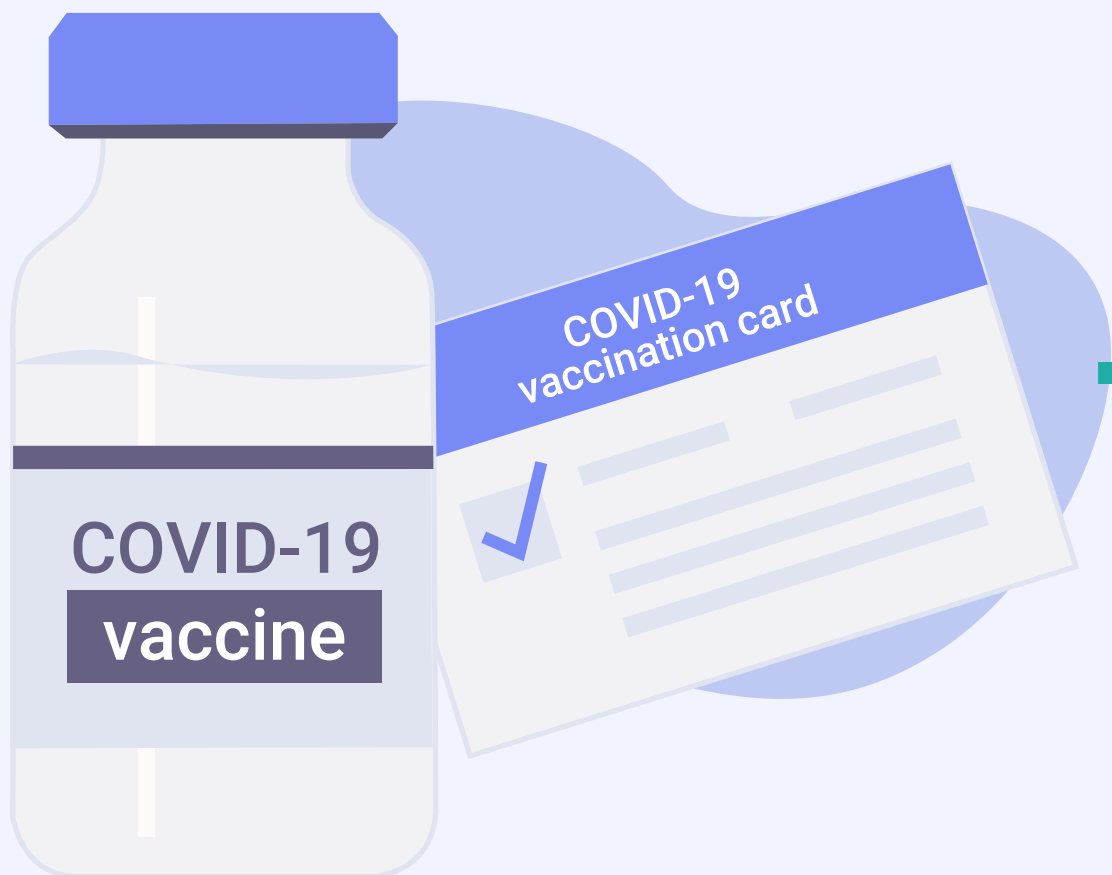


How to Comply with OSHA's New COVID Rules



On November 5, 2021 the federal Occupational Safety and Health Administration (“OSHA”) issued an [emergency temporary standard](#) (“ETS”) that requires all companies with 100 or more employees to establish and implement a written policy by **December 6, 2021** that requires all employees to be fully vaccinated against COVID-19 or submit to weekly COVID-19 testing starting **January 4, 2022**. The ETS answers many of the questions raised after President Biden’s [COVID-19 Action Plan](#) that was announced on September 9, 2021.

State OSHA Plans

There are twenty-one states and one territory ¹ that already have OSHA-approved plans for private employers and 6 other states that have OSHA-approved plans for public employers. By order of this ETS, all state plans are required to adopt standards that are at least as effective as the requirements laid out here. Additionally, all state laws relating to the issues examined in this ETS are preempted, and do not have the effect of law unless they are submitted to OSHA for approval. That authority extends, particularly, to those state laws that conflict with the provisions in the ETS.

State Opposition

The Fifth Circuit has recently issued a stay of the ETS in response to a lawsuit challenging its constitutionality, temporarily halting its enforcement until a final decision can be reached. Other circuits are facing similar challenges, but have yet to issue any decisions. Regardless of the decisions reached in any individual circuit court, there is likely going to be further consolidated review resulting in a final nationwide determination as to the ETS’ enforceability, possibly coming from the Supreme Court. As of right now, the best course of action is for employers to familiarize themselves with the dictates in the ETS so they may be prepared to immediately implement the required policies should this issue resolve itself in favor of the ETS’ enforceability. It is also important to recognize that while the ETS can mandate these policy implementations, employers have the right to decide for themselves whether they would like to administer the same kind of policies absent OSHA enforcement.

¹ Puerto Rico has its own OSHA-approved plan.

100 Employee Headcount

The ETS applies to all employers with 100 or more employees at any time while the ETS is in effect, except for:

- Employers covered under the [Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors](#) (the vaccine mandate for federal contractors), or
- Settings where the employee provides healthcare services or healthcare support services that fall under the requirements of [29 CFR 1910.502](#) (the vaccine mandate for healthcare workers).

In determining their number of employees, employers must include all employees across all of their U.S. locations. Part-time and seasonal employees also count towards the total, but independent contractors do not. There are some situations where it can be confusing to know which employees to count. Some common scenarios are addressed below.

- **Franchises:** In a traditional franchisor-franchisee relationship, the franchisor only counts their “corporate” employees and each franchisee only counts the employees of that individual franchise.
- **Staffing Agencies:** Where employees of a staffing agency are placed at a host employer location, only the staffing agency counts the employees being hosted. Normally, the staffing agency and the host employer would share coverage under OSHA but, for these purposes, the host employer only counts those individuals they employ directly, not those supplied by the staffing agency.
- **Multi-Employer Worksites:** In situations where there are multiple employers at a worksite, such as a host employer with a general contractor and subcontractor, each employer only counts its own employees at the worksite—they are not aggregated. That said, to meet the 100-employee threshold, the employer still must count all of its employees—not just those at a particular worksite.

This 100-employee threshold determination is measured as of November 5, 2021. If an employer had 100 or more employees as of that date, they are subject to the ETS requirements. If an employer did not meet the threshold number on November 5 but does later, it will be subject to the ETS once the threshold is reached. Once an employer is subject to the ETS requirements, it remains subject until the ETS expires, even if its headcount subsequently goes below 100.

Vaccination or Testing Requirement

OSHA has determined that vaccination is the best way to combat the COVID-19 pandemic. Thus the ETS requires employers to develop, implement, and enforce a written mandatory COVID-19 vaccine policy. The policy must exempt those who cannot receive the vaccine for medical reasons or who are entitled to reasonable accommodation due to a disability or religious belief.

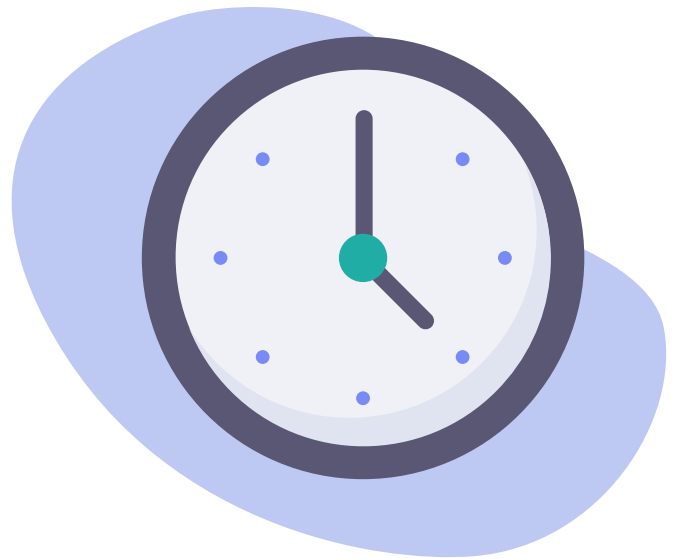
Alternatively, the ETS permits employers to establish, implement, and enforce a written policy that requires unvaccinated employees to (1) take COVID-19 tests and submit their results at least every seven days and (2) wear proper face coverings while in the workplace. Employers are strongly encouraged to create mandatory vaccination policies and refrain from permitting testing exceptions.

Employers must enforce their policies through training, work rules, and disciplinary action.

Leave

To remove barriers preventing employees from getting vaccinated, this ETS requires that employers provide up to four hours of paid time off for employees to get each primary dose of the COVID-19 vaccine. That time must only be paid if the employee uses regular work time to get the vaccine. However, that time may also include preparatory tasks like scheduling. Employers are not required to reimburse incidental costs such as travel.

Employers must also provide reasonable paid time off for the employee to recover from any side effects caused by the vaccine. Employers can limit the amount of paid time available. OSHA has indicated that providing two days of paid time for employees to recover from each primary dose would generally meet this requirement. Employers may require employees to apply any available paid leave they have already accrued.



Proof of Vaccination

To comply with these new mandatory vaccination policies, employees must submit valid proof of vaccination to their employers. Acceptable types of proof include:

- The record of immunization from a health care provider or pharmacy;
- A copy of the U.S. CDC COVID-19 Vaccination Record Card;
- A copy of other 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 healthcare professional(s) or clinic site(s) administering the vaccine(s).

If an employee is unable to obtain appropriate physical proof of vaccination, they may self attest to their vaccination status. However, the employee must first have made an honest effort to obtain their records through the means available to them. In their attestation, the employee must include all the details of their vaccination, to the best of their recollection, must attest that they are unable to produce proof of their status, and must include the following language: "I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties."

All policies created in response to this ETS must include exemptions for those with medical contraindications,² disabilities, or sincerely held religious beliefs which preclude them from receiving the COVID-19 vaccine. Employees who fall under those exemptions are entitled to and must be afforded reasonable accommodations. For more information regarding accommodations for disabilities and religious beliefs, employers should consult the Equal Employment Opportunity Commission's [website](#) for regulations, guidance, and technical assistance.

² A contraindication is a situation in which a medication, procedure, or other medical treatment should not be used because it may be harmful to the person. For example, when two medications interacting together create a negative impact on the patient's health, they would be contraindicated.

Testing Procedures

The policies employers create will need to detail the testing requirements for their employees, including such details as where they may be tested and to whom test results must be submitted. Self-administered and self-read tests (such as “at-home” COVID-19 tests) are unacceptable unless they are observed by the employer or an authorized telehealth provider.

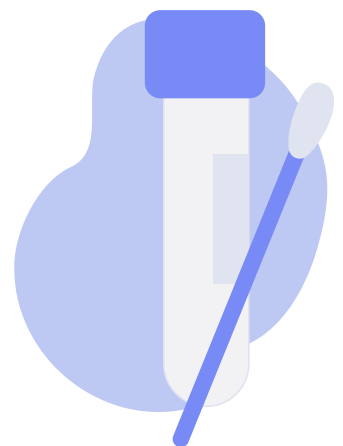
Employers must require employees who report to a worksite at least once every seven days to take COVID-19 tests and submit their results at least once every seven days. Employees who do not report to a workplace ^[3] at least once every seven days (e.g. a remote worker who comes in occasionally) will need to be required to be tested within 7 days prior to returning to the workplace and to provide documentation of the test result upon their return. The test must be taken within seven days prior to the employee’s return. Additionally, an employee who tests positive for COVID-19 is exempt from the testing requirement for 90 days following the positive test result.

If an employee submits a positive test or is otherwise diagnosed with COVID-19, the employer must remove the employee from the workplace immediately and not permit them to return to the workplace until certain requirements are met.

Employers are not responsible for testing costs for those employees who choose not to get the vaccine.

Returning to Work

Employees who receive a positive COVID-19 test or are diagnosed with COVID-19 by a licensed healthcare provider can return to work when they: (1) receive a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test, (2) meet the return-to-work criteria in the CDC’s “Isolation Guidance”; or (3) receive a recommendation to return to work from a licensed healthcare provider.



³ Be aware that employees reporting to worksites other than the employer’s place of business (for example, construction workers reporting to a worksite owned by the client or a group of employees holding an off-site meeting at a conference center), are considered to be reporting to a worksite.

Face Coverings

Employers must ensure that each employee who is not fully vaccinated wears a face covering while at the workplace. There are limited, temporary instances where those employees may remove their face covering, such as when eating or drinking. A face covering is one that completely covers the nose and mouth of the wearer, which is made with two or more layers of a breathable fabric that is tightly woven, is secured to the wearer's head, and is a solid piece of material without slits, exhalation valves, visible holes, or other openings in the material. Employers must ensure both that the employee wears the face covering correctly (covering the nose and mouth) and that the face covering is replaced when it gets wet, soiled, or damaged.

Employers may not prohibit any employee, customer, or visitor from voluntarily wearing a face covering regardless of vaccination status. Employers must also permit the use of respirators in place of face coverings, if the employee decides to use one.

Employers are not required to provide face coverings for employees who choose not to get the vaccine.

Information Required to be Provided to Employees

This ETS requires employers to provide certain information to their employees in a language they can understand and at an appropriate literacy level so that each employee can understand the information. This requirement may mean that employers need to develop multiple versions of their policies and information.

Employers must specifically provide information about their policies and procedures for COVID-19 testing and face coverings to unvaccinated employees. Employers must provide the following to all employees:

- The employer vaccination policy;
- The process to be used to determine vaccination status;
- The time and pay/leave employees are entitled to;
- The procedures employees need to follow to provide notice of a positive covid test/diagnosis;
- The procedures for requesting records;

Information about COVID-19 vaccine efficacy, safety, and benefits;

- The CDC's "[Key Things to Know About COVID-19 Vaccines](#)" must be provided.
- Information on retaliation protections provided by [29 CFR 1904.35\(b\)\(1\)\(iv\)](#);
- Information about how they are protected from discrimination for exercising their rights under the ETS according to [Section 11\(c\) of the OSH Act](#); and
- Information regarding criminal penalties associated with knowingly supplying false statements or documentation, which could include fines up to \$10,000 and imprisonment for up to six months or both under [Section 17\(g\) of the OSH Act](#).

Reporting Requirements

Employers are required to report each work-related COVID-19 fatality to OSHA within eight hours of learning about the fatality, and each work-related COVID-19 in-patient hospitalization within twenty-four hours of learning about it. The clock begins to run on these circumstances when either (1) the employer learns of the fatality or the hospitalization, or (2) when the employer learns that the fatality or hospitalization was the result of an exposure in the workplace. Employers must make reasonable effort to obtain necessary information to make good-faith work-relatedness determinations.

An employer “learns” of an occurrence when any employee learns of the occurrence. It is the employer’s responsibility to educate the workforce of their responsibilities to notify the appropriate contact with pertinent information.

Recordkeeping Requirements

Employers are responsible for maintaining records of each employee’s proof of vaccination and COVID-19 test results. Employers must also maintain a roster of all employees’ vaccination statuses and the basis for any employee’s status as unvaccinated. These records must be maintained as employee medical records and may not be released except to the individual employee or their representative, or upon request from OSHA.

Upon request, employers must provide the individual COVID-19 vaccine documentation and any COVID-19 test results for a particular employee—or former employee—to that employee and to anyone having written authorized consent of that employee by the end of the next business day after a request so that it may be examined and copied. The total number of fully vaccinated employees and total number of employees at a workplace must also be provided, upon request, to the same individuals by the end of the next business day.

Employers must provide the written vaccine policy required by this ETS and the aggregate numbers maintained in the roster to the Assistant Secretary ^[4] of the Department of Labor for examination and copying within 4 business hours of a request. Employers must provide all other records and other documents required to be maintained to the Assistant Secretary by the end of the next business day after a request.

Requesters are entitled to one free copy of each requested record, but may be charged for duplicative records, though not for an update to a previously requested record.

⁴ “Assistant Secretary” means the Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, or the Assistant Secretary’s designee. A designee includes a representative conducting an inspection or an investigation.

