Biden’s COVID-19 Action Plan directing OSHA to develop vaccination and testing requirements for workplaces with 100 or more employees. The Employer ETS follows OSHA’s issuance of vaccination requirements for federal employees and contractors in September and was issued alongside a vaccine mandate for healthcare workers at facilities participating in Medicare and Medicaid. OSHA estimates that the Employer ETS will result in approximately 23 million individuals becoming vaccinated and will prevent over 6,500 deaths and over 250,000 hospitalizations. While employers are required to ensure that their employees are fully vaccinated or subject to weekly testing by January 4, 2022, they must comply with all other requirements of the Employer ETS by December 5, 2021. The Employer ETS is already subject to multiple legal challenges and, two days after its issuance, a federal appeals court temporarily enjoined its enforcement.

Key Takeaways

- By January 4, 2022, the Employer ETS requires all employers with 100 or more employees to ensure that their workforce is fully vaccinated or to require unvaccinated workers (including workers with religious or medical exemptions) to produce a negative COVID-19 test result at least weekly and follow masking requirements when working indoors.
- By December 5, 2021, employers are required to comply with all other requirements of the Employer ETS, such as determining the vaccination status of employees, collecting and maintaining proof of vaccination and ensuring that unvaccinated workers are masked in the workplace.
- By December 5, 2021, the Employer ETS also requires covered employers to provide paid time (up to four hours, including travel time, at the employee’s regular rate of pay) to employees to get vaccinated and, if needed, paid sick leave to recover from any side effects that prevent them from working.

- The Employer ETS does not require employers to provide or pay for COVID-19 tests. However, employers may be required to do so under other laws or collective bargaining agreements.
- The Employer ETS is intended to preempt inconsistent state and local occupational safety and health workplace laws relating to COVID-19, in particular those that ban or limit an employer from requiring vaccinations, face coverings or testing.
- The Employer ETS does not preempt generally applicable requirements meant to protect public health by helping prevent the spread of COVID-19 in public spaces, such as requirements mandating that everyone wear face coverings in indoor spaces like businesses, schools and government buildings, or provide proof of vaccination or recent COVID-19 testing to enter restaurants, shops or other public spaces.

Employer ETS

Background

In September, President Biden announced a forthcoming emergency rule requiring all employers with 100 or more employees to ensure that their workforce is fully vaccinated or that any unvaccinated workers submit a negative COVID-19 test result on a weekly basis.¹ Since its announcement, the anticipated rule has drawn criticism from certain states and industry groups. For example, in September, the Attorneys General of 24 states, including Arizona and Texas, sent a letter to President Biden stating that they would seek legal action if the administration did not reconsider its plan to issue a federal vaccine mandate.² Certain trade groups likewise expressed concerns regarding the implementation of the mandate.³ The day after OSHA issued the Employer ETS, more than 25 states filed lawsuits challenging it, including in the U.S. Courts of Appeals for the Fifth, Sixth, Eighth, and Eleventh Circuits.⁴ On November 6, the Fifth Circuit issued a non-dispositive opinion staying enforcement of the Employer ETS pending expedited judicial review.⁵

The Employer ETS is OSHA's second ETS related to COVID-19, the first having been issued in June 2021 for workplace settings where healthcare services are provided (the "Healthcare ETS").⁶ The Employer ETS, which will cover 84 million employees, is intended to complement the Biden administration's previously announced vaccination requirements for federal employees (the

¹ For additional details about President Biden's announcement on the federal vaccine mandate and other initiatives and measures to reduce the number of unvaccinated individuals, please refer to our [September 15, 2021 memorandum](#).

² September 16, 2021 Letter from 24 Attorneys General to President Joseph R. Biden, [https://ago.wv.gov/Documents/AGs%20letter%20to%20Pres.%20Biden%20on%20vaccine%20mandate%20\(FINAL\)%20\(02715056xD2C78\).PDF](https://ago.wv.gov/Documents/AGs%20letter%20to%20Pres.%20Biden%20on%20vaccine%20mandate%20(FINAL)%20(02715056xD2C78).PDF).

The letter argued that a federal vaccine mandate was "illegal" and represented "a threat to individual liberty" and "a public health disaster."

³ See, e.g., September 14, 2021 National Federation of Independent Business letter to Secretary of Labor (urging Department of Labor to seek permission to proceed through notice-and-comment rulemaking as opposed to issuing an ETS), <https://assets.nfib.com/nfibcom/NFIB-Letter-David-Addington-9.15.21.pdf>; September 9, 2021 Statement of Retail Industry Leaders Association ("requiring large employers to mandate vaccination of all employees or produce a negative test is a colossal undertaking."), <https://www.rila.org/focus-areas/public-policy/retailers-remain-committed-partners-covid-fight>.

⁴ See James C. McKinley J. and Isabella Grullón Paz, Court temporarily Blocks Biden's Vaccine Mandate for Large Companies (Nov. 6, 2021), <https://www.nytimes.com/2021/11/06/world/americas/biden-osha-vaccine-mandate-blocked.html>. See also Lisa Kim, Here Are The GOP-Led States Fighting The Biden Administration's Private Employer Vaccine Mandate, Forbes (Nov. 5, 2021), <https://www.forbes.com/sites/lisakim/2021/11/05/here-are-the-gop-led-states-fighting-the-biden-administrations-private-employer-vaccine-mandate/?sh=764f458733ad>; Dan Levin, 11 States Sue the Biden Administration Over Its Vaccine Mandate for Large Companies, N.Y. Times (Nov. 5, 2021), <https://www.nytimes.com/2021/11/05/world/states-sue-biden-vaccine-mandate.html>; see also *State of Missouri v. Biden*, Case No. _ (8th Cir. Nov. 5, 2021), https://ago.mo.gov/docs/default-source/press-releases/2021-11-05---osha-vaccine-mandate---petition-for-review---final.pdf?sfvrsn=76a943a9_2.

⁵ *BST Holdings v. OSHA*, 21-60845 (5th Cir.). The opinion was in response to a petition filed by a group of businesses, religious groups, advocacy organizations and several Republican-led states arguing that the Employer ETS exceeds the OSHA's and Congress's authority.

⁶ OSHA's Healthcare ETS broadly covers workplace settings where any employee provides healthcare services or healthcare support services. It does not require mandatory vaccination but requires covered employers to provide reasonable time off and paid leave for COVID-19 vaccinations and vaccine side effects. See OSHA, Occupational Exposure to COVID-19; Emergency Temporary Standard; Interim Final Rule, <https://www.osha.gov/laws-regs/federalregister/2021-06-21>.

“Federal Employee Vaccine Mandate”) and contractors (the “Federal Contractor Vaccine Mandate”) and newly announced vaccination requirements for healthcare workers at facilities participating in Medicare and Medicaid (the “CMS Mandate”).⁷ The Federal Employee Vaccine Mandate required each federal government agency to mandate COVID-19 vaccination for all of its employees by November 22, 2021.⁸ Under the Federal Contractor Vaccine Mandate, federal contractors and subcontractors at all tiers are required to be fully vaccinated.⁹ The CMS Mandate, which was announced by the Centers for Medicare & Medicaid Services at the Department of Health and Human Services, requires that healthcare workers at facilities participating in Medicare and Medicaid, including hospitals and long-term care facilities, be fully vaccinated.¹⁰ The CMS Mandate is expected to apply to more than 17 million workers at approximately 76,000 healthcare facilities.¹¹ Employers falling under the following three vaccine mandates—the Employer ETS, the CMS Mandate, and the Federal Contractor Vaccine Mandate—have until January 4, 2022 to comply with the vaccination requirement.¹² The White House anticipates that the Employer ETS and CMS Mandate will cover “two-thirds of all workers” in the United States.¹³

Employer Requirements

Covered Employers and Employees. The Employer ETS requires employers with 100 or more employees to develop, implement and enforce a written mandatory COVID-19 vaccination policy, with an exception for employers that instead establish, implement and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace.¹⁴ The Employer ETS does not cover workplaces subject to (1) the Federal Contractor Vaccine Mandate; (2) the CMS Mandate; or (3) OSHA’s Healthcare ETS.¹⁵

In determining whether the 100-employee threshold is met, employers are required to include all employees across all of their U.S. locations, regardless of employees’ vaccination status or where they perform their work.¹⁶ Part-time employees are to be included in this determination, but not independent contractors.¹⁷ An employer is covered if, at any time while the Employer ETS is in effect, they have at least 100 employees. In a traditional franchisor-franchisee relationship in which each franchise location is independently owned and operated, the franchisor and franchisees would generally be separate entities for coverage

⁷ White House, Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies (Nov. 4, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/>.

⁸ White House, Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/>; Safer Federal Workforce, FAQs, <https://www.saferfederalworkforce.gov/faq/vaccinations/#:~:text=A%3A%20Yes.,of%20where%20they%20are%20working.>

⁹ White House, Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>; White House, Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/>.

¹⁰ White House, Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies (Nov. 4, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ COVID-19 Vaccination and Testing; Emergency Temporary Standard 86 Fed. Reg. 61,402, 61,513 (Nov. 5, 2021) (to be codified at 29 C.F.R. parts 1910, 1915, 1917, 1918, 1926, and 1928), <https://www.govinfo.gov/content/pkg/FR-2021-11-05/pdf/2021-23643.pdf>.

¹⁵ 86 Fed. Reg. at 61,551 (29 C.F.R. § 1910.501(b)(2)); *Id.* at 61,438 (The Employer ETS “does not apply in settings where any employee provides healthcare services or healthcare support services while they are covered by the requirements of [the Healthcare ETS].”); White House, Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies (“OSHA is also clarifying that it will not apply its new rule to workplaces covered by either the CMS rule or the federal contractor vaccination requirement.”), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/>.

¹⁶ 86 Fed. Reg. at 61,513.

¹⁷ *Id.*

purposes, such that the franchisor would only count “corporate” employees, and each franchisee would only count employees of that individual franchise.¹⁸ However, in scenarios in which two or more related entities “handle safety matters as one company,”¹⁹ they may be regarded as a single employer and employees of all entities making up the integrated single employer would be counted. If employees of a staffing agency are placed at a host employer location, only the staffing agency would count those workers for purposes of the 100-employee threshold.²⁰

The Employer ETS does not apply to employees of covered employers (1) who do not report to a workplace where other individuals are present; (2) while working from home; or (3) who work exclusively outdoors.²¹

Policy Requirements. An employer’s written policy must include the requirements for vaccination; applicable exclusions from the written policy (e.g., medical contraindications, medical necessity requiring delay in vaccination or reasonable accommodations for workers with disabilities or sincerely held religious beliefs); information on determining an employee’s vaccination status and how this information will be collected; paid time and sick leave for vaccination purposes; notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace; information to be provided to employees; disciplinary action for employees who do not abide by the policy; the policy’s effective date and deadlines; and details on to whom the policy applies.²²

Mandatory Vaccination or Weekly Testing. Under the Employer ETS, “fully vaccinated” means an individual’s status two weeks after receiving both doses of a qualifying two-dose vaccine or one dose of a qualifying single-dose vaccine and does not include boosters.²³ Consistent with EEOC guidance, the Employer ETS provides that mandatory vaccination programs should apply to all employees other than those employees: “(i) [f]or whom a vaccine is medically contraindicated; (ii) [f]or whom medical necessity requires a delay in vaccination; or (iii) [w]ho 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.”²⁴

Employers are required to ensure that employees who are not fully vaccinated get tested for COVID-19 at least weekly or within seven days prior to returning to work, if in the office weekly or away from the workplace for a week or longer (e.g., teleworking prior to reporting to a workplace with others), respectively.²⁵ Employees who are not fully vaccinated should be tested using a test that is cleared, approved or authorized by the Food and Drug Administration, administered in accordance with authorized instructions and not both self-administered and self-read, unless observed by the employer or an authorized telehealth proctor.²⁶

Employers are also required to ensure that employees who are not fully vaccinated wear a face covering when indoors or when occupying a vehicle with another person for work purposes except in limited circumstances, such as when an employee is alone in a room with floor to ceiling walls and a closed door or for identification purposes in compliance with safety and security

¹⁸ *Id.*

¹⁹ *Id.* The Employer ETS does not provide further guidance on what “handl[ing] safety matters as one company” means.

²⁰ *Id.*

²¹ *Id.* at 61,551.

²² *Id.* See OSHA, COVID-19 Vaccination and Testing, ETS Frequently Asked Questions (Nov. 4, 2021), <https://www.osha.gov/coronavirus/ets2/faqs>.

²³ 86 Fed. Reg. at 61,552. The following forms of documentation will satisfy the proof of vaccination status required by the ETS: (1) a record of immunization from a healthcare provider or pharmacy; (2) a copy of a Centers for Disease Control and Prevention (CDC) COVID-19 Vaccination Record Card; (3) a copy of medical records documenting the vaccination; (4) a copy of immunization records from a public health, state, or tribal immunization system; (5) a copy of any other official 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; or (6) in instances where an employee is unable to produce acceptable proof of vaccination, a signed and dated statement by the employee attesting to their vaccination status. *Id.*

²⁴ *Id.* at 61,552.

²⁵ *Id.*

²⁶ *Id.* at 61,551.

measures.²⁷ The Employer ETS prohibits employers from preventing any employee from voluntarily wearing a face covering, regardless of that employee's vaccination status, unless it creates a serious workplace hazard.²⁸

With respect to a positive test result or diagnosis, under the Employer ETS employers must: (1) require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19; (2) immediately remove any employee from the workplace who received a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider, regardless of that employee's vaccination status; and (3) prevent employees from returning to the workplace until they meet criteria for returning to work.²⁹

Paid Time Off and Testing Costs. The Employer ETS requires that employers provide employees (1) up to four hours of paid time off, including travel time, at the employee's regular rate of pay to receive each vaccination dose (if during working hours), as well as (2) reasonable time and paid sick leave to recover from any side effects experienced following each dose.³⁰ Employers are not required to provide paid time to employees for complying with testing requirements or to employees who are removed from the workplace as a result of a positive COVID-19 test or diagnosis of COVID-19; however, paid time for such situations may be required by other laws, regulations or collective bargaining or other collectively negotiated agreements.³¹ The Employer ETS does not require employers to pay for testing costs; however, employers may be required to pay for testing under other laws, regulations or collective bargaining or other collectively negotiated agreements.³²

Recordkeeping and Reporting. Employers are required to determine each employee's vaccination status by obtaining acceptable proof of vaccination, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status.³³ Employers are also required to maintain a record of each test result provided by each employee or obtained during tests conducted by the employer. These records should be kept confidential and separate from the employees' personnel files.³⁴ If the employer has already ascertained and retained records of the employees' vaccination status prior to the effective date of the Employer ETS, it is not required to re-verify the vaccination status of those employees.³⁵ If an employee does not provide acceptable documentation of a COVID-19 test result, the employer is required to keep that employee out of the workplace until the employee complies.³⁶

Employers are also required to report to OSHA (1) each work-related³⁷ COVID-19 fatality within eight hours of the employer learning about the fatality and (2) each work-related COVID-19 in-patient hospitalization³⁸ within 24 hours of the employer learning about the in-patient hospitalization. Additionally, employers are required to inform employees about (1) the requirements of the Employer ETS as well as any employer policies and procedures established for its implementation; (2) the CDC guidance on COVID-19 vaccine efficacy, safety and the benefits of being vaccinated³⁹; and (3) the Occupational Safety and

²⁷ *Id.* at 61,553.

²⁸ *Id.*

²⁹ *Id.* In order to return to the workplace, the employee must: (1) receive a negative result on a COVID-19 nucleic acid amplification test ("NAAT") following a positive result on a COVID-19 antigen test if the employee chooses to seek a NAAT test for confirmatory testing; (2) meet the return-to-work criteria in the CDC's "Isolation Guidance"; or (3) receive a recommendation to return to work from a licensed healthcare provider. *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 61,552.

³⁴ *Id.* See EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws at K4, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

³⁵ 86 Fed. Reg. at 61,552-53.

³⁶ The Employer ETS is silent on whether employers are required to provide paid leave to employees who do not provide acceptable documentation of a COVID-19 test result.

³⁷ A COVID-19 case is "work-related" if "an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness." 29 C.F.R. 1904.5.

³⁸ 86 Fed. Reg. at 61,554. "In-patient hospitalization" is defined as "a formal admission to the in-patient service of a hospital or clinic for care or treatment." 29 C.F.R. 1904.39(b)(9).

³⁹ CDC, Key Things to Know About COVID-19 Vaccines, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>.

Health Act's (the "OSH Act") prohibition on retaliation against employees for exercising any rights afforded by the OSH Act, including the right to file a whistleblower complaint relating to a health and safety concern or to report a work-related injury or illness.⁴⁰

Intersection with State Law. The Employer ETS specifically provides for preemption of "inconsistent state and local requirements relating to these issues, including requirements that ban or limit employers' authority to require vaccination, face covering, or testing, regardless of the number of employees."⁴¹ Further, the Employer ETS requires the 28 states in which state government agencies enforce workplace safety regulations to adopt the federal ETS or their own plan that is "at least as protective" as the Employer ETS.⁴² If a state chooses to develop its own plan, it must notify OSHA within 15 days and adopt a plan within 30 days.⁴³

The Employer ETS establishes minimum requirements for employers, and does not prevent employers from implementing additional measures consistent with the its requirements, nor does the Employer ETS change collective bargaining agreement obligations.⁴⁴ Employers who fail to comply with the requirements of the Employer ETS could face citations of up to approximately \$14,000 per violation.⁴⁵

Pursuant to the OSH Act, the Employer ETS may be revised or updated by OSHA and otherwise will be in effect for six months, at which point OSHA will determine if it will be adopted as a final standard.⁴⁶

Implications for Employers

- Employers are advised to determine whether they are a covered employer under the Employer ETS and, if so, ensure that they implement vaccination, mandatory testing and masking policies that are consistent with the Employer ETS.
- Employers are advised to review the EEOC Guidance and ensure that their policies and procedures for assessing medical and religious accommodations concerning a COVID-19 vaccination requirement are consistent with the EEOC Guidance, the Americans with Disabilities Act, Title VII and any other applicable federal, state and local law, rules or regulations.
- Given lawsuits that have been, and are expected to be, filed challenging the legal authority of the Employer ETS, it is expected that multiple legal challenges to the Employer ETS will be addressed by courts in the coming weeks. Employers are advised to monitor further developments.
- Additionally, employers may want to monitor COVID-19 guidance from relevant federal, state and local authorities as the public health situation is rapidly developing.
 - President Biden's national strategy to combat COVID-19 (COVID-19 Action Plan) can be found [here](#).
 - The Employer ETS can be found [here](#).
 - OSHA's resources on the Employer ETS can be found [here](#).
 - EEOC guidance for employers on COVID-19 vaccinations and equal employment opportunity laws can be found [here](#).

⁴⁰ *Id.* at 61,554.

⁴¹ *Id.* at 61,551.

⁴² *Id.* at 61,506.

⁴³ *Id.*

⁴⁴ *Id.* at 61,551.

⁴⁵ See OSHA, OSHA Penalties, <https://www.osha.gov/penalties>.

⁴⁶ OSH Act Section 6(c)(3).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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