

November 5, 2021

## OSHA Issues COVID-19 Vaccination and Testing Emergency Rules

By: [John Epperson](#)

The U.S. Occupational Safety and Health Administration (OSHA) published its much-anticipated Emergency Temporary Standard (ETS) regarding COVID-19 vaccination and testing on November 5, 2021. The ETS went into effect immediately upon publication in the [Federal Register](#) with requirements phased in over 30 to 60 days. Workplaces in states that are authorized to regulate occupational safety with their own programs (such as California's Cal/OSHA) are not covered directly by this ETS but those state programs will need to implement similar rules that are least as effective as the federal ETS within 30 days.

The ETS only applies to employers with 100 or more employees, although smaller employers may elect to comply voluntarily. Some employers already covered by other specific COVID-19 standards are not required to comply with the ETS. A key element of the ETS is the requirement that employers have a COVID-19 policy that requires either mandatory employee vaccination or weekly COVID-19 testing and face coverings at the workplace for unvaccinated employees. COVID-19 testing capacities are already strained in some areas so employers with low vaccination rates among their employees will struggle to meet this requirement. Notably, the ETS does not require employers to pay for testing, although they may elect to do so on their own.

Employers must determine the vaccination status of each employee and maintain records of employee vaccination status, including a roster of each employee's vaccination status. Employees must be provided reasonable time (up to four hours paid time) to get vaccinated and employers must allow use of paid sick time for side effects following vaccination. Employees will be required to promptly inform their employer if they test positive for COVID-19 and employers must remove those employees from the workforce and keep them out of the workplace until they meet criteria in the ETS for returning.

Employers will be required to provide information to their employees about their workplace policies to implement the ETS, the CDC document "[Key Things to Know About COVID-19 Vaccines](#)," protections from retaliation and discrimination, and criminal penalties for knowingly supplying false statements or documentation. They must also allow employees to review and copy the vaccination documentation the employer maintains on that employee.

The ETS requires that any work-related COVID-19 fatalities be reported to OSHA within eight hours of learning of them and work-related COVID-19 hospitalizations must be reported within 24 hours of learning of the hospitalization. The ETS does not provide additional guidance on how to determine when a COVID-19 case is work-related, but that has been addressed to some extent in previous OSHA guidance documents.

Note that the ETS is also serving a dual purpose as a proposed rule, in addition to serving as an emergency standard, so OSHA is soliciting comments on the ETS and suggestions for potential modifications in the next iteration. OSHA has specifically solicited comments on whether the ETS should be expanded to apply to employers with fewer than 100 employees, as well.

Employers have only 30 days after November 5, 2021 to come into compliance with all of the ETS requirements except for testing, for which they have an additional 30 days. For many employers, this will be a daunting task, particularly if they have multiple facilities in different states, some of which will need to comply with the OSHA ETS while others will need to comply with yet-to-be-adopted state versions of the rule. Thirty days is a very short deadline for state agencies to adopt even an emergency rule, so it is likely they will not stray far from OSHA's text, but it is yet another point to be monitored. Even if a business already mandates vaccination or has an exceptional vaccination rate among employees, they must still comply with multiple new requirements. Litigation has already been filed by some states opposing the ETS as a vaccine mandate, which will add another layer of complexity as courts rule on inevitable motions to stay the effect of the new rule.

Buchalter has experienced attorneys who regularly assist employers on environmental, health and safety matters and labor and employment matters, including issues raised by COVID-19. If you have questions or need assistance, please contact one of the attorneys listed below.



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