



November 15, 2021

**COVID-19 Workplace Safety: Guidance for Large Employers (100 or More Employees)**

On November 5, the Occupational Safety and Health Administration (“OSHA”) issued an emergency temporary standard (“ETS”) requiring covered employers to develop, implement, and enforce either a mandatory COVID–19 vaccination policy or a policy requiring vaccination or weekly COVID–19 testing and face coverings. The requirements of the ETS cover all employers with a total of 100 or more employees.

There have been numerous legal challenges filed in courts already, and the Fifth Circuit has issued a nation-wide temporary stay on the ETS, pending further action by the court. So, it’s unclear when or if the ETS will become effective.

As drafted, the effective date for the ETS was supposed to be November 5, 2021. However, the ETS gave employers until December 6, 2021, to implement the ETS’s requirements, and until January 4, 2022, to implement weekly testing for unvaccinated employees. OSHA anticipates that the ETS will be in effect for six months.

The following summarizes the requirements under the ETS. References to “primary vaccine” refer to the doses required to be considered “fully vaccinated” and not to booster shots.

**UPDATE: On January 13, 2022, the Supreme Court struck down the enforcement of the ETS.**

**Employer Policy on Vaccination**

<p>What is required of an employer’s policy on vaccination?</p>	<p>The ETS requires employers to either:</p> <ol style="list-style-type: none"> <li>1. Implement a mandatory vaccination policy, or</li> <li>2. Adopt a policy allowing employees to choose to be “fully vaccinated” against COVID-19, or provide proof of weekly COVID-19 testing <u>and</u> wear a face covering.</li> </ol>
<p>What is a “mandatory vaccination policy”?</p>	<p>A mandatory vaccination policy is an employer policy requiring vaccination of all employees, except:</p> <ol style="list-style-type: none"> <li>(1) those for whom a vaccine is medically contraindicated,</li> <li>(2) those for whom medical necessity requires a delay in vaccination, or</li> <li>(3) those legally entitled to a reasonable accommodation because of disability or religion.</li> </ol>



## Guidance for Large Employers (100 or More Employees)

Page 2

<p>What does “fully vaccinated” mean?</p>	<p>“Fully vaccinated” means 2 weeks after completing a primary COVID-19 vaccine (with the required intervals between doses) that is: (i) approved or authorized for emergency use by the FDA; (ii) listed for emergency use by the World Health Organization (WHO); or (iii) administered as part of a clinical trial at a U.S. site under certain circumstances.</p> <p>The ETS does not offer any exemptions to vaccination requirements based on antibodies from a previous infection.</p> <p>Booster shots and additional doses are not included in the definition of fully vaccinated under the ETS.</p>
<p>What must be included in the mandatory vaccination policy?</p>	<p>The policy should address:</p> <ul style="list-style-type: none"><li>• requirements for COVID-19 vaccination;</li><li>• applicable exclusions (described above);</li><li>• information on determining an employee’s vaccination status and how this information will be collected;</li><li>• paid time and sick leave for vaccination purposes;</li><li>• employee’s obligation to notify the employer of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace;</li><li>• how the employer is making this information available to employees, etc.;</li><li>• disciplinary action for employees who do not abide by the policy; and</li><li>• relevant information regarding the policy’s effective date, who the policy applies to, deadlines, and procedures for compliance and enforcement.</li></ul>
<p>Does the mandatory vaccination policy have to address the testing and face covering requirements for unvaccinated employees?</p>	<p>Yes, employers should include procedures for two sets of employees (vaccinated and unvaccinated) in the written policy.</p>
<p>May an employer choose to require vaccination of only some subset of its</p>	<p>Yes. For example, an employer may implement a partial mandatory vaccination policy that requires vaccination for employees providing</p>



Guidance for Large Employers (100 or More Employees)

Page 3

employees and to treat vaccination as optional for others?	services to the public but allows other employees the choice of vaccination or testing.
Which employees are NOT covered by the ETS?	<p>The following employees are not covered by the ETS:</p> <ol style="list-style-type: none"> <li>1. Employees at workplaces subject to the Executive Order 14042 (Vaccination for Federal Contractors);</li> <li>2. Employees who do not report to a workplace where other individuals such as coworkers or customers are present;</li> <li>3. Employees while working from home; and</li> <li>4. Employees who work exclusively outdoors.</li> </ol>

**Determine Employee Vaccination Status**

Do employees need to submit proof of vaccination or can an honor system be utilized?	<p>The employer must require each vaccinated employee to provide acceptable proof of vaccination status, including whether they are fully or partially vaccinated.</p> <p><u>The employer must retain either a physical or digital copy of the documentation.</u></p> <p>If an employee is unable to produce acceptable proof of vaccination, the ETS provides that a signed and dated statement by the employee will be acceptable.</p> <p>Employers that have already ascertained vaccination status prior to the effective date of the ETS through another form, attestation, or proof and retained records, are exempted from re-determining the vaccination status of individuals whose fully vaccinated status has been previously documented.</p>
--	--

**Employer Support for Employee Vaccination**

Does the ETS require employers provide paid leave to get vaccinated?	<i>Time for Vaccination:</i> Employers are required to (1) provide reasonable time during work hours for primary vaccination dose(s), and (2) <u>pay employees for up to 4 hours per dose at the employee’s regular rate of pay.</u>
--	--



Guidance for Large Employers (100 or More Employees)

Page 4

	<p>This vaccine leave cannot be offset by any other leave that the employee has accrued, such as sick leave or vacation leave.</p> <p><i>Time for Recovery:</i> Employers are required to provide reasonable time and paid sick leave to recover from side effects following vaccination doses. Generally, OSHA presumes that, if an employer makes available up to 2 days of paid sick leave per primary vaccination dose for side effects, the employer would be in compliance with this requirement.</p> <p>Booster shots are not covered by these provisions.</p>
<p>Does the ETS require employer-provide paid leave for employees experiencing side effects from the vaccine?</p>	<p>If an employee already has accrued paid sick leave, an employer may require the employee to use that paid sick leave when recovering from side effects experienced following a primary vaccination dose. However, the employer cannot require an employee to go into the negative for paid sick leave.</p>

**COVID-19 Testing for Employees Who are Not Fully Vaccinated**

<p>What is the COVID-19 testing requirement for unvaccinated employees?</p>	<p>Unvaccinated employees who report at least once every 7 days to a workplace where other individuals such as coworkers or customers are present:</p> <ul style="list-style-type: none"> <li>• Must be tested at least once every 7 days; and</li> <li>• Must provide documentation of the most recent test result to the employer no later than the 7th day following the date on which the employee last provided a test result.</li> </ul> <p>An employee who does not report during a period of 7 or more days to a workplace where other individuals, such as coworkers or customers, are present (e.g., teleworking for two weeks prior to reporting to a workplace with others):</p> <ul style="list-style-type: none"> <li>• Must be tested within 7 days prior to returning to the workplace; and</li> <li>• Must provide documentation of that test result to the employer upon return to the workplace.</li> </ul>
---	--



Guidance for Large Employers (100 or More Employees)

Page 5

	Employers must begin compliance with the testing requirements only for employees who have not yet received the requisite number of doses to become fully vaccinated <u>by January 4, 2022</u> .
Does the ETS require employers to cover the costs associated with COVID-19 testing?	No.
Do employees who have received 1 dose of a 2-dose sequence have to test weekly?	Yes, the employee would need to test weekly until 2 weeks after receiving their second dose.
Do employees who have received a 2 <sup>nd</sup> dose but are not yet 2 weeks past that 2 <sup>nd</sup> dose need to test weekly?	Employees who have completed the entire primary vaccination by January 4, 2022, do not have to be tested, even if they have not yet completed the 2-week waiting period.
If an employee is entitled to a reasonable accommodation due to a disability or religion, would the employee still need to be tested weekly?	Yes. However, if testing for COVID-19 conflicts with a worker’s sincerely held religious belief, practice or observance, the worker may be entitled to a reasonable accommodation.
Does the COVID-19 testing requirement apply to an unvaccinated employee who tests positive or is diagnosed with COVID-19?	When an unvaccinated employee has received a positive COVID–19 test, or has been diagnosed with COVID–19 by a licensed healthcare provider, the employer must not require that employee to undergo COVID–19 testing for 90 days following the date of their positive test or diagnosis.  This prohibition is because of the high likelihood of false positive results that do not indicate active infection but are rather a reflection of past infection. <u>However, when the employee returns to work they must continue to wear a face covering in accordance with the ETS.</u>



**Positive COVID-19 Test and Removal from the Workplace**

<p>What if an employee tests positive for COVID-19?</p>	<p>Regardless of COVID-19 vaccination status, the employer must:</p> <ul style="list-style-type: none"><li>• require each employee to “promptly notify” the employer when they receive a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider; and</li><li>• immediately remove from them from the workplace until the employee:<ul style="list-style-type: none"><li>○ meets the return-to-work criteria in CDC’s “Isolation Guidance”; or</li><li>○ receives a recommendation to return to work from a licensed healthcare provider; or</li><li>○ receives a negative result on a COVID-19 nucleic acid amplification test (NAAT).</li></ul></li></ul>
<p>Does the employer have to provide the employee with paid time off if they are removed from the workplace?</p>	<p>No. But other laws, regulations, or collective bargaining agreements may require paid leave, and employers should allow their employees to make use of any accrued leave in accordance with the employer’s policies.</p>
<p>If an employee has been removed from the workplace because they are COVID-19 positive, can the employer require them to work remotely (e.g., telework)?</p>	<p>Yes, if suitable work is available and if the employee is not too ill to work.</p> <p>In cases where working remotely or in isolation is not possible, OSHA encourages employers to consider flexible and creative solutions, such as a temporary reassignment to a different position that can be performed by telework.</p> <p>If an employee is too ill to work, remote work should not be required, and sick leave or other leave should be made available as consistent with the</p>



Guidance for Large Employers (100 or More Employees)

Page 7

	<p>employer’s general policies and practices, and as may be required under applicable laws.</p>
<p>If an employee tests positive or is diagnosed with COVID-19, is the employer required to conduct contact tracing?</p>	<p>Employers should follow state and local public health guidance for contact tracing.</p>
<p>Do I have to report COVID-19 hospitalizations and fatalities to OSHA?</p>	<p>An employer is only required to report <u>work-related</u> COVID-19 fatalities and in-patient hospitalizations to OSHA. The employer must report to OSHA:</p> <ul style="list-style-type: none"> <li>• Each work-related COVID–19 fatality within 8 hours of the employer learning about the fatality.</li> <li>• Each work-related COVID–19 in- patient hospitalization within 24 hours of the employer learning about the in- patient hospitalization.</li> </ul>
<p>What are the reporting requirements for work-related cases?</p>	<p>COVID-19 is a recordable illness and employers are responsible for recording cases of COVID-19 if: (1) the case is a confirmed case of COVID-19; (2) the case is work-related and (3) the case involves e.g., medical treatment beyond first aid, days away from work, etc.</p> <p>If an employer determines that a reported case of COVID-19 is work-related, the employer must record that information on the OSHA Forms 300, 300A, and 301, or on equivalent forms, if required to do so under the OSHA Regulations.</p> <p>Employers must generally provide access to the OSHA log to employees, former employees, and their representatives with the names of injured or ill employees included on the form. If, however, the employee requests that their name not be entered on the OSHA log, the employer must treat their illness as a privacy concern case and may not enter their name on the log.</p>

**Face Coverings for Employees Who are Not Fully Vaccinated**



## Guidance for Large Employers (100 or More Employees)

Page 8

<p>Who must wear a face covering?</p>	<p>Only employees who are not fully vaccinated are required to wear a face covering under the ETS when indoors and when occupying a vehicle with another person for work purposes, with exceptions (see below).</p> <p>The employer must ensure that any face covering: (i) is worn by the employee to fully cover the employee’s nose and mouth; and (ii) is replaced when wet, soiled, or damaged (e.g., is ripped, has holes, or has broken ear loops).</p> <p>The employer must not prevent any employee, regardless of vaccination status, from voluntarily wearing a face covering or facemask unless the employer can demonstrate that doing so would create a hazard.</p>
<p>Are there any exceptions to the face covering requirements for not fully vaccinated workers?</p>	<p>Yes. The exceptions are:</p> <ul style="list-style-type: none"><li>• When an employee is alone in a room with floor to ceiling walls and a closed door.</li><li>• For a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements.</li><li>• When an employee is wearing a respirator or facemask.</li><li>• Where the employer can show that the use of face coverings is infeasible or creates a greater hazard that would excuse compliance.</li></ul>

### Provide Information to Employees

<p>Are employers required to provide specific information about the ETS to employees?</p>	<p>Yes. The employer must inform each employee, in a language and at a literacy level the employee understands, about:</p> <ul style="list-style-type: none"><li>• the requirements of the ETS and any policies and procedures the employer establishes to implement this ETS. This includes:<ul style="list-style-type: none"><li>○ any employer policies;</li><li>○ the process that will be used to determine employee vaccination status;</li><li>○ the time and pay/leave they are entitled to for vaccinations and any side effects experienced following vaccinations</li></ul></li></ul>
---	--





Guidance for Large Employers (100 or More Employees)

Page 9

	<ul style="list-style-type: none"> <li>○ the procedures they need to follow to provide notice of a positive test or diagnosis;</li> <li>○ the procedures to be used for requesting records;</li> <li>○ for unvaccinated employees, information about the employer’s policies and procedures for COVID-19 testing and face coverings.</li> </ul> <p>In addition, the employer must provide employees with the following information:</p> <ul style="list-style-type: none"> <li>● CDC’s <a href="#">Key Things to Know About COVID-19 Vaccines</a>;</li> <li>● OSHA’s prohibition against discharging or discriminating against an employee for reporting work-related injuries or illness, or for exercising rights under, or as a result of actions that are required by, the ETS, or retaliating for filing an occupational safety or health complaint, reporting a work-related injuries or illness, or otherwise exercising any rights afforded by the OSHA; and</li> <li>● The criminal penalties associated with knowingly supplying false statements or documentation.</li> </ul>
--	--

**Recordkeeping and Availability of Records**

What other records must an employer maintain regarding employee’s vaccination status?	The ETS requires an employer to maintain a roster listing all employees and clearly indicating for each one whether they are fully vaccinated, partially vaccinated, not fully vaccinated because of a medical or religious accommodation, or not fully vaccinated because they have not provided acceptable proof of their vaccination status. Although unvaccinated employees will not have proof of vaccination status, the employer must include all employees, regardless of vaccination status, on the roster.
What confidentiality requirements apply to the records?	The records and roster required by the ETS are employee medical records and must be maintained as such records and must not be disclosed except as required or authorized by the ETS or other federal law, including the Americans with Disabilities Act.
Can OSHA demand to see employer records?	Upon request, an employer is required to provide OSHA with the aggregate number of fully vaccinated employees along with the total number of employees at that workplace <u>within 4 hours of such request</u> . Upon



Guidance for Large Employers (100 or More Employees)

Page 10

	request, an employer is required to provide OSHA all other records and other documents required to be maintained by the ETS <u>by the end of the next business day.</u>
Can employees demand to see employer records?	Upon request, an employer is required to provide an employee or employee representative with the aggregate number of fully vaccinated employees along with the total number of employees at that workplace <u>by the end of the next business day after such request.</u>
What testing records must be retained by the employer for unvaccinated employees?	The employer must maintain a record of each test result required to be provided by each employee. These records must be maintained as employee medical records and must not be disclosed except as required by the ETS or other federal law.
What records must be retained by the employer if an employee tests positive or is diagnosed with COVID-19?	The ETS does not contain specific requirements for the employer to establish or maintain records of employee notifications of a positive COVID-19 test or diagnosis of COVID-19 by a licensed healthcare provider.
Are employers required to provide employees with access to their COVID-19 test records?	Yes. The employer must make available, for examination and copying, the individual COVID-19 vaccine documentation and COVID-19 test results for a particular employee to that employee and to anyone having written authorized consent of that employee <u>by the end of the next business day.</u>

This alert is for general information purposes and should not be construed as legal advice. If you would like information about this alert, please contact one of the firm's attorneys:

Deborah Buyer, 212-225-8483 x1, [deborah@deborahbuyerlaw.com](mailto:deborah@deborahbuyerlaw.com)

Lydia Fan Wong, 212-225-8483 x2, [lydia@deborahbuyerlaw.com](mailto:lydia@deborahbuyerlaw.com)

© Deborah Buyer Law PLLC 2021

These materials do not constitute legal advice or create an attorney-client relationship. The reader is advised to consult with an attorney to obtain legal advice.

U.S. Treasury Circular 230 Notice: U.S. Treasury Regulations require us to inform you that any U.S. tax advice in this communication cannot be used by you to avoid tax penalties or to promote, market or recommend to another party any transaction or matter addressed herein.