Shumaker

JUNE 7, 2023 | PUBLICATION

Client Alert: OSHA's Emergency Temporary Standard Mandates Vaccination or Weekly Testing for Employers with 100+ Employees - Legal Challenges Already Underway

RELATED PROFESSIONALS

Jennifer B. Compton
Frederick M. Thurman, Jr.
Haley D. Kole
Hugo S. "Brad" deBeaubien

MEDIA CONTACT

Wendy M. Byrne
wbyrne@shumaker.com

Download Client Alert: OSHA's Emergency Temporary Standard Mandates Vaccination or Weekly Testing for Employers with 100+ Employees – Legal Challenges Already Underway

Almost two months after President Biden proposed a "Path Out of the Pandemic," the United States Occupational Safety and Health Administration (OSHA) issued its highly awaited Emergency Temporary Standard (ETS) requiring employers with at least 100 employees to establish, implement, and enforce a written policy on vaccines, testing, and face coverings, that: i) requires covered employees to be fully vaccinated against COVID-19; or, as an alternative, ii) requires covered employees that are not fully vaccinated to test for COVID-19 at least weekly and wear a face covering. The ETS was published in the *Federal Register* on November 5, 2021 and is intended to "preempt 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." By its terms, the ETS requires that all covered employees either be fully vaccinated or subject to weekly testing by January 4, 2022, and comply with all other ETS provisions by December 5, 2021. That said, a number of states and private businesses have already launched legal challenges to the ETS, and as of the publication of this Client Alert, a federal appeals court has stayed enforcement of the ETS pending further consideration of the issues in litigation. Shumaker will continue to monitor developments in this regard and will provide further updates on the status of the ETS.

The ETS and associated OSHA guidance are nearly 500 pages in length. What follows are some common questions employers may have about the new ETS, together with our general guidance on how the ETS

addresses each issue. If you have any questions or need assistance in complying with the new ETS, please contact Shumaker's Labor, Employment and Pensions Service Line.

Which employers are covered by the ETS?

The ETS covers employers with 100 or more employees company-wide. The 100-employee total includes part-time employees, temporary employees, seasonal employees, and minors, but does not include independent contractors. The ETS includes three crucial exceptions and thus does not apply to:

I. Federal contractors subject to the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors;
II. Workplaces or settings where employees provide health care services or health care support services and are subject to the previously-issued Healthcare ETS;
III. Employees who do not report to a workplace where coworkers or customers are present, employees who work from home, or employees who "work *exclusively* outdoors" (though these employees are counted as part of the employer's total workforce for purposes of determining whether the employer has 100 or more employees).

If at any time during the six months in which the ETS is in effect an employer employs at least 100 employees, the ETS's requirements will apply regardless of future fluctuations in the employer's size. The ETS makes clear that OSHA is still evaluating the feasibility and necessity of a similar ETS for smaller employers.

Does the ETS cover employers who employ workers through multiple related legal entities?

Generally, the ETS and the Frequently Asked Questions OSHA has issued interpreting the ETS provide that the ETS applies to a "single corporate entity with multiple locations," with all employees at all locations counted in the aggregate. However, the ETS also provides in the preamble that "two or more related entities may be regarded as a single employer for OSH Act purposes if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted." There is currently no further guidance to determine when two related entities may regarded as a single employer for purposes of this ETS, though OSHA can be expected to take a broad view. In addition, the ETS specifies that in traditional franchisor-franchisee relationships, in which each franchise location is independently owned and operated, "the franchisor and franchisees would be separate entities for coverage purposes, such that the franchisor would only count."

What documentation must covered employers obtain from covered employees regarding their vaccination status?

The ETS requires covered employers to obtain and retain documentation as to the vaccination status of each of its employees and proof of vaccination for those who are fully or partially vaccinated, all of which must be kept confidential, as required under the Americans with Disabilities Act and associated Equal Employment Opportunity Commission guidance. Employers must also maintain a confidential "roster" of all employees reflecting each person's vaccination status. Notably, there are no exceptions to the ETS's vaccination or testing requirement for individuals who previously contracted and recovered from COVID-19. However, employers mandating vaccination must nevertheless be mindful of the duty to accommodate employees with disabilities or sincerely held religious beliefs, practices, or observances, that preclude them from receiving a COVID-19 vaccine. The ETS also excuses from its vaccination requirement "those for whom a vaccine is medically contraindicated" and "those for whom medical necessity requires a delay in vaccination."

Acceptable proof of an employee's vaccination status includes: a vaccine card, a record of immunization from a health care provider or pharmacy, or "any other official document" verifying the date and type of vaccination and the location where the employee received the vaccine. If an employee is unable to produce any of the aforementioned forms of proof, a signed and dated attestation may also be acceptable where the employee acknowledges: (a) their receipt of the vaccine, fully administered; (b) that they have lost or are otherwise unable to provide proof of vaccination despite effort to obtain same; and (c) that providing false information regarding vaccination status may subject the employee to criminal penalties. Employees who fail to provide acceptable proof of vaccination or an attestation must be treated as though they are unvaccinated.

Does the ETS require covered employers to provide paid time off for employees to get vaccinated and recover from side effects?

The ETS requires that covered employers provide up to four hours of paid time off to employees to receive each dose of the vaccine, and provide "reasonable time and paid sick leave to recover from side effects experienced following each dose," which OSHA has indicated may be up to two days per dose. Employers may require employees to use available sick leave or other paid time off to recover from the side effects of receiving a vaccine dose, but not for the four hours of paid time off to obtain each dose.

It is important to note that employers are NOT required to provide paid time off to any employee who tests positive for COVID-19 and is removed from the workplace under the ETS. However, an employer may be required to do so under an applicable collective bargaining agreement, an employer paid leave policy, or another law.

What does a COVID-19 testing program for unvaccinated employees look like?

The ETS requires employers to ensure that each employee who is not fully vaccinated is 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). Regardless of how often employees enter the workplace, they must provide documentation of their negative COVID-19 test to their employer. Employers are not required to test employees on-site.

The ETS provides that acceptable COVID-19 tests include "proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer." Even though at-home and over-the-counter tests are permitted, the employer must ensure the test is not both self-administered and self-read—that is, the employer or an authorized telehealth proctor must observe self-administered tests and their results.

The ETS does not require employers to pay for any costs associated with testing, but notes that other state or federal laws or collective bargaining agreements may require the employer pay for testing costs. That said, employers should be mindful of the potential need to compensate employees for hours worked while getting tested. Employers may also have to pay the cost of testing for those who have been granted a reasonable accommodation based on disability or sincerely-held religious belief from the vaccine portion of the requirement, in order to prevent disparate treatment of such workers.

Must covered employers require that unvaccinated employees wear a face covering?

Covered employers must ensure that each employee who is not fully vaccinated wears a two-layer face covering while indoors or when in a vehicle with a co-worker. Face coverings must be worn unless: (i) the employee is alone in a room with floor to ceiling walls with the door closed; (ii) for a "limited time" while

eating or drinking; (iii) when the employee is wearing a respirator or face mask; or (iv) if the employer can show wearing a face covering is infeasible or causes a greater hazard. Unvaccinated employees may be required to bear the cost of their face coverings. And note that an unvaccinated employee may be entitled to a reasonable accommodation if the employee cannot wear a face covering because of disability or a sincerely held religious belief.

What are covered employer's obligations if an employee contracts COVID-19?

The ETS requires employers to: (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, regardless of vaccination status, who received a positive COVID-19 test or is diagnosed with COVID-19 by a licensed health care provider; (3) keep removed employees out of the workplace until they meet criteria for returning to work set forth in the ETS. These requirements apply to vaccinated and unvaccinated workers alike.

Additionally, the ETS states that employers must report to OSHA work-related COVID-19 fatalities within eight hours of learning of them, and report to OSHA any employee's work-related COVID-19 in-patient hospitalization within 24 hours of learning of it. The ETS does not provide detailed guidance in how to determine if a COVID-19 exposure is work-related. Instead, it references the guidelines found at 29 CFR part 1904.5, which provide as follows:

> *How do I handle a case if it is not obvious whether the precipitating event or exposure occurred in the work environment or occurred away from work?* In these situations, you must evaluate the employee's work duties and environment to decide whether or not one or more events or exposures in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition.
>
> 29 CFR part 1904.5(b)(3).

What information must covered employers provide to employees about the ETS?

Covered employers must provide employees with the following information using a language and literacy level the employees can understand:

1. Information about the requirements of the ETS and workplace policies and procedures established to implement the ETS;
2. The CDC document "Key Things to Know About COVID-19 Vaccines";
3. Information about protections against retaliation and discrimination; and
4. Information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.

What penalties might a covered employer face for non-compliance with the ETS?

Covered employers who fail to comply with the ETS may face citations and penalties of up to $13,653 per violation. OSHA also has the authority to issue additional citations and penalties up to $136,532 for what it deems willful or egregious violations. In addition to citations and penalties imposed by OSHA, covered employers may face potential exposure for individual whistleblower, retaliation, negligence, and other claims potentially asserted by employees.

How long will the ETS be in effect?

Because it is an Emergency *Temporary* Standard created as a result of OSHA's determination that COVID-19 presents a "grave danger" to the unvaccinated warranting immediate action, the ETS can only remain effective for a period of six months. After that time, it must be replaced by a permanent OSHA standard created through the formal rulemaking process involving a notice-and-comment period.

What about legal challenges to the ETS and states with their own OSHA programs?

OSHA has made it clear that the new ETS preempts any inconsistent state or local law, including laws that ban or limit an employer's authority to require vaccination, masks, or testing. Not surprisingly, the new ETS has already faced a multitude of legal challenges in the short time since the ETS was published, and other lawsuits are likely. In fact, as noted above, as of the publication of this Client Alert, a federal appeals court has stayed enforcement of the ETS pending further consideration of the issues in litigation, although the court did not specify whether the stay applies nationwide or just within the jurisdiction of the particular ruling court. Shumaker will continue to monitor developments in this regard and provide further updates on the status of the ETS.

States that have their own OSHA plans may adopt standards that differ from the federal ETS, but those standards must be "as effective as" the federal ETS. Those states have 30 days to either adopt the federal ETS or to implement a regulation that is at least as effective as the federal ETS and have 15 days to notify OSHA of the action they intend to take.

Conclusion

As noted above, the ETS and associated OSHA guidance are nearly 500 pages in length. Due to the extensive nature of the ETS and the relatively short time frame for compliance, employers need to start preparing as soon as possible to comply with the ETS. A majority of the requirements are to become effective December 5, 2021, with the remaining requirements becoming effective January 4, 2022, but that may change given the recently-issued stay by a federal appeals court and the additional legal challenges that are pending. Shumaker will continue to monitor these developments and provide updates accordingly. If you have any questions about the ETS, the status of legal challenges to the ETS, or what your business should be doing about the ETS at this time, please contact Shumaker's Labor, Employment and Pensions Service Line.

© 2026 Shumaker, Loop & Kendrick, LLP. All Rights Reserved. Privacy Policy/Disclaimer

Shumaker