



Employment Law Note

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OSHA's New Rule on COVID-19 Vaccination and Testing Under Fire



By **Tina Aiken**, taiken@sebrisbusto.com

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) released its highly anticipated emergency temporary standard (ETS) regarding COVID-19 vaccination and testing. Under the ETS, employers with 100 or more employees must require employees to *either* be vaccinated *or* present a negative COVID-19 test weekly and wear a face covering when indoors. The ETS also requires employers to pay employees for the time it takes to get vaccinated and recover from any side effects that prevent them from working.

Almost immediately, the lawsuits challenging the ETS rolled in. Under the unique rules applicable to challenging federal administrative agencies, petitions for review were filed the same day in the Fifth, Sixth, Eighth, and Eleventh U.S. Circuit Courts of Appeal. At least 27 states have filed lawsuits and more may follow between now and a November 14 deadline. Then, a lottery will determine which circuit court gets to decide the consolidated cases. Meanwhile, on November 5, 2021, the Fifth Circuit Court of Appeals granted a preliminary injunction barring the ETS from taking effect.

What's All the Fuss About?

The ETS requires all covered employers to establish a vaccination policy, determine employee vaccination status, provide the requisite paid time off, and ensure that unvaccinated employees are masked. The deadline for compliance is December 5, 2021.

Beginning on January 4, 2022, unvaccinated employees must undergo weekly testing.

Employers covered by the ETS. All private employers with 100 or more total employees at any time the ETS is in effect (*i.e.*, from November 5, 2021, until the ETS expires) are subject to the new rule. Employers should count all employees individually, whether they are full-time, part-time, working on a temporary basis, or working from home. Independent contractors and leased employees are not counted. The ETS does not apply to workplaces covered by the federal contractor requirement or settings covered by the Healthcare ETS while that ETS is in effect.

Employees covered by the ETS. The ETS provides a few exceptions for covered employees. For example, the ETS does not apply to employees who do not report to a workplace where other individuals, such as coworkers or customers, are present; employees while working from home; or employees who work exclusively outdoors. However, employers can enforce vaccination or testing requirements for these employees if they choose.

Record-keeping required by the ETS. The ETS requires employers to maintain a roster of and records pertaining to employee vaccination status while the ETS is in effect. Employers must maintain the information as confidential medical records. Acceptable proof of vaccination status includes:

- the record of immunization from a health care provider or pharmacy;

- a copy of the COVID-19 Vaccination Record Card;
- a copy of medical records documenting the vaccination;
- a copy of immunization records from a public health, state or tribal immunization information system or a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration and the name of the health care professional or clinic site administering the vaccine; or
- a signed and dated employee attestation (when an employee is unable to produce proof of vaccination).

The ETS also requires employers to make available, for examination and copying by an employee or the employee's representative, the employee's COVID-19 vaccine documentation and any COVID-19 test results for the employee. Additionally, employers must make available to an employee or their representative the aggregate number of fully vaccinated employees and the total number of employees at the workplace.

Finally, the ETS requires that employers establish procedures for employees to promptly report a positive COVID-19 test or positive COVID-19 diagnosis to the employer. Upon such notice, employees must be immediately removed from the workplace until return-to-work criteria from the CDC are met. Work-related COVID-19 fatalities must be reported to OSHA within eight hours of learning about them, and work-related COVID-19 in-patient hospitalizations must be reported within 24 hours.

Employers must pay for employees' time to get vaccinated and recover from side effects. The ETS requires employers to provide up to four hours of paid time off for employees to get vaccinated, including travel time, at the employee's regular pay rate. The ETS also requires "reasonable time" and paid

sick leave to recover from the side effects of each dose of the vaccine. Employers may require employees to use accrued paid sick leave benefits for recovery from vaccination but may not require employees to use existing leave entitlements for the time to get vaccinated. If an employee does not have accrued paid sick leave needed to recover from vaccine side effects, an employer may not require the employee to accrue negative paid sick leave or borrow against future paid sick leave.

Testing requirements in lieu of vaccination. The ETS requires that covered employers ensure that each unvaccinated employee regularly submits a negative COVID-19 test result. Testing frequency for unvaccinated employees depends on whether the employee regularly reports to a workplace or was recently diagnosed with COVID-19.

- If an unvaccinated employee regularly reports to a workplace, they must present a COVID-19 test result at least once every 7 days.
- If an unvaccinated employee usually does not report to a workplace, *e.g.*, they regularly work from home, they must test within 7 days prior to returning to the workplace and provide documentation of that test result upon return to the workplace.
- If an employee is diagnosed with COVID-19, by a health care professional or by a positive COVID-19 test result, then the employer must not require that employee to undergo testing for 90 days following the date of the positive test or diagnosis.

To qualify as a COVID-19 test under the ETS, the test must be: (1) cleared, approved, or authorized by the FDA to detect a current COVID-19 infection; (2) administered as instructed by the manufacturer; and (3) not both self-administered and self-read unless observed by the employer or authorized telehealth proctor. Antibody tests do not qualify under the ETS as COVID-19 tests.

Significantly – and uncharacteristically – the ETS allows employers to require unvaccinated employees to bear the cost of masks and testing as a not-so-subtle attempt to encourage employees to get the shots.

Exceptions allowed in a mandatory vaccination policy. An employee may be exempted from a vaccination requirement if the employee is entitled to reasonable religious or disability accommodations under federal civil rights laws, vaccination is medically contraindicated, or a medical necessity requires delay. Employers that mandate vaccination should have a procedure for reviewing and resolving accommodation requests and anticipate that such requests will begin immediately upon the announcement of their vaccine mandates. Employers should be aware that the ETS masking and testing requirements for unvaccinated employees will apply to employees who qualify for accommodations.

Employers that decide to comply with the ETS by allowing employees to choose vaccination or weekly testing may receive few accommodation requests because employees who cannot be vaccinated for medical or religious reasons can select the weekly testing alternative. By contrast, employers that comply with the ETS by implementing a vaccination mandate should anticipate and prepare for accommodation requests.

Masks are required for unvaccinated employees. Under the ETS, employers must 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. The ETS includes an exception to the face-covering requirement when an employee is alone in a closed room; for a limited time while eating or drinking; for a limited time for identification purposes; when an employee is wearing a respirator or facemask (such as a mask for medical procedures); or where the employer can show that the use of face coverings is not feasible or creates a greater hazard.

As noted above, the ETS does not require the employer to pay for any costs associated with face coverings. However, Washington State employers must provide cloth face coverings or something more protective for employees, free of charge, when the use of a mask is required. Further, Washington employers must immediately replace an employee's mask if requested or if the mask becomes wet, dirty, damaged, or when recommended by the manufacturer.

Employers must establish written policies. The ETS requires covered employers to establish either a mandatory vaccine policy or a weekly testing and mask policy. A written policy should detail the requirements the employer has decided upon and the consequences for noncompliance. The policy should clearly state the employer's procedural requirements, including required documentation for proof of vaccination and weekly testing (if applicable), a process for employees to submit required documentation, the time frame for employees to comply, the procedure for storage and retention of employees' documentation, a process for religious and disability accommodation requests, and the consequences for employees who fail to comply with the employer's policy.

Employers must inform employees about the ETS and the benefits of vaccination. The ETS requires employers to provide employees with information about the ETS, workplace policies and procedures established to implement the ETS, employee rights and protections, information about laws that provide for criminal penalties for knowingly supplying false statements or documentation, and the benefits of vaccination.

Consequences for non-compliance. Covered employers who fail to follow the ETS while it is in effect could face OSHA citations and penalties of up to \$13,653 per violation and additional citations or penalties for willful or egregious failures to comply. Under the Build Back Better legislation to amend the

Occupational Safety and Health Act, OSHA penalties will increase up to \$70,000 for "serious violations" and \$700,000 for willful or repeated violations. In addition to OSHA citations and penalties, covered employers may face potential exposure for individual whistleblower, retaliation, negligence, and other claims asserted by employees.

Further considerations. Under OSHA, an ETS is in place for only six months. However, OSHA has sought notice and comment, so the ETS may be converted to a permanent standard if it survives legal challenges.

Washington State is one of 22 states with an OSHA-approved plan covering both private sector and state and local government workers. Those states are required to adopt standards that are at least as

effective as the ETS. Under federal regulations, states with approved plans have 15 days to advise OSHA of their responses and another 15 days to implement compliant standards.

Given the number of pending lawsuits challenging the ETS, it seems likely that the U.S. Supreme Court will need to weigh in on the issue. Notwithstanding the pending litigation, we recommend that covered employers continue preparing for enforcement of the ETS.

Please contact us with questions about the ETS or if you need assistance drafting a written policy that complies with OSHA's new rule.

For more information about this month's Employment Law Note
contact us at [425-454-4233](tel:425-454-4233)



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