



## OSHA Issues Emergency Temporary Standard Requiring COVID-19 Tests or Vaccination

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The highly anticipated and hotly debated OSHA Emergency Temporary Standard (ETS) regarding COVID-19 testing and vaccination has been issued. Below are our takeaways for what this means for your business. We are happy to answer any of your questions and help with the process of implementation.

**Which employers must comply with the new ETS?** Employers with 100 or more employees that are subject to OSHA's authority and jurisdiction generally, unless certain limited exceptions apply (for example, employers that are already subject to the Healthcare ETS do not need to comply with the new ETS).

**If I am subject to the ETS, what is required?** The ETS requires covered employers to either (1) develop, implement, and enforce a mandatory COVID-19 vaccination policy that applies to all employees, or (2) establish, implement, and enforce a policy that requires unvaccinated employees undergo weekly COVID-19 testing and wear a face covering in the workplace. Employers must also:

- Obtain and maintain documentation of each employee's vaccination status.
- Provide employees with reasonable time off, including up to four hours of paid leave, to receive each vaccination dose.
- Provide employees with reasonable time and paid sick leave to recover from side effects of each dose.
- Provide employees with: (1) the requirements of the ETS, including the policies and procedures the employer establishes to implement the ETS; (2) a CDC document with information about the vaccines; (3) information about protections against retaliation and discrimination; and (4) information about laws regarding criminal penalties for supplying false statements or documentation.
- Notify OSHA of any work-related COVID-19 fatality within eight hours of learning about it and within 24 hours of learning about a work-related COVID-19 hospitalization.

**Who pays for the weekly testing of unvaccinated employees?** The ETS does not require employers to pay costs associated with testing. However, employer payment for testing-associated costs may be required by other laws or collective bargaining agreements. Obviously, employers may voluntarily assume the costs associated with testing.

**What happens if an employee tests positive for COVID-19?** Employees who receive a positive COVID-19 test or are diagnosed with COVID-19 must be removed from the workplace immediately, regardless of vaccination status.

**When does the ETS take effect?** Immediately upon publication in the Federal Register (publication is scheduled for *November 5, 2021*). Employers must comply with the following deadlines:

- 30 days after publication, employers must meet the requirements for testing unvaccinated employees (except employees who have started, but not completed, a full vaccination regimen).
- 60 days after publication, employers must meet the requirements for testing unvaccinated employees (except employees who have completed the full vaccination regimen but for whom the two-week post-vaccination period for full vaccination has not passed).

**What do employers need to do now?** We expect there will be legal challenges to the ETS and it is possible that a court may issue an injunction temporarily halting implementation of the ETS. Nevertheless, employers should begin implementing the requirement to determine employees' vaccination status and obtain acceptable proof of vaccination, as well as develop policies and procedures for implementing the ETS. We are happy to help with developing and drafting policies, procedures, and forms, as well as answer any specific questions you have about the new ETS.

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*This is a rapidly evolving situation from both a legal and public health standpoint. Because guidance from Harrisburg changes frequently, you should always check to make sure you are aware of the most recent guidance. Wisler Pearlstine is committed to providing up to date, practical legal advice on how to manage the legal implications of the evolving landscape of the COVID-19 pandemic.*

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