

# LABOR AND EMPLOYMENT LAW

## INFORMATION MEMO

NOVEMBER 4, 2021

## OSHA's Vax or Test Emergency Temporary Standard (ETS) is Here

On Nov. 4, 2021, the Occupational Safety and Health Administration (OSHA) released an emergency temporary standard (ETS) requiring all employers with 100 or more employees, with a few exceptions, to mandate vaccination or test employees weekly for COVID-19. OSHA justified the ETS by citing a "grave danger" posed by the coronavirus. Covered employers are required to develop, implement and enforce either a mandatory COVID-19 vaccination policy or a policy requiring employees to choose to get vaccinated or to undergo regular testing and wear a face covering at work. In addition, the ETS requires employers to provide paid time off for workers to get vaccinated and paid sick leave for employees to recover from any side effects resulting from vaccination.

The ETS impacts approximately 84 million workers and will take effect Nov. 5, 2021. The first compliance deadline for employers is Dec. 5, 2021, requiring employers to provide time off for workers to get vaccinated and ensuring those who are not vaccinated are wearing masks and are being tested at least weekly. Employees must be fully vaccinated by Jan. 4, 2022 or submit to testing if unvaccinated.

The ETS is intended to preempt states, and political subdivisions of states, from adopting and enforcing workplace requirements relating to these issues, except under the authority of a federally approved state plan.

Highlights of the ETS is below:

- *Workplaces not covered by the ETS*

Workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety Guidance and employees in healthcare services and healthcare support services settings covered by OSHA's healthcare ETS, workplaces of employers who have fewer than 100 employees and public employers in states without OSHA-approved state plans are not covered by this ETS.

- *Employees of Covered Employers Not Subject to the ETS*

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 they are working from home, or employees who work exclusively outdoors. However, these employees are to be included in the total count of employees to meet the 100-employee threshold for coverage under the ETS.

- *Policy Options*

- *Vax*

Employer must develop, implement and enforce a mandatory COVID-19 vaccination policy. Such a policy must require vaccination of all employees, other than those employees who fall into one of three categories: those for whom a vaccine is medically contraindicated, those for whom medical necessity requires a delay in vaccination, or those 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. Employees who fall into these three categories must test weekly for COVID-19 and wear a face covering as per the ETS' requirements. New York employers should also be cognizant of the implication of New York State and local human rights laws with respect to reasonable accommodations

in this area. As long as each employee that does not fall into one of those three categories is vaccinated, the written policy would still meet the definition of a mandatory vaccination policy. OSHA has also provided a [template for a mandatory vaccination policy](#).

**OR**

– Vax or Test and Mask

In the alternative, employers may choose to establish, implement and enforce a policy allowing employees to elect either to get vaccinated or to undergo weekly COVID-19 testing and wear a face covering at the workplace. Here, employers must ensure that each employee who is not fully vaccinated is tested at least weekly (if in the workplace once per week) or within seven days before returning to work (if away from the workplace for a week or longer). Employees not fully vaccinated must wear a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances. OSHA has also provided a [template for a vaccination or testing and face covering policy](#).

OSHA recognizes that there may be employers who develop and implement partial mandatory vaccination policies, i.e., that apply to only a portion of their workforce, and has provided guidance for compliance in these scenarios.

• *Paid Time Off*

Employers must provide employees with reasonable time off to receive the vaccination, including up to four hours of paid time (includes travel time), to receive each primary vaccination dose, and reasonable time and paid sick leave to recover from any side effects experienced following each primary vaccination dose. Generally, OSHA presumes that, if an employer makes available up to two days of paid sick leave per primary vaccination dose for side effects, the employer would be in compliance with this requirement.

• *Documentation and Reporting*

Employers must determine the vaccination status of each employee, obtain acceptable proof of vaccination from vaccinated employees, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status. The ETS provides a list of acceptable proof of vaccination status to determine if an employee is fully vaccinated. At this time, booster shots are not included in the definition of fully vaccinated under the ETS.

Employers must also report work-related COVID-19 fatalities to OSHA within eight hours of learning about them, and report work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization. Employers may also have to make certain records available for examination and copying to an employee or an employee representative.

Employers must require each employee to promptly notify them when they receive a positive COVID-19 test or is diagnosed with COVID-19 and keep the employee removed from the workplace until certain return to work criteria are met.

• *Notice to Employees*

Employers must provide each employee with information, in a language and at a literacy level the employee understands, about the requirements of the ETS and workplace policies and procedures established to implement the ETS; vaccine efficacy, safety and the benefits of being vaccinated (by providing the CDC document "[Key Things to Know About COVID-19 Vaccines](#)"); protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false statements or documentation.

- *Unionized Workplaces*

Employers in unionized workplaces with 100 or more employees must follow the minimum requirements established by the ETS. The ETS does not prevent employers from agreeing with employees and their representatives to implement additional measures, and the ETS does not displace collectively bargained agreements that exceed the requirements of the ETS.

- *Deadlines*

<i>By Dec. 5, 2021</i>	<i>By Jan. 4, 2021</i>
<ul style="list-style-type: none"> <li>- Establish compliant policy</li> <li>- Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status</li> <li>- Provide paid time off for vaccination and for recovering from vaccination</li> <li>- Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis and remove these employees from the workplace until they can return to work as per the ETS</li> <li>- Ensure employees who are not fully vaccinated wear face coverings as per the ETS</li> <li>- Provide employees with information about the ETS</li> <li>- Comply with the ETS' reporting requirements and make certain records available</li> </ul>	<ul style="list-style-type: none"> <li>- Ensure employees have received their final vaccination dose</li> <li>- Ensure employees who are not fully vaccinated (due to exceptions as per the ETS) are tested for COVID-19 at least weekly (if in the workplace at least once a week) or within seven days before returning to work (if away from the workplace for a week or longer)</li> </ul>

Employers not enforcing OSHA's newest rule could be cited by the agency and face a fine of up to \$13,653 for each serious violation. A willful violation, essentially an employer deliberately disregarding the mandate, could lead to a fine as high as \$136,532. Employers with 100 or more employees must review the ETS and take action to develop and implement plans to comply with the standard within the stipulated timelines.

If you have any questions about the information presented in this memo, please contact [Thomas Eron](#), [Nihla Sikkander](#), any attorney in our [Labor and Employment practice](#) or the attorney at the firm with whom you are regularly in contact.

