



Featured News

EMPLOYMENT ALERT
OSHA Vaccination and Testing Standard

The much anticipated OSHA COVID-19 vaccination and testing emergency temporary standard (“ETS”) was released on November 4, 2021, and is set to be published on November 5, 2021. As promised, it mandates that employers with 100 or more employees require that their employees receive a COVID-19 vaccine authorized by the FDA with limited exceptions. Importantly, California, as well as other states with federally approved occupational safety and health state plans (each a “State Plan”), have 30 days to amend their standards to be identical to or “at least as effective as” the ETS or demonstrate that the State Plan covering the ETS is “at least as effective” as the ETS.



In a nutshell, the ETS requires covered employers to either (1) develop, implement and enforce a mandatory COVID-19 vaccination policy or (2) develop, implement and enforce a hybrid vaccination and COVID-19 testing/face covering policy.

Covered Employers.

Covered employers are employers that have 100 or more employees across all of their U.S. workplaces. In calculating the number of employees an employer has, all employees, regardless of current vaccination status, are counted. Additionally, there is no distinction between part-time and full-time, remote workers and in-office staff, temporary and seasonal employees, minors or employees that work exclusively outdoors, in determining whether an employer meets the 100 employee threshold. All employees are tallied in determining whether the employer has 100 employees, i.e., is a covered employee under the ETS.

Although counted in determining if an employer meets the 100-employee threshold under the ETS, not all employees may be subject to the policy developed by the employer in accordance with the ETS. A covered employer with 150 employees, 100 of which work entirely remotely and 50 that work in an office setting, are only required to mandate vaccinations or testing/face coverings for the 50 employees working in the office.

Employer Policy.

A covered employer’s vaccination policy is required to set forth details for employees including:

1. requirements for COVID-19 vaccination;
2. applicable exclusions from the policy (e.g., medical contraindications, medical necessity requiring delay in vaccination, or reasonable accommodations for workers with disabilities or sincerely held religious beliefs);
3. how the covered employer will determine an employee’s vaccination status and how this information will be collected;
4. paid time and sick leave for vaccination purposes;
5. notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace;
6. information to be provided to employees, i.e., personal information regarding their vaccination status or information regarding the number of employees vaccinated in a work location versus the total number of employees; and
7. disciplinary action for employees who do not abide by the policy.

The policy should also clearly identify when it will be effective, to whom the policy applies, and deadlines for getting vaccinated or providing vaccination information.

If an employer chooses to have a hybrid plan where an employee may choose to forego vaccination, separate and apart from medical or religious accommodations, the employer should also set forth requirements for testing and wearing face coverings.

Proof of Vaccination Status.

Important to the covered employer's policy will be the requirement that an employer obtain and maintain physical or electronic copies of an employee's proof of vaccination. It is not sufficient that the employer merely view the vaccination information. The EST provides a list of documentation acceptable to prove vaccination status.

In certain situations, an employee may not be able to provide acceptable proof of vaccination status. In that case, an employee will be required to issue a statement setting forth their vaccination status and the efforts that they have undertaken in order to obtain documentation verifying vaccination. The statement will require a declaration that it is true and accurate and that the employee is not knowingly providing false information.

In addition, a covered employer will be required to maintain a roster of employees noting vaccination status – fully vaccinated, partially vaccinated, unvaccinated due to medical or religious accommodation or unvaccinated.

Employer Vaccination Support.

A covered employer must provide its employees with up to four (4) hours of paid time to obtain each of the employee's primary vaccination doses. The primary vaccination is a single-dose vaccination for the Janssen (Johnson & Johnson) vaccine, and a two (2)-dose primary vaccination series for the Pfizer-BioNTech and Moderna vaccines. Booster shots are not considered part of the primary vaccination and not included in the requirement that an employee be provided with paid time for vaccinations.

Paid time for vaccinations does not include reimbursement for transportation costs to obtain the vaccine. It is merely a provision for a reasonable amount of time to allow each employee to receive their primary vaccination doses. This can include time spent during work hours related to the vaccination appointment(s), such as registering, completing required paperwork, all time spent at the vaccination site (e.g., receiving the vaccination dose, post-vaccination monitoring by the vaccine provider), and time spent traveling to and from the location for vaccination (including travel to an off-site location (e.g., a pharmacy), or situations in which an employee working remotely (e.g., telework) or in an alternate location must travel to the workplace to receive the vaccine).

Although under the ETS an employer is not required to provide paid-time off for an employee to recover from any side effects from a vaccination, an employee that has accrued paid sick leave is entitled to use it and may be required to use it.

COVID-19 Testing for Unvaccinated Employees.

Any unvaccinated employee, which includes employees that are only partially vaccinated and those subject to accommodations, that report to a workplace are required to submit to a weekly COVID-19 test. Additionally, any employee who normally works remotely or is normally exempt from the vaccination/testing policy, but must come to the workplace, is required to obtain a negative COVID-19 within seven (7) days prior to his/her/their appearance at the workplace. An unvaccinated employee entering the workplace is also required to wear a face covering.

Although covered employers are not required to pay for the costs of COVID-19 testing, it may be required by other state or local laws. Additionally, covered employers are required to maintain records of each test result. Both vaccination status and test results are considered employee medical records and must be maintained accordingly.

Records.

Under the ETS, an employer must make available to an employee or an employee's representative, that individual employee's COVID-19 test and/or vaccination documentation. This information must be provided the next business day following the day on which a request has been made.

In addition, employers are required to provide employees, upon request, with the aggregate number of fully-vaccinated employees at the workplace along with the total number of employees at the workplace. This is also required to be provided by the business day following the request.

Compliance Deadlines.

Within thirty (30) days of publication, November 5, 2021, employers are required to have:

- established a policy on vaccination;
- obtained the vaccination status of each employee (including proof of vaccination and roster of the vaccination status of all employees);
- provided paid time for employee vaccinations;
- required employees that are not fully-vaccinated to wear face coverings when indoors;
- provided employees with information about the ETS, vaccination efficacy, safety and benefits, protections against retaliation and discrimination and criminal penalties for providing false information; and
- make vaccination and COVID-19 testing records available.

Within sixty (60) days of publication, employers are required to ensure that employees who are not fully-vaccinated are tested at least weekly if in the workplace at least once a week or within seven (7) days before returning to the workplace.

It is important to understand that an employer must require any employee who comes to work at the workplace to be fully-vaccinated or tested. This requirement means, for example that, an employee must have completed the initial Pfizer dose, the second Pfizer dose and the two (2) – week waiting period subsequent to the second Pfizer dose before being considered fully vaccinated under the ETS.

California.

As stated above, California, specifically CAL-OSHA, may present a plan that is identical or at least as effective as the ETS within the next thirty (30) days. With that being the case, it would be prudent for employers to determine the policy that they plan to develop – mandated vaccinations or hybrid – and begin educating their employees accordingly.

As with everything related to COVID-19 and your workforce, the landscape is constantly changing. Please contact us if you have any questions regarding COVID-19 and your employees or the ETS.



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