

OSHA ETS Private Employer Vaccine Mandate Summary

The Occupational Safety and Health Administration (OSHA) issued an Emergency Temporary Standard (ETS) which will require all employers with more than 100 employees to mandate that onsite employees be vaccinated or provide weekly negative test results. Employers must have employees fully vaccinated and require that onsite unvaccinated employees provide negative test results and wear face coverings in the workplace by January 4, 2022.

Who is Covered?

An important initial note: the determination as to whether a particular employer is covered by the ETS is **separate** from whether individual employees are covered. For example, remote and outdoor workers are counted for purposes of whether the employer meets the 100-employee threshold, but **are not** subject to the ETS requirements.

Which employers are covered?

The ETS covers all employers with at least 100 employees at any time the ETS is in effect. In determining the number of employees for purposes of the 100-employee threshold, companies should:

- Include all employees across all U.S. locations
 - For single entities with multiple locations, all employees at all locations are counted
- Include part-time employees
- Include remote workers
- NOT include independent contractors
- Include temporary and seasonal workers employed directly (*i.e.*, not obtained from a staffing agency), as long as they are employed while the ETS is in effect
- For traditional franchisor-franchisee relationships in which each franchise location is independently owned and operated, the franchisor and franchisee would count their own employees separately
- Include employees who work exclusively outdoors
- Staffing agencies and host companies count employees separately – temporary employees would be counted by the staffing agency, and host companies would only be covered by the ETS if they have 100 employees *in addition to* any temporary workers provided by a staffing company

The ETS **does not** apply to workplaces covered by the federal contractor vaccine mandate or settings covered by the healthcare ETS. Federal contractors must comply with requirements under that mandate and cannot substitute compliance with the ETS instead.

Which employees are covered?

The ETS applies to all onsite employees of covered employers. The ETS **does not** apply to remote or outdoor employees, or settings where workers do not interact indoors with other individuals.

Written Employer Vaccination Policy

The ETS requires that employers establish, implement, and enforce a written mandatory vaccination policy. OSHA has provided a sample template of an employer written mandatory vaccination policy [here](#).

Vaccination

“Fully vaccinated”

Under the ETS, “fully vaccinated” means two weeks after the second dose in two-shot vaccines, or two weeks after the first dose in one-shot vaccines.

Proof of vaccination

Employers must require each vaccinated employee “to provide acceptable proof of vaccination status,” including whether they are fully or partially vaccinated. Acceptable forms of proof:

- Record of immunization from a health care provider or pharmacy;
- A copy of the 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, dates of administration, and the name of the health care professional or clinic site administering the vaccine.

If an employee is unable to produce acceptable proof of vaccination, they can provide a signed and dated statement attesting to:

- Vaccination status
- That they have lost or otherwise are unable to produce proof
- The following statement: “I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.”
- To the best of their recollection, type of vaccine administered, date of administration, name of health care professional or clinic site administering the vaccine

Digital copies are acceptable, including digital photos of the above forms of proof. Employers will not be held responsible for fraudulent vaccine documentation if they have done due diligence.

Recordkeeping for vaccination status

Employees cannot merely show the employer their vaccination status – the employer must retain either a physical or digital copy of each employee’s vaccination status. Further, an employer must “preserve acceptable proof of vaccination,” including a roster of each employee’s vaccination status. Such records are considered medical records and must be stored separately and kept confidential, but must only be retained as long as the ETS is in effect.

Time off for vaccination

Employers must provide “a reasonable amount of time” for each employee to receive their vaccine, including up to 4 hours paid time off (including travel time) at the employee’s regular rate of pay. Additionally, employers must provide reasonable time and paid sick leave for employees to recover from side effects experienced as a result of vaccine doses.

Testing

The ETS allows for employers to offer testing as an alternative to getting vaccinated. However, employers are not required to provide testing as an alternative.

Who must get tested?

Unvaccinated employees who report to workplaces where other individuals are present must provide proof of negative test results. Unvaccinated remote workers or those who otherwise do not report to the workplace are not required to be tested.

How often must an unvaccinated employee be tested?

Employees who come into the workplace at least once a week must be tested on a weekly basis. For employees who enter the workplace less than once a week, or in single instances, the employee must provide proof of a negative test within 7 days of entering the workplace.

Cost

The ETS does not require that employers cover the costs of testing, and allows for employers to shift such costs to those employees who must get tested. However, employers may be required to cover such costs under other laws and can decide to cover them at their discretion.

Acceptable Tests

Under the ETS, acceptable tests are any diagnostic tests that are approved under the Emergency Use Authorization and by the FDA. Antibody tests are not acceptable tests under the ETS. Employees may use self-administered antigen tests for purposes of compliance with the ETS, but

may not self-administered AND self-read such tests, UNLESS observed by the employer or an authorized telehealth proctor.

Recordkeeping for testing results

Employers must maintain a record of each test result provided by each qualifying employee. Such records are considered medical records and must be stored separately and kept confidential, but must only be retained while the ETS is in effect.

Compensable Time

The time an employee takes to undergo COVID-19 testing as part of compliance with the ETS may be considered compensable under wage and hour laws, particularly given [previous guidance on the subject](#) (see questions 7 and 8). However, this issue is still unclear, and the DOL has stated that it will issue new guidance on this issue in accordance with the ETS.

Employees with COVID-19

If an employee has been diagnosed with COVID-19 or receives a positive COVID-19 test, the employer may not require regular weekly testing (as a compliance alternative to vaccination) for 90 days because of the high likelihood of false positive results that do not indicate active infection but are rather a reflection of past infection. The employee may still get tested for purposes of producing a negative result to return to the office (see below).

Exemptions and Reasonable Accommodations

Employees with qualifying religious exemptions under Title VII and qualifying disability exemptions under the ADA may be exempt from vaccine, testing, and face masking requirements under the ETS, and entitled to reasonable accommodations from their employers, absent undue hardship. The ETS refers employers to [EEOC guidance](#) on exemptions and reasonable accommodations for further information.

Removals from the Workplace

Upon notification that an employee has tested positive for COVID-19, the employer must immediately remove that employee from the workplace. The employee may not return to the workplace until the employee:

- Receives a negative test result;
- 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 under the ETS to provide PTO to any employee removed from the workplace because of a positive COVID-19 test or diagnosis.

Face Coverings

Employers must ensure that employees who are not fully vaccinated wear face coverings that follow CDC guidelines while working indoors and when in a vehicle with another person for work purposes, except:

- When an employee is alone in a room with floor to ceiling walls and closed door;
- While the employee is eating or drinking (“limited time”);
- For identification purposes;
- When an employee is wearing a respirator or facemask; or
- Where employers can show face coverings are infeasible or would create a greater hazard.

Employees who are vaccinated do not have to wear face coverings under the ETS.

Information for Employees

The ETS requires that employers inform employees about the requirements under the ETS and COVID-19 vaccine efficacy, safety, and benefits (the latter of which can be met by providing the following document: <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>).

Reporting COVID-19 Fatalities and Hospitalizations

The ETS requires employers to report to OSHA:

- Each work-related COVID-19 fatality within 8 hours of the employer’s knowledge, and
- Each work-related COVID-19 in-patient hospitalization within 24 hours of the employer’s knowledge.

Further Resources

- Vaccination and Testing ETS landing page: <https://www.osha.gov/coronavirus/ets2>
- Vaccination and Testing ETS fact sheet: <https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf>
- Vaccination and Testing ETS FAQs: <https://www.osha.gov/coronavirus/ets2/faqs>
- Full Vaccination and Testing ETS text: <https://www.federalregister.gov/public-inspection/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard>