

# SHERMAN & HOWARD ADVISORY

## OSHA Issues Long-Awaited Vaccine Mandate



November 4, 2021

On November 4, the Occupational Safety and Health Administration ("OSHA") issued an Emergency Temporary Standard ("ETS") requiring most employers in the country to implement COVID-19 vaccine requirements or require employees to present evidence of weekly negative COVID-19 tests. While the 490-page ETS will not be officially published until November 5, it is available to the public and can be found [here](#). The following is an overview of the ETS:

### Which Employers Are Covered?

The ETS applies to all employers who have 100 or more U.S. employees at any time the standard is in effect, regardless of the number or location of worksites an employer may have. Part-time employees count toward the 100-employee threshold, but independent contractors do not. Employees of a staffing agency would be counted by that agency, and not the employer to whom they are sent to work. On multi-employer worksites, such as in construction, each employer would count its own employees (regardless of whether they are working on that particular site) but would *not* count the employees of other employers onsite. For employers who have both remote and in-office employees, all such employees are counted toward the 100-employee threshold. It is important to note that once an employer is covered by the ETS, it is covered for the duration of the standard's effectiveness regardless of whether the employer subsequently drops under 100 employees.

### Exemptions:

The ETS does not apply to the following:

- Those workplaces covered by the [Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors](#);
- Those settings where any employee provides healthcare services or healthcare support services while they are covered by the requirements of [OSHA's Healthcare ETS \(29 CFR 1910.502\)](#); and



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- Employees (a) who do not report to a workplace where other individuals such as coworkers or customers are present; (b) while working from home; or (c) who work exclusively outdoors. However, OSHA has made clear that these are very narrow circumstances. For example, on construction sites, most employees will spend at least some of their time indoors and therefore will not be excluded from the vaccine mandate.

## What Does the Standard Require?

The ETS contains many requirements for covered employers. The most notable among them are as follows:

- Employers must determine the vaccination status of all their employees. Employees who do not provide proof of vaccination must be treated as not fully vaccinated. Acceptable proof of vaccination includes:
  - 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 health care professional(s) or clinic site(s) administering the vaccine(s).
- Employers must maintain electronic or hard copies of the proof of vaccination for all employees.
- Employers must maintain a "roster" of employees and their vaccination status (i.e., fully vaccinated, partially vaccinated, not fully vaccinated due to an accommodation, or not fully vaccinated because no proof of vaccination provided).
  - These records are considered "medical records" for purposes of confidentiality and must not be disclosed except as authorized by law. However, employers' obligation to retain these records exists only while the ETS is in effect.
- Employers must establish, implement, and enforce a *written* mandatory vaccine policy. This policy must require:
  - Vaccination of all employees, including new employees as soon as practicable, other than employees
    - For whom a vaccine is "medically contraindicated";
    - For whom a medical necessity requires a delay in vaccination; or
    - Who are legally entitled to a religious or medical accommodation.
- Employers are exempted from the mandatory vaccine policy requirement only if they establish, implement, and enforce a *written* policy "allowing any employee not subject to a mandatory vaccination policy to choose either to be fully vaccinated against COVID-19 or provide proof of regular testing for COVID-19 ... and wear a face mask . . . ."
- Employers who choose this alternative must require employees who are not fully vaccinated to provide proof of a negative COVID-19 test every 7 calendar days. For employees who do not

regularly work in areas where other employees or customers are present, they must be tested within 7 calendar days of entering such an area and provide proof of the negative test before entering the area.

- The ETS does not require employers to pay for such testing, though they may do so if they wish. Other obligations, such as collective bargaining agreements or legal accommodations, may require such employer payment.
- The ETS prohibits tests that are both self-conducted and self-read unless the test is proctored or observed, and antibody tests will not be permitted.
- Employees who do not provide proof of a negative test must be excluded from the worksite until a negative test is provided.
- Employees who test positive for COVID-19 must not be forced to test again for 90 days.

These records are considered “medical records” for purposes of confidentiality and must not be disclosed except as authorized by law. However, employers’ obligation to retain these records exists only while the ETS is in effect.

- Employers must require that employees report a positive COVID-19 test result and exclude such employees from the workplace until:
  - The employee receives a negative result;
  - meets CDC return-to-work criteria; or
  - receives a recommendation to return to work from a licensed healthcare provider.
- Employers must require non fully vaccinated employees to wear face coverings except:
  - When an employee is alone in a room with floor to ceiling walls and a closed door;
  - For a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements;
  - When an employee is wearing a respirator or medical procedure mask; or
  - Where the employer can show that the use of face coverings is infeasible or creates a greater hazard.
- Employers must not prohibit customers or visitors from voluntarily wearing face coverings.
- Employers must provide a reasonable amount of time for employees to get vaccinated and must provide up to 4 hours of paid time to do so. Employers must also provide reasonable paid sick leave for employees to recover from any side effects of a vaccination.
- Employers must inform employees, in a language and at a literacy level the employee understands:
  - About the ETS’s requirements;
  - About COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated, by providing the document, “[Key Things to Know About COVID-19 Vaccines](#)”; and
  - About OSHA’s anti-retaliation regulation found at 29 CFR 1904.35(b)(1)(iv) and the prohibitions on making false statements found in 18 U.S.C. 1001 and 17(g) of OSH Act

## When Must Employers Come Into Compliance?

Employers must comply with the ETS by December 5. However, employers have until January 4, 2022, to comply with the ETS testing requirements. In order to avoid the testing requirement, employees must have received their last vaccination shot by January 4, 2022.

## What About State Plan States?

States that run their own occupational safety and health programs will have 30 days from the publication date of the ETS to either adopt the ETS or an ETS that is equally as effective. It is likely that many states will not comply with this requirement.

## What About Legal Challenges and Inconsistent State and Local Requirements?

Attorneys General of 24 states [have vowed](#) to take action to prevent the ETS from taking effect. There are several avenues by which these states may achieve their objectives.

States have argued that the ETS cannot pass muster under the emergency temporary standard provision in the OSH Act—that the ETS is “necessary to protect employees” that “are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards.” 29 USC 655(c)(1). The Attorneys General argued there is no “grave danger,” COVID-19 is not a “substance, agent, or hazard,” and the ETS’s applicability to employers of 100 or more is “inexact” and insufficient to safeguard against the alleged danger. States have also argued that the ETS infringes upon their authority to regulate the health and wellbeing of their citizens, which is primarily a matter of local concern. Opponents are quick to note that 5 out of the 6 past challenges to different OSHA Emergency Temporary Standards have been successful. Persons “adversely affected” by the ETS have 60 days to challenge the validity of the standard. 29 USC 655(f).

States have and will take actions that likely conflict with the ETS. For example, Texas Governor Abbott’s [Executive Order](#) compels employers to provide broad exemptions to mandates, including objections based on “personal conscience”—an exception which could swallow the rule. The Texas House and Senate are considering bills to further these objectives. In another example, Florida Governor Ron DeSantis has implored his state legislature to enact legislation providing that employees cannot be terminated for their refusal to be vaccinated. In response to President Biden’s pronouncement, Arkansas passed a [law](#) that allows employees to opt out of vaccine mandates by either producing a negative antigen or diagnostic test no more than one time per week, or by providing proof of immunity (including antibodies) twice per year. The law also provides that employees who are fired due to refusal to be vaccinated may be eligible for unemployment benefits. While these are just a few examples of State mandates likely to conflict with the ETS, other legislation/pronouncements will emerge. Conflicting mandates will face their own legal challenges. The ETS explicitly notes that its requirements preempt any contrary state or local requirements, and that employers in such jurisdictions must comply with the ETS.

Dozens [of states](#) have already filed suit seeking declaratory and injunctive relief from the federal contractor mandate, and some states may attempt to amend those complaints to challenge the ETS. The suits allege, among other things, violation of separation of powers and state’s rights. There are many creative legal theories. For example, Arizona Attorney General Mark Brnovich’s suit alleges the mandate violates Equal Protection because it applies only to U.S. citizens while undocumented immigrants are released into the country unvaccinated. Brnovich further argues that the mandate infringes upon citizens’ constitutional right to maintain bodily integrity to refuse medical treatment and their statutory rights under the Emergency Use Authorization.

Over the coming days (and hours), dozens of legal challenges will emerge and evolve. It is critically important that private employers do not construe rhetoric and legal challenges as evidence that the ETS is unenforceable. It is very likely that legal challenges to the ETS will not be resolved before the date by which employers must be in compliance.

## Next Steps

Employers covered by the ETS have 30 days to develop and finalize their vaccination policies. Within 60 days, employers must be ready to implement the policies and any related testing procedures. Below are recommended next steps for moving your organization to timely compliance.

### Within 30 days:

- Identify the individual or individuals within your organization who will be responsible for development, implementation, and enforcement of the policy and all of its components.
- Decide whether your organization will implement a mandatory vaccination policy or a policy that permits employees to choose whether to be fully vaccinated or to submit to regular testing and wear face coverings as required by the ETS.
- Notify employees as soon as possible of your organization's decision and the deadlines for obtaining vaccination in order to avoid testing.
- Draft a policy including all information required by the ETS.
- Distribute the CDC's document "[Key Things to Know](#)" to all employees.
- Develop a roster of employees and a process for determining current vaccination status and collecting and retaining all documentation of vaccination status.
- Draft an attestation form for vaccination status with the required language from the ETS.
- Establish protocols for providing employees with the required paid time off for vaccination and recovery.
- Expect the unexpected, and have a plan in place to respond. Your new policy may be met with significant resistance that could pave the way for press inquiries, union organizing activity, walkouts, and more.

### Within 60 days:

- Prepare a protocol/schedule for employee testing for COVID for employees not fully vaccinated and/or subject to an accommodation and process for retaining testing records
- Ensure the organization has a policy and procedure for employees to seek exemption and/or reasonable accommodation from the vaccine requirements

Finally, work with legal counsel to make sure you are familiar with the details of the ETS, which are many and are not all reproduced here, and to craft policies and protocols most appropriate for your workplace circumstances. Sherman & Howard's experienced OSHA and employment counsel are available to assist with any questions or compliance issues.