



Federal ETS for Employers with 100+ Employees

November 10, 2021

* Although we will be providing legal information during this webinar, we will not be providing legal advice.

Agenda



- Introduction
- Litigation and Legal Challenges
- State OSHA Plans
- Employee Headcount
- Written Plans
- Vaccinate or Test Mandate
- Other Requirements
 - Response to positive tests
 - Face Coverings
 - Reporting
 - Recordkeeping
 - Providing Information

What are the ETS?



- The Federal ETS are “Emergency Temporary Standards” that were issued by the Occupational Safety and Health Administration (OSHA) on November 5, 2021.
- The Federal ETS [published in the Federal Register](#) are 154 pages long.
- Under the ETS, employers with at least 100 employees must adopt a vaccination policy that requires employees to be fully vaccinated or submit to at least weekly testing.

Legal Challenges and Litigation Part 1



- The ETS have already led to significant litigation.
 - The Attorney General of Arizona Mark Brnovich hurried to federal court to file the first suit before the ETS were even issued.
- When the text of ETS was released, on November 5, suits were quickly filed by 26 states and various private employers in the U.S. Courts of Appeals for the Fifth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits.
- On November 6, the Fifth Circuit issued a stay of the ETS pending expedited review.

Legal Challenges and Litigation Part 2



- Because suits raising similar issues have been brought in several different circuits, the Department of Justice notified the Judicial Panel on Multidistrict Litigation.
- The suits will be consolidated and assigned to one circuit court, chosen by lottery. They will then be heard by a panel of seven circuit and district court judges from different circuits.
- The Department of Justice has informed the Courts of Appeals that it expects the multi-circuit lottery to take place on or about November 16.

Legal Challenges and Litigation Part 3



- Will the suits challenging the ETS be successful? It's difficult to say.
- Before 2021, OSHA had only issued 9 ETS. Six of those ETS were challenged in court and only one was allowed to go into effect.
- The Supreme Court has already rejected challenges to vaccination mandates in New York, Indiana and Maine.
- Where does that leave businesses? We recommend that businesses become familiar with the ETS and prepare to implement them.

Why State Plans?

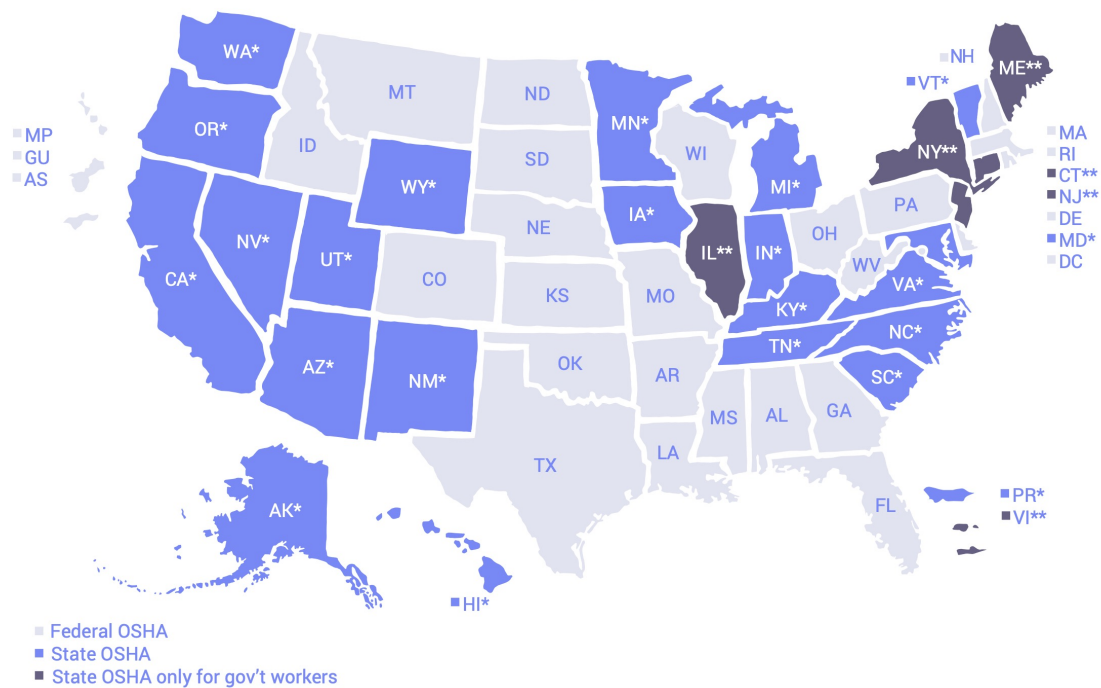


- Some states already had a program in place in 1970
- State plans cover public sector employees
- Laboratory of states
 - California
 - Workplace violence
 - Airborne disease
 - Heat
 - Virginia
 - 1st permanent COVID-19 Standard
- Split cost
 - Federal OSHA bears 50%
 - State bears 50%

State OSHA Plans



OSHA Applicability



State Plans Under Fire



- State plans must be at least as effective as federal reg
 - 15 days to tell OSHA how they plan to comply
 - 30 days to issue compliant state ETS
- State plans of AZ, UT, and SC in jeopardy
 - Failure to issue ETS for healthcare workers
 - Early move (October) in anticipation of the ETS for large employers
 - States have 45 days to respond & show cause why a proceeding should not commence

State Plan Revocation Process



- Determination by federal OSHA that state plan is not “at least as effective”
- Inform state of intent to revoke
 - Notice & hearing procedures
 - Could take longer than the ETS is in effect
- Return state to initial approval status
 - Resume concurrent jurisdiction
 - Notice & hearing requirements

Employee Headcount



- **100 Employees**
 - At ANY POINT after ETS passed
 - Fluctuate from below to above 100 = ETS applies
 - Fluctuate from above to below 100 = ETS applies
 - Not all contributing to headcount will be covered
- **Who counts**
 - Seasonal & part time workers count
 - Remote employees count
 - All locations count together (it is a corporate- or firm-wide count)
 - Outdoor employees count
 - Minors count
 - Staffing agency employees are counted by the agency, not the client
 - Independent Contractors do not count

Written Policy Requirement



- Employer must establish, implement, and enforce:
 - (1) a written mandatory vaccination policy, OR
 - (2) a written policy allowing employees a choice to either (a) be fully vaccinated OR (b) provide proof of regular testing and wear a face covering
- Written policy needs to be in place by December 5, 2021.
- Employer should make the policy readily accessible to all employees through normal methods of providing information to employees.
- Policy should be drafted in easily understandable language.

Option 1: Mandatory Vaccination



What to include in mandatory vaccination policy:

- Require full vaccination
- Exemptions for certain medical reasons and for employees who are entitled to a [reasonable accommodation](#) because of a disability, sincerely held religious belief, or pregnancy
- Information on determining vaccination status and how information will be collected and stored
- Paid time and sick leave for vaccination purposes
- Disciplinary action for employees who violate policy
- If not all employees vaccinated, testing and face covering requirements for unvaccinated employees
- Notification of positive COVID-19 tests and removal from workplace
- Who the policy applies to (in office vs. remote)
- Procedures for complying with policy

Leave Requirements



For purposes of vaccination, employer is required to:

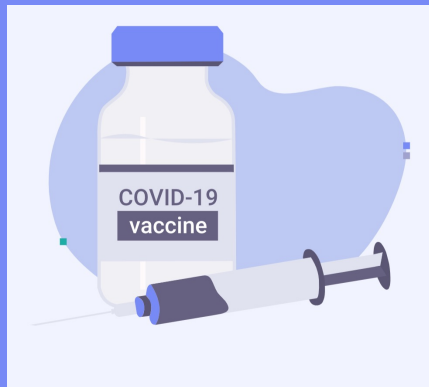
- (1) provide a reasonable amount of time to each employee during work hours for each of their primary vaccination doses, including up to 4 hours of paid time (including travel time), at the employee's regular rate of pay
- (2) provide reasonable time and paid sick leave to recover from vaccination side effects for each dose

Option 2: Allow Testing



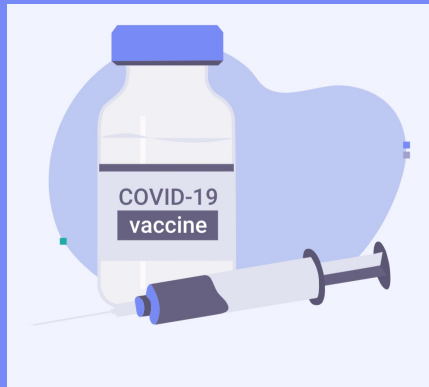
- If employer does not require vaccination, it must ensure employees who are not fully vaccinated comply with the following:
 - Employees who report at least once every 7 days to a workplace where other people are present (1) must be tested once every 7 days and (2) must provide documentation of the result to the employer within 7 days of providing the previous test result.
 - Employees don't report to a workplace with others during a period of 7 or more days (1) must be tested within 7 days prior to returning to the workplace and (2) must provide documentation of the result to the employer upon return.
- Employer must maintain proof of test result
- If employee doesn't provide documentation of test result, employee can't return to workplace until result is provided
- Employer does not have to (but may) pay for testing (unless required by other laws, regulations, or collective bargaining agreement).

Proof of Vaccination



- Employer has obligation to determination vaccination status of each employee.
- Acceptable proof of vaccination status:
 - 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 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).

Proof of Vaccination – Limited Option to Self- Attest



- If employee can't obtain appropriate documentation of vaccination, they can sign and date a statement that attests to the following:
 - (1) Vaccination status (full or partial);
 - (2) They lost or were unable to produce proof of vaccination;
 - (3) The type of vaccine administered (to best of recollection);
 - (4) Dates of administration (to best of recollection); and
 - (5) Name of provider or clinic that administered vaccine
- Must include declaration that statement is true and accurate and acknowledgment that knowingly providing false information may subject employee to criminal penalties

Employer Response to a Positive Test



- Regardless of vaccination status or testing, an employer must:
 - Require each employee to promptly notify the employer when they receive a positive COVID-19 test or are diagnosed with COVID-19
 - Immediately remove from the workplace any employee who receives a positive COVID-19 test or is diagnosed with COVID-19
 - Keep the employee removed until the employee:
 - Receives a negative result on a COVID-19 nucleic acid amplification test (NAAT)
 - Meets the return-to-work criteria in CDC's "Isolation Guidance"; or
 - Receives a recommendation to return to work from a licensed healthcare provider
- Employers are NOT required to provide paid time to any employee for removal because of a positive COVID-19 test or diagnosis of COVID-19

Face Coverings



An employer must ensure that each employee who is not fully vaccinated wears a face covering when indoors and when occupying a vehicle with another person for work purposes, except:

- When alone in a room with floor to ceiling walls and a closed door.
- For a limited time eating or drinking at the workplace or for identification purposes.
- While wearing a respirator or facemask.
- Where use of face coverings is infeasible or creates a greater hazard that would excuse compliance

Face Coverings



Definition of “face covering” in the ETS:

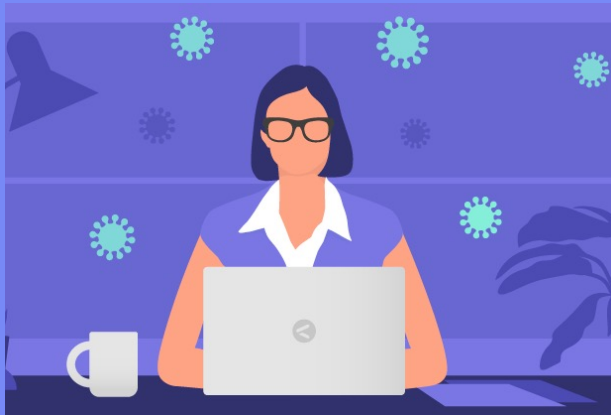
- Completely covers the nose and mouth;
- Is made with two or more layers of a breathable fabric that is tightly woven;
- Is secured to the head with ties, ear loops, or elastic bands that go behind the head;
- Fits snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and
- Is a solid piece of material.

Employer and Employee Reporting Duties



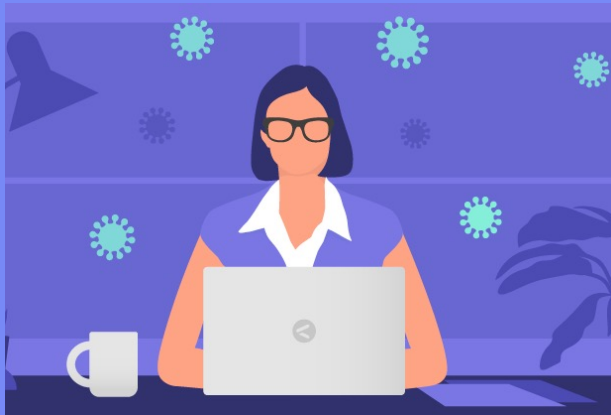
- An employer must report to OSHA:
 - Each work-related COVID-19 fatality within 8 hours of an employer learning about the fatality.
 - Each work-related COVID-19 in-patient hospitalization within 24 hours of an employer learning about the in-patient hospitalization
- Availability of records:
 - By the end of the next business day, employers must provide employees the following upon request:
 - An individual's COVID-19 vaccine documentation and any COVID-19 test results to that employee and to anyone having written authorized consent of that employee
 - The aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace

Providing Information to Employees



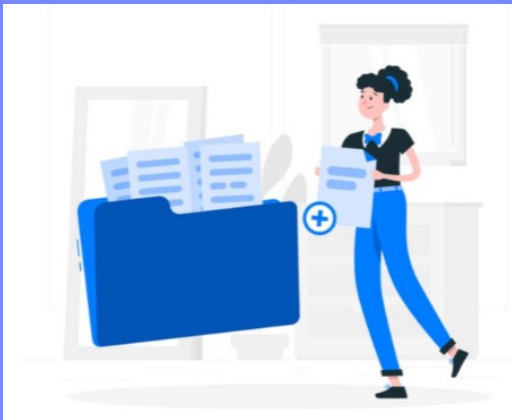
- An employer must inform each employee, in a language and at a literacy level the employee understands, about:
 - Company policies required by the ETS
 - The process that will be used to determine employee vaccination status
 - The time and pay/leave they are entitled to for vaccinations and any side effects experienced following vaccinations
 - The procedures they need to follow to provide notice of a positive COVID-19 test or diagnosis of COVID-19 by a licensed healthcare provider
 - The procedures to be used for requesting records
 - The procedures for COVID-19 testing and face coverings, as applicable

Providing Information to Employees



- An employer must inform each employee, in a language and at a literacy level the employee understands, about:
 - COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated, by providing the document, “Key Things to Know About COVID-19 Vaccines”
 - The requirements of 29 CFR 1904.35(b)(1)(iv), which prohibits an employer from discharging or in any manner discriminating against an employee for reporting a work-related injuries or illness
 - And Section 11(c) of the OSH Act, which prohibits an employer from discriminating against an employee for exercising rights under, or as a result of actions that are required by the ETS
 - The prohibitions of 18 U.S.C. 1001 and of section 17(g) of the OSH Act, which provide for criminal penalties associated with knowingly supplying false statements or documentation

Recordkeeping



- Employers must keep:
 - A record of each employee's vaccination status and must preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated
 - A roster of each employee's vaccination status
 - A record of each test result provided by each employee or obtained during tests conducted by an employer
- These records are considered employee medical records
- These records are not subject to the 30 year employee medical record requirement, but must be maintained and preserved while the ETS remains in effect.

Sixfifty Return-to- Worksite Toolset



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