

New COVID-19 Vaccination/Testing Mandates for Private Employers: *Who Must Comply and How?*

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On November 4, the Department of Labor, Occupational Safety and Health Administration, released new requirements to implement a vaccine directive that President Biden announced in September. The key question is which businesses are impacted by OSHA's Emergency Temporary Standard or CMS' Interim Final Rule. As with many employment-related laws, the short answer is: It depends. But the answer is critical because if you are a private employer with 100 or more employees (to include part-time workers toward the threshold) then you are required to either (1) mandate COVID-19 vaccination for your workforce (allowing for certain medical and religious exemptions) or (2) require unvaccinated employees to demonstrate a weekly negative test and wear face coverings. If an employee does not supply a negative test or tests positive for COVID-19, employers are required to keep employees out of the workplace until certain conditions are met. Employers who do not comply could face significant monetary penalties and employers must act soon to meet the two-phased compliance deadlines of December 5, 2021 and January 4, 2022.

Summary of OSHA's ETS Key Points

- What employers are covered?
 - The ETS applies to employers with a total of 100 or more employees at any time the standard is in effect. Part-time employees count towards the company total, but independent contractors do not, nor do temporary workers supplied by a staffing company.
 - For example, if an employer has 100 employees when the ETS first goes into effect and the workforce then drops down below 100, even significantly, the workforce is still subject to the ETS for the duration of time the ETS remains in effect. Likewise, if an employer has less than 100 employees when the ETS goes into effect but at any point thereafter grows to 100 employees, that workforce will be subject to the ETS from that point forward.
- What employees are not covered?
 - Even if an employer has 100 or more employees, the ETS does not apply to employees who: (1) work at a site where there are no other individuals, (2) work from home; or (3) exclusively work outdoors.
 - Federal contractors and subcontractors covered by the President's Executive Order 14042 and resulting Safer Federal Workforce Task Force COVID-19 Workplace

Safety: Guidance for Federal Contractors and Subcontractors are not subject to the ETS. While the ETS and the Federal contractor guidance are not congruent, OSHA has determined that compliance with the Federal contractor guidance is sufficient to achieve the goals of the ETS and thus such employers do not have to be subject to both sets of rules.

- Employers are required to determine the vaccination status of employees and whether the employee is fully vaccinated.
 - The ETS sets forth the acceptable forms of proof, to include a self-attestation in certain limited circumstances such as when actual proof has been lost.
 - An employee who does not provide an acceptable form of proof of vaccination will be treated as unvaccinated.
 - Employers also must maintain a record of each employee's vaccination status and preserve acceptable proof for each employee partially or fully vaccinated.
 - Such records are considered medical records and must be maintained as such.
- Employers are required to provide a reasonable amount of time, up to 4 hours of paid time, including travel time, for employees to obtain primary doses of a vaccine. Additionally, employers are required to provide reasonable time and paid sick leave to recover from vaccine side effects.
 - If you are a Nevada employer, Senate Bill 209 (2021) requires private employers with 50 or more employees to provide up to 4 hours of paid leave for employees to receive a two-dose COVID-19 vaccine and up to 2 hours for a single dose vaccine.
- For employees who are not vaccinated and are in the workplace at least once a week, they must be tested for COVID-19 at least once every 7 days and provide documentation no later than the seventh day following the date of the last test result.
- For unvaccinated employees working remotely or that have been away from the workplace for a week or more, they must be tested for COVID-19 within 7 days of the date they return to the workplace.
- Can employers let unvaccinated employees provide a home test to comply with the weekly testing requirement?
 - Not if the over-the-counter test is both self-administered and self-read unless observed by the employer or authorized telehealth proctor.
 - The ETS defines a "COVID-19 test" as "a test for SARS-CoV-2 that is: (1) cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the U.S. Food and Drug Administration (FDA) to detect current infection with the SARS-CoV-2 virus (e.g., a viral test); (2) administered in accordance with the authorized instructions; and (3) not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. Examples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens), proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer."
 - An antibody test also does not meet the definition of a COVID-19 test under the ETS.

- Employers are not required to pay for COVID-19 tests for unvaccinated employees, but may opt to do so. However, employers should be mindful of any applicable state or local law or collective bargaining agreement that may provide a different requirement.
- Employers must also implement policies that require employees to promptly notify the employer when they received a positive COVID-19 test or are diagnosed by a licensed healthcare provider.
- Employers must remove any employee testing positive from the workplace and not permit the employee to return to work until certain testing, isolation or medical recommendation is received.
- With limited exception, the ETS is intended to preempt any state or local laws that restrict an employer's ability to impose vaccination, testing or masking requirements.
- When does OSHA's ETS go into effect?
 - The ETS is effective upon publication in the Federal Register on November 5, 2021, but there is a 30-day comment period that will follow.
 - On December 5, 2021 (which is 30 days after publication on November 5, 2021), employers must comply with all requirements of the ETS except for testing of employees who are not fully vaccinated. Employers must comply with testing unvaccinated employees within 60 days of the effective date, or by January 4, 2022.

Summary of CMS Interim Final Rule

- If a workplace is covered by the CMS rule, it will not also be subject to OSHA's ETS.
- Requires staff at Medicare and Medicaid-certified providers and suppliers subject to CMS health and safety regulations to be fully vaccinated by January 4, 2022. The first phase of the regulation requires covered staff to receive the first dose of a primary series or a single dose COVID-19 vaccine within 30 days after the regulation is published, or by December 5, 2021.
- The CMS rule does not include a weekly testing component.
- Vaccine exemptions are permitted for recognized medical conditions for which vaccines are contraindicated (as a reasonable accommodation under the American with Disabilities Act) or a deeply held religious belief (under Title VII of the Civil Rights Act of 1964), but only if legally required.
- The CMS rule applies to all staff regardless of whether they provide care, treatment or other services and regardless of any clinical responsibility or patient contact.
 - However, employees who provide services on a remote basis and do not have direct contact with patients and other staff, are not subject to the vaccination requirements.
- The CMS rule is intended to preempt any state or local laws that restrict an employers' ability to impose vaccination, testing or masking requirements.

QUESTIONS:

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