



ETS is Back on the Menu

December 22, 2021

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

Agenda

- OSHA Emergency Temporary Standard (ETS)
 - What is an ETS?
 - What Does this ETS Require?
- The ETS Litigation
 - History
 - Overview
 - What's Next?
- Practical Outlook
 - What the ETS Means for Businesses
 - Best Practices
- Q&A

What is the ETS?



- The Federal ETS is the “Emergency Temporary Standard” that was issued by the federal Occupational Safety and Health Administration (OSHA) on November 5, 2021.
- The Federal ETS [published in the Federal Register](#) is 154 pages
- 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.

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
- 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
- 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.

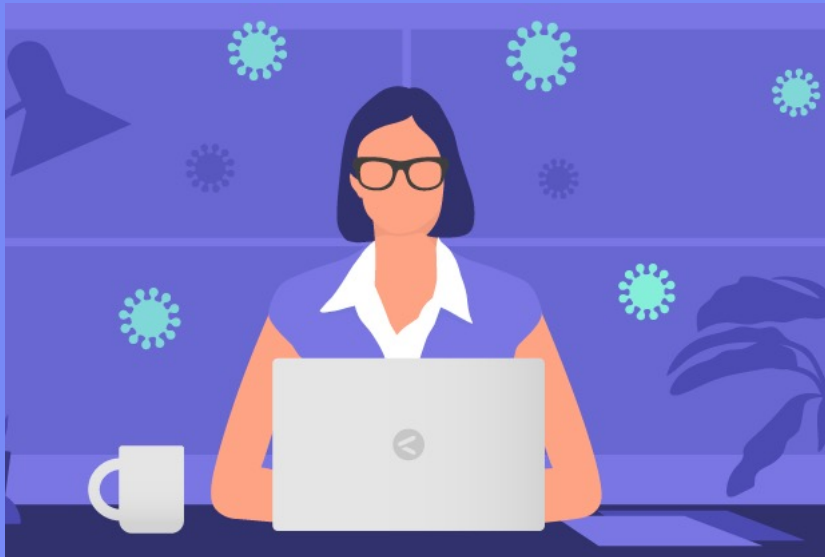
Leave Requirements



For purposes of vaccination, employer is required to:

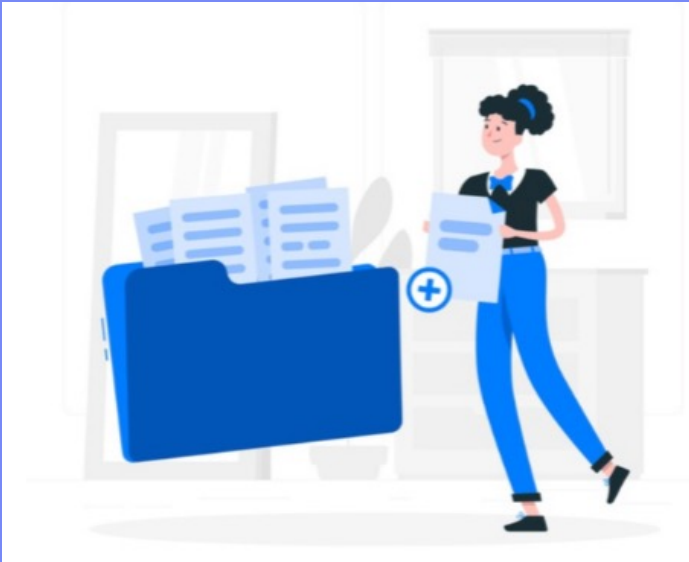
- (1) provide a reasonable amount of time to each employee during work hours for each of their primary vaccination doses, up to 4 hours of paid time (including travel time), at the employee's regular rate of pay
- (2) provide reasonable time and paid sick leave to recover from vaccination side effects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

Providing Information to Employees



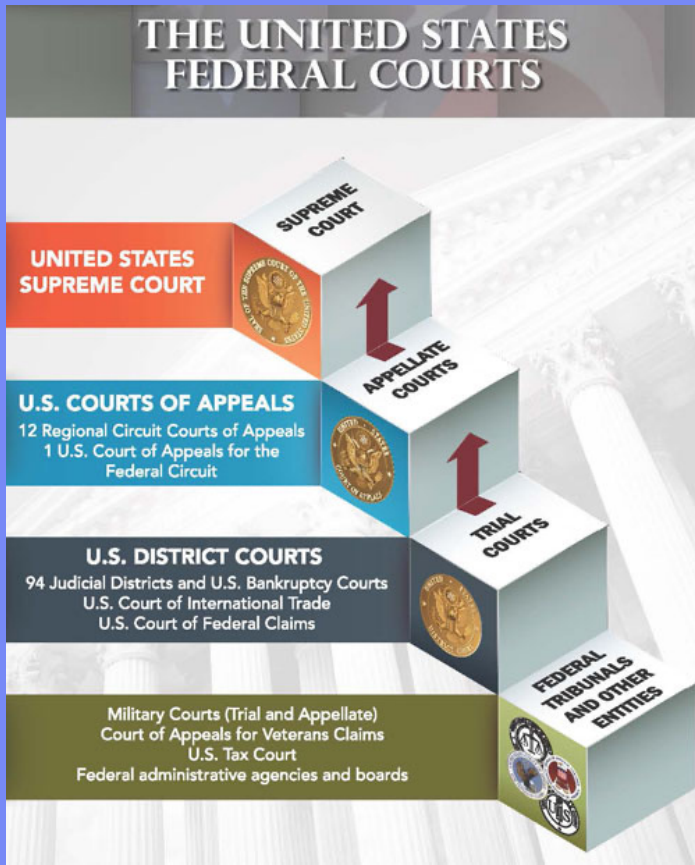
- An employer must inform each employee, **in a language** and at a literacy level the employee understands, about:
 - “Key Things to Know About COVID-19 Vaccines”
 - [Provisions of the ETS](#) prohibit an employer from discharging or in any manner discriminating against an employee for reporting a work-related injury or illness
 - The OSH Act prohibits an employer from discriminating against an employee for exercising rights under, or as a result of actions that are required by the ETS
 - Criminal penalties associated with knowingly supplying false statements or documentation

Recordkeeping

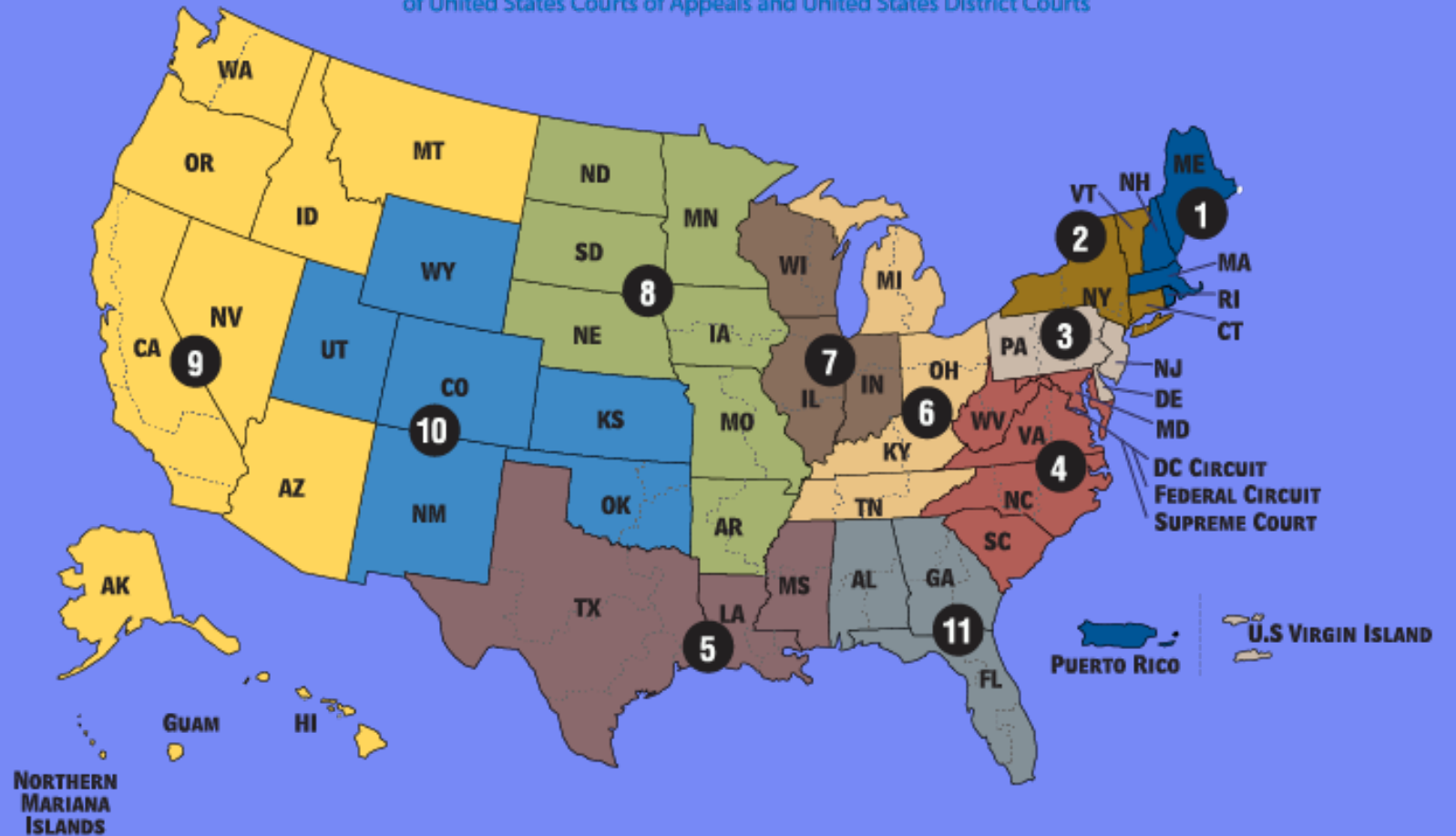


- Employers must:
 - Keep a record of each employee's vaccination status and preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated
 - A roster of each employee's vaccination status
 - A record of each test result provided by each employee or obtained during tests 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 they must be maintained and preserved while the ETS remains in effect.

Legal Landscape



Geographic Boundaries of United States Courts of Appeals and United States District Courts



ETS Litigation History



- November 5 – OSHA releases the ETS for public review and the floodgates are opened. Everyone Sues Everywhere.
- November 6 – The U.S. Court of Appeals for the Fifth Circuit pauses the ETS.
- November 16 – The Judicial Panel of Multidistrict Litigation consolidates all ETS cases (including the Fifth Circuit ruling) before the U.S. Court of Appeals for the Sixth Circuit.
- December 17 – The U.S. Court of Appeals for the Sixth Circuit dissolves the Fifth Circuit's pause on the ETS.
- ETS is Back on the Menu!

Sixth Circuits Opinion



- [2 – 1 Decision](#) by a three-judge panel of the Sixth Circuit lifting the pause on the ETS.
- The Panel focused on who will likely win the lawsuit.
- The Decision directly contradicts the earlier Fifth Circuit decision.
- The Panel found that the ETS is likely within OSHA's:
 - Constitutional Authority
 - Statutory Authority
 - Emergency Temporary Standard Requirements

Conflicting Decisions



- “Grave danger” standard
- 5th Circuit – “Because the petitions give cause to believe there are grave statutory and constitutional issues with the Mandate”
- 6th Circuit – It is “difficult to imagine more OSHA could do to justify its findings that workers face a grave danger in the workplace”

¹In comparing this case with *Alabama Association*, the Fifth Circuit wrote, “But health agencies do not make housing policy, and occupational safety administrators do not make health policy.” *BST Holdings*, 17 F.4th at 619. The Fifth Circuit fails to acknowledge that OSHA stands for the Occupational Safety and Health Administration. See 29 U.S.C. § 651(b) (“The Congress declares it to be its purpose and policy . . . to assure so far

What's Up Next in the Litigation?



- Within an hour of the Sixth Circuit's decision, an emergency petition to pause the ETS was filed.
- The petition is directed to Justice Kavanaugh who oversees the Sixth Circuit.
- Justice Kavanaugh has asked for additional briefings to be filed for the case by December 30, 2021.
- A decision will likely not be made until early next year.

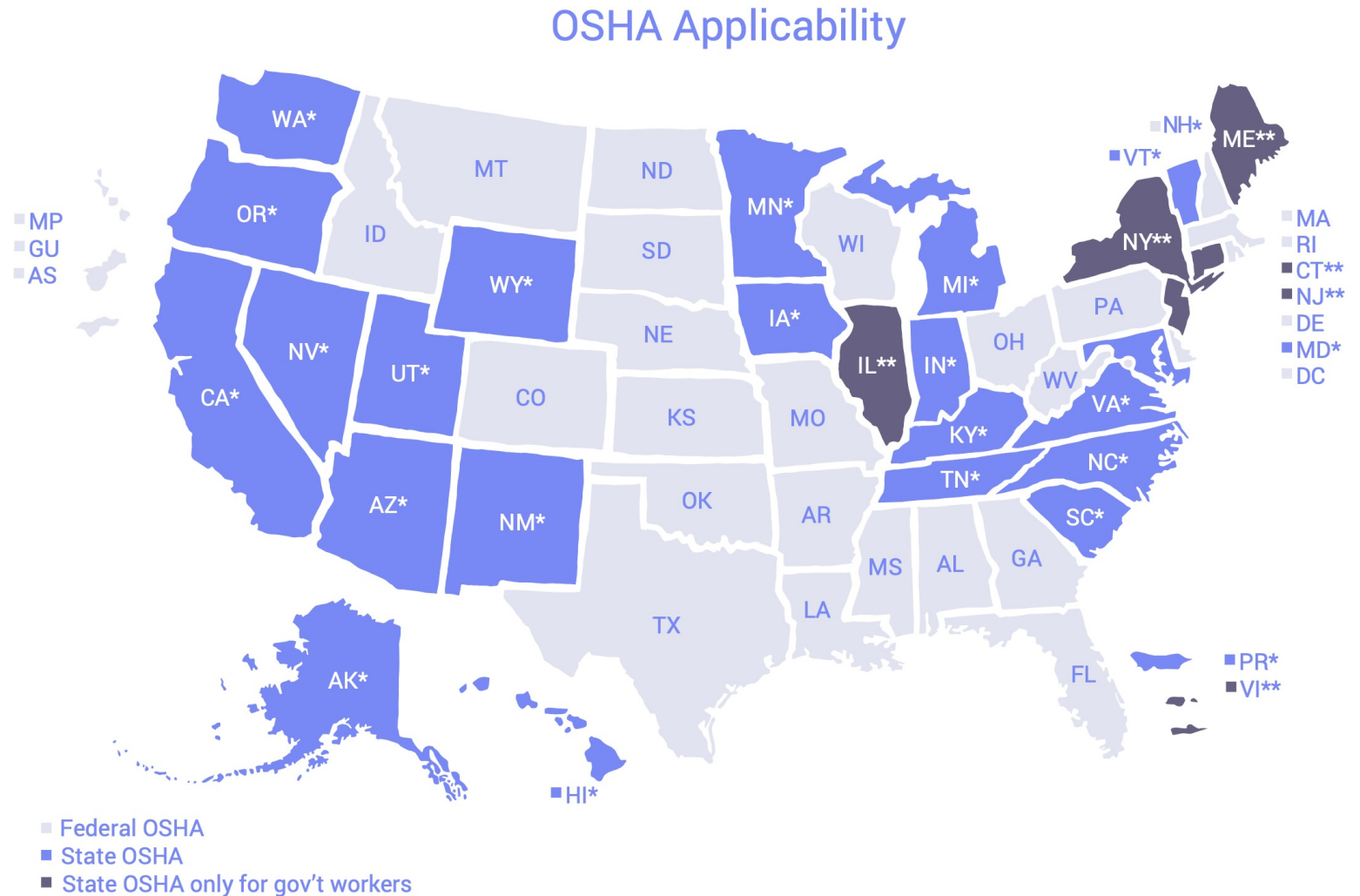
Deadlines

- Immediate Effect!
 - OSHA could technically issue citations TODAY based on the text of the ETS
- If you are exercising reasonable, good faith efforts to come into compliance:
 - No citations for noncompliance until January 10
 - No citations for noncompliance with testing requirements before February 9
 - OSHA will work closely with companies to provide compliance assistance
- The ETS is a proposal for a permanent standard
 - Written comments on any aspect of the ETS must be submitted by January 19, 2022
 - Submit comments to www.regulations.gov in Docket number OSHA-2021-0007



State OSHA Deadline

- States with their own OSHA plans must be at least as protective as federal OSHA
- Original State Deadlines:
 - Notify OSHA of intentions by Nov. 20
 - Adopt the ETS or its own regulation by Dec. 5
 - Those deadlines were not modified due to the pause
- Expect to hear from state plans in the coming days



Next Steps for Businesses

- Determine whether the ETS covers your organization
 - Federal or state OSHA?
 - 100 employees nationwide?
 - Are you exempt?
- Create a compliant, written COVID-19 Policy
 - Communicate it to your workforce
 - Prepare to implement it by January 10
- Gather vaccine status information
 - Develop a vaccination roster
- Determine how you will train your workforce
 - Start the info campaign early
- Start researching practical solutions to testing in the locations where you have employees if you will offer the testing option



Written Policy Best Practices



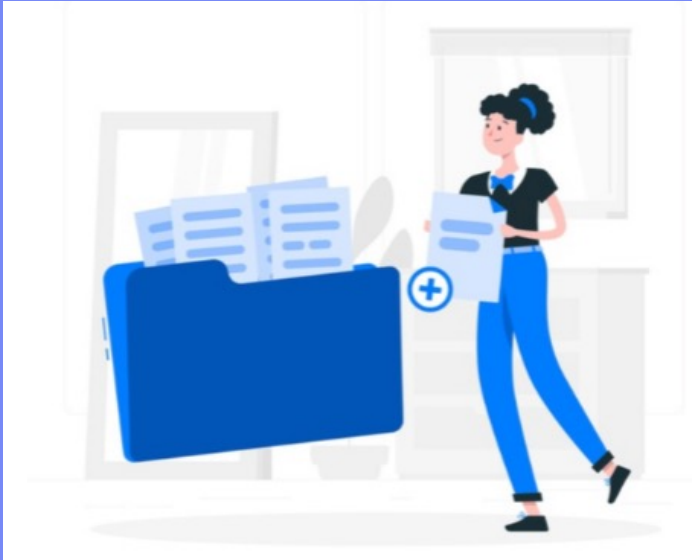
- At a minimum, a policy should include:
 1. Requirements for COVID-19 vaccination;
 2. Applicable exclusions from the written policy;
 3. *Testing & face covering requirements;
 4. How will you collect status info
 5. Paid time and sick leave for vaccination purposes
 6. Notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace;
 7. Information to be provided to employees; and
 8. Disciplinary action for violating the policy;
 9. All relevant information regarding the policy's effective date, who the policy applies to, deadlines, and procedures for compliance and enforcement
- Employer should make the policy readily accessible to all employees through normal methods of providing information to employees

Providing Information to Employees



- Communication Is KEY
 - Company COVID-19 policy as required by law or implemented at company's discretion (vaccination, masking, screening, remote working, etc.)
 - The process that will be used to determine employee compliance with policy
 - The procedures they need to follow to provide notice of a positive COVID-19 test or diagnosis of COVID-19
 - The procedures for COVID-19 testing and face coverings, as applicable
 - Mission/Values-based reasons for how you are making policy decisions
 - UPDATES to the COVID-19 Policy

Recordkeeping Best Practices



- Records of the policies themselves
- Track vaccination status information
- Screeners
- Contact Tracing and Investigations
- Keep medical records separate and confidential
 - OSHA has a 30-year medical record retention rule
 - Federal ETS and Cal-OSHA currently exempt vaccine cards from the 30-year requirement
 - All vaccine and testing records and rosters required by the ETS are considered employee medical records
 - ADA has a 1-year medical record retention rule
 - Self-screeners are subject to the 1-year rule but don't qualify as medical records under Fed OSHA

Face Coverings Under the ETS



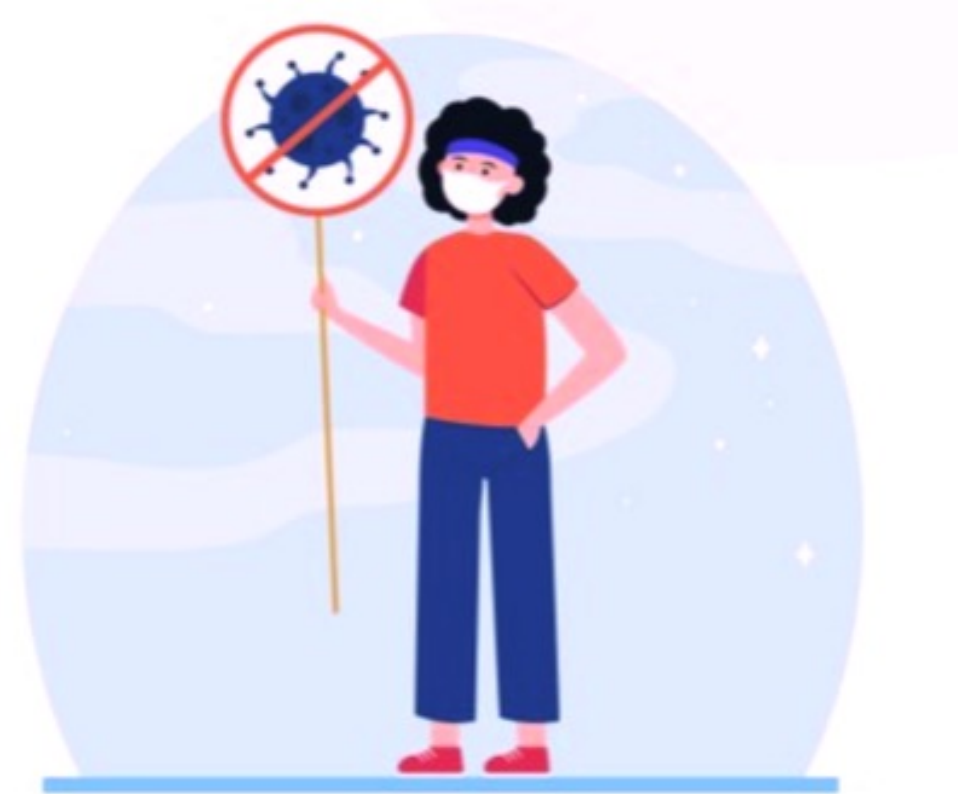
An employer should ensure that each employee who is not fully vaccinated wears a face covering when indoors and when occupying a vehicle with another person for work purposes, except:

- 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;
- Where use of face coverings is infeasible or creates a greater hazard that would excuse compliance;

* Non-ETS Best Practice – if you do not know which employees are vaccinated, require everyone to mask and social distance

Masking Best Practices

- Everyone should wear a mask indoors in public if you are in an area of substantial or high transmission.
- Unvaccinated individuals should wear a mask indoors in any public space
- Wear a mask if:
 - Immunocompromised
 - At higher risk for severe complications from COVID-19
 - Someone in the household is immunocompromised, at increased risk of severe complications, or not fully vaccinated
- Check your county using the CDC's [online tool](#)





What to Do After Testing Positive

Status	Return to Worksite	Quarantine/ Isolate	Inform Close Contacts	Self Care
Vaccinated	<ul style="list-style-type: none">Receiving a negative testMeeting CDC isolation guidance recommendations	If tested positive over last 10 days	Can be spreading 48 hours before symptoms appear or test positive	<ul style="list-style-type: none">Monitor SymptomsHydrateSeek emergency care if neededMask if around others
Unvaccinated	<ul style="list-style-type: none">Receives a recommendation to return from a licensed healthcare provider	14 Days		



Employee Health Screening

- California still requires daily health screeners
- Many other jurisdictions relaxed screening requirements with their masking rules
- CDC guidance does not require screening, but considers it a best practice
- Many workplaces will have individuals who cannot receive the vaccine for exempt reasons
- Vaccinated individuals can still get COVID-19
- Tracking close contacts if there is a COVID case at your worksite is easier if you have screeners