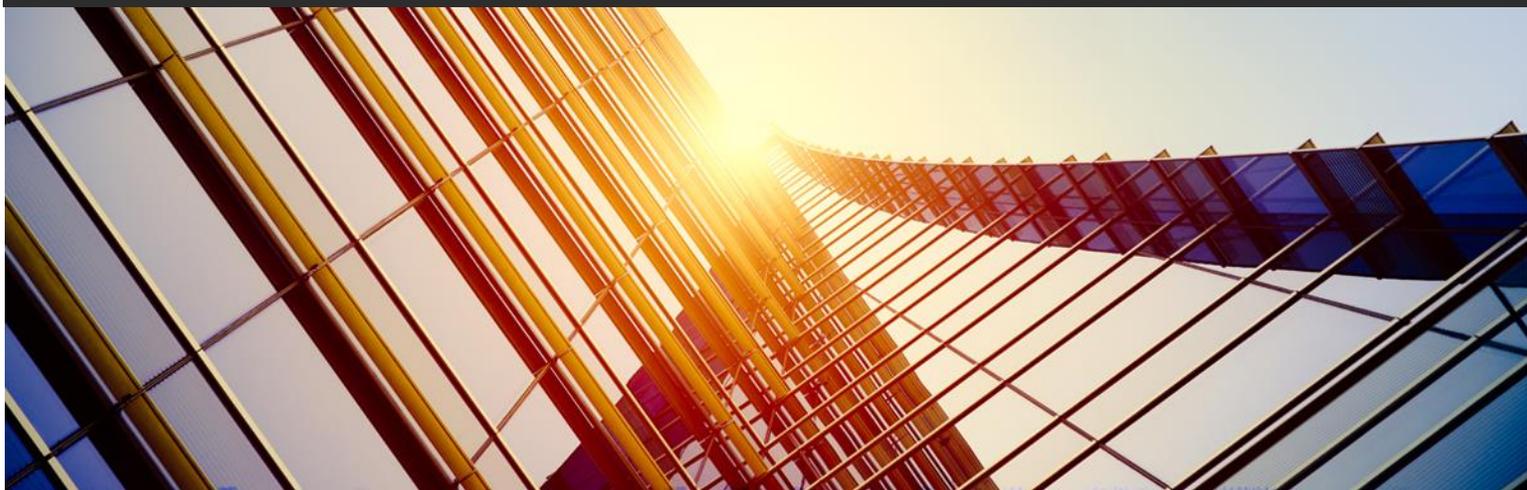


**Alert | Health Emergency Preparedness Task Force:  
Business Continuity Amid COVID-19**



November 2021

## **The COVID-19 Vaccine/Testing Mandate Is Here: What Does It Mean for Employers?**

On Nov. 4, 2021, the Occupational Safety and Health Administration (OSHA) unveiled its long-awaited [Emergency Temporary Standard \(ETS\)](#) regarding the Coronavirus Disease 2019 (COVID-19) vaccination, vaccination verification, face coverings, and testing.

The COVID-19 ETS requires employers with more than 100 employees to develop, implement, and enforce either: (1) a mandatory COVID-19 vaccination policy; or (2) a policy requiring employees to choose between getting vaccinated or undergoing regular COVID-19 testing and also wearing a face covering at work. The COVID-19 ETS will remain in effect for at least six months. The COVID-19 ETS requirements go into effect in 30 days (**Dec. 5, 2021**), except for the testing requirements, which go into effect in 60 days (**Jan. 4, 2022**). Any lawsuits challenging the ETS must be filed in the appropriate United States Court of Appeals by Jan. 4, 2022.

The Biden administration also announced that the compliance deadline for vaccine mandates for federal contractors and subcontractors will parallel with the Jan. 4, 2022 ETS deadline. Today, the Centers for Medicare and Medicaid Services announced it was requiring workers at health care facilities participating in Medicare and Medicaid to be fully vaccinated by Jan. 4, 2022. The upshot of this is that if an employer is subject to multiple government regulations, the compliance deadline is the same.

The ETS provides clarity on a number of important implementation issues.

- **How to count 100 employees** – The COVID-19 ETS applies to employers that have more than 100 employees company-wide, not just at any individual location, measured as of Nov. 5. Thus, for the sake of example, if an employer has 50 locations with two employees at each location, the employer is covered by the ETS. For the purposes of assessing whether an employer is covered by the ETS, part-time employees—which include temporary and seasonal employees—are to be counted toward the 100-employee threshold. However, independent contractors are not counted in the 100-employee threshold. Each employer is to count its own employees. Employees who work from home count towards the 100-employee threshold.
- **Workplaces not covered** – the COVID-19 ETS does not apply to: (1) workplaces covered under the Safer Federal Workforce Task Force; (2) health care settings already subject to the requirements of the previously implemented ETS; or (3) remote employees who do not perform work in the workplace at least part of the time.
- **Vaccination Policy** – Covered employers must have either a vaccination or testing policy (“vaccinate-or-test”). Employers who choose to go the vaccination route must establish, implement, and enforce a written mandatory vaccination policy. This can include a vaccination policy that applies only to a portion of the workforce—for example, it could exempt employees who work from home only or employees who work exclusively outdoors.
- **Religious and medical accommodations** – An employer’s mandatory vaccination policy need not apply to employees:
  - For whom a vaccine is medically contraindicated;
  - For whom medical necessity requires a delay in vaccination; or
  - With legal entitlement to a reasonable accommodation under federal civil rights laws, because of a disability or sincerely held religious belief.
- **Paid time for vaccination and sick leave for side effects of vaccination** – An employer must provide at least four hours of paid time to each employee for each of their primary vaccination doses. The employer must also provide reasonable time and paid sick leave for employees to recover from side effects of a COVID-19 vaccine. Employers may not substitute mandated unpaid sick leave for employee time off.
- **Alternative to Vaccination at Company Discretion** – An employer may choose to allow an exception to vaccination provided that it enforces a policy requiring both proof of regular testing for COVID-19 and use of a face covering at work. In other words, an employer may implement a policy that gives employees a choice between: (1) getting vaccinated, or (2) submitting to regular testing and wearing a face covering at the workplace. The specific requirements should an employer elect an alternative to vaccination of the entire workforce are summarized below.
- **Proof of vaccination** – Employers must determine the vaccination status of each employee and require employees to provide proof of vaccination status, including whether they are fully or partially vaccinated.
  - Employees must provide proof of vaccination (e.g., a record of immunization or a copy of the COVID-19 Vaccination Record Card) or, if proof is not available, sign an attestation form regarding their vaccination status.
  - An employer must treat an employee who refuses to provide proof of vaccination status as not fully vaccinated.

- Employers must maintain a record of each employee’s vaccination status and treat it as a medical record.
- Proof received by the employer before Nov. 5, 2021, can be credited and the employer does not need to re-verify those vaccinations or comply with other record-keeping requirements if they did not then keep copies of the vaccination record.
- **Testing for employees who are not fully vaccinated** – Employees who are not fully vaccinated must submit to regular COVID-19 testing.
  - For employees who are not fully vaccinated and who report to a workplace where other employees work or where customers are present at least once a week, testing must occur at least weekly, and records must be updated every seven days—which may result in more frequent testing.
  - Employees who are not fully vaccinated and who report to a workplace less frequently, must provide a test before every visit, and the test must have been taken within seven days of the office visit. This also applies to work-from-home employees in the event they do come to the workplace.
  - Employers must exclude and/or remove employees from the workplace who do not provide a negative COVID-19 test result until they provide a negative test result.
  - Employers must keep a record of employee test results and treat those records as medical records.
- **Who pays for testing?** – The ETS does not require employers to pay for any costs associated with employee COVID-19 testing. An employer may pay for the costs if it chooses to do so. However, other federal and state laws or collective bargaining agreements may require an employer to pay for testing.
- **Face coverings** – With few exceptions (e.g., when an unvaccinated employee is alone in a room), employees who are not fully vaccinated must also wear face coverings when in an indoor workplace or when in a vehicle with another employee.
- **Notification and removal after a positive COVID-19 test** – Employees must notify employers when they test positive for COVID-19 or are diagnosed with COVID-19 by a health care provider. The employer must remove the positive COVID-19 employee from the workplace until the employee: (1) has a negative test; (2) meets the return-to-work criteria under the Centers for Disease Control and Prevention guidelines; or (3) receives a recommendation to return to work by a health care provider.
  - Employers are not required to provide paid time to any employee for removal due to a positive COVID-19 test or diagnosis. State law or regulations, however, may require an employer to provide paid time to employees.
- **Informing employees** – Employers must inform employees of, among other things, its vaccination policy, the requirements of the ETS, and COVID-19 vaccine efficacy and safety.
- **Employees who refuse vaccination or testing** – If an employer implements a mandatory vaccination policy, the employer can terminate employees who refuse to be vaccinated, provided the employees are not entitled to a medical or religious accommodation. Though the ETS does not require the employer to terminate the employees who refuse vaccination, continuing to employ the unvaccinated employee puts the employer at risk of an OSHA citation for violating the ETS. The maximum penalty for a serious violation is \$13,653 per violation, which can be multiplied by repeat instances of noncompliance.

It is generally expected there will be judicial challenges to the ETS, as both states and business groups have indicated they will challenge the ETS in court and seek to enjoin its enforcement. The litigation may focus on whether OSHA has established that “employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful” and that the ETS is “necessary to

protect employees from the danger.” The Department of Labor has signaled they stand ready to defend the ETS against such challenges.

Importantly, the COVID-19 ETS preempts inconsistent state or local law, including existing laws that prohibit employers from implementing COVID-19 safety protocols such as vaccination, masks, and/or testing.

## KEY TAKEAWAYS

OSHA has taken the position that the COVID-19 ETS preempts any conflicting state or local laws, even state OSHA plans that must be federally approved. As such, it is clear that there will be challenges to the COVID-19 ETS. Still, in preparation for the Jan. 4 compliance deadline, employers must promptly: (1) decide whether to implement a mandatory vaccination policy or a policy that allows employees an option of vaccination or submitting to mandatory weekly COVID-19 testing consistent with the ETS; (2) develop a system to track and log employees’ vaccination status and/or the results of weekly COVID-19 testing, if an employer chooses the vaccinate-or-test option; and (3) establish a policy and system to address reasonable accommodation requests, if any, that complies with governing regulations promulgated by the Equal Employment Opportunity Commission.

For more information and updates on the developing situation, visit [GT’s Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#) and [Business Continuity Amid COVID-19](#) page.

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