

# OSHA's Vaccine/Testing Mandate is Here: Now What?

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Warren B. Lightfoot  
*Shareholder*

Allen B. "Josh" Bennett  
*Shareholder*

Sarah E. Rawls  
*Associate*

**MAYNARD**  
COOPER GALE

## Legal Challenges

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- No surprise here: Legal challenges to the ETS have been and will be made.
- ETS challenged in court six times, **upheld once** (1978).
- Where does this leave employers?
  - Until these challenges are resolved, employers should **prepare for compliance**.

# The Emergency Temporary Standard ("ETS") Basics

- Covered employers must either:
  1. Mandate employees be fully vaccinated against COVID-19, or
  2. Require employees that are not fully vaccinated to produce a "verified" negative **test on a weekly basis** AND **wear face coverings in the workplace.**
- Employers must pay employees for time taken to get vaccinated, and, if needed, recover from any side effects.
- Duration: 6 Months

## Covered Employers

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- ETS covers any “large” employer with 100 or more employees.
- **Exclusions**
  1. Employers subject to the federal contractor vaccine requirements, OR
  2. Employers subject to the Healthcare ETS or CMS Rule.

## Who is a “large” employer?

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- Definition includes **all employees across all of U.S. locations**, regardless of where they perform work.
- Part-time employees count.
- Independent contractors do not count.
- What if the employee count fluctuates?

## Examples

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- If an employer has 150 employees, 100 of whom work from home full-time + 50 who work in the office at least part of the time, the employer would be within the scope of this ETS because it has more than 100 employees.
- If an employer has 200 employees, all of whom are vaccinated, that employer still would be covered.

## Related Entities

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- Employees of all entities making up the integrated **single employer** must be counted.
- Two or more related entities may be regarded as a single employer if they **handle safety matters as one company**.
- OSHA likely will decide coverage on a fact-specific basis, considering:
  1. Degree of interrelatedness in handling workplace safety issues.
  2. Whether entity is considered a joint employer for purposes of other employment laws.

## Covered Employees

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- ETS vaccine/testing **requirements do not apply** to employees who:
  1. Do not report to a workplace where there are other humans (including customers);
  2. WFH (remotely); or
  3. Work exclusively outdoors.



## Key Dates

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- December 5, 2021
- January 4, 2022

	Dec. 5	Jan. 4
Establish <u>policy</u> on vaccination	X	
Determine <u>vaccination status</u> and obtain acceptable proof of vaccination	X	
Provide paid leave for employees to obtain vaccine	X	
Ensure employees who are not fully vaccinated are <u>tested</u> for COVID-19 at least weekly		X
Ensure employees who are not fully vaccinated <u>wear face coverings</u> when indoors or when occupying a vehicle with another person for work purposes	X	
Provide each employee <u>information</u> about the ETS	X	

# Employer Policy on Vaccination

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- Employers **must**
  - Develop, implement, and enforce a mandatory COVID-19 vaccination policy
  - Unless they adopt a policy requiring employees to choose to either be vaccinated or undergo regular COVID-19 testing and wear a face covering at work.
- **Deadline:** Dec. 5, 2021
- Contact a Maynard, Cooper & Gale attorney for information related to drafting entity-specific policies.

# Determination of Employee Vaccination Status

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- Employers must obtain and maintain records of vaccination status, including a roster of employee vaccination status.
- If no proof of vaccination is provided, you must treat such employees as unvaccinated.
- Acceptable proof of vaccination status includes:
  - Record of immunization from a health care provider or pharmacy;
  - COVID-19 Vaccination Record Card; and
  - Medical records documenting the vaccination.

## What if an employee is unable to submit proof of vaccination?

- Obtain a signed and dated employee attestation.
- Attestation must state their vaccination status and that they have lost and are otherwise unable to produce proof.
- Employees must declare that the statement of their vaccination status is true and that they understand providing false information may subject them to criminal penalties.

# Roster Requirements

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- Create and maintain a roster of employees and their vaccination statuses for the duration of the ETS.
- Keep separate as confidential employee medical records.

## Paid Leave Requirements

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- Employees have the right to take paid time off to:
  1. **Obtain** the vaccine; and
  2. **Recover** from any side effects.

## Time Off to Obtain the Vaccine

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- Provide employees reasonable paid time, including **up to four hours** of paid time, to receive each primary vaccination dose.
- Not obligated to reimburse employees for transportation costs.
- Cannot be offset by any other leave that an employee has accrued (e.g., paid sick leave, vacation time, PTO, etc.).
- During Work Time v. Outside of Workday



## During Work Hours

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- Employer must pay the employee up to four hours of regular pay for each primary shot.
- Four hours is **not automatic**.
- OSHA assumes that 55 minutes is a reasonable period of time to be compensated.
- Employer cannot require that an employee use accrued paid leave, such as sick leave or vacation leave, to obtain the vaccine.

## Outside of Workday

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- Employer is not required to pay an employee for obtaining the vaccine outside the workday.

## Time Off for Recovery from Side Effects

- Offset option may be available.
- **First**, look to an employee's accrued sick bank.
  - Single or separate buckets of PTO?
  - Cannot require an employee to accrue negative paid sick leave or borrow against future paid sick leave to recover from vaccination side effects.
- **Second**, if the employee does not have any sick leave available, the employer still must provide reasonable paid time off to recover.
  - Employers may set a **cap** on the amount of paid sick leave available to employees to recover (2 days presumed reasonable).

# Testing Option

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- Employees must elect either to get vaccinated or to undergo regular COVID-19 testing AND wear a face covering at work.
- **Deadline:** Jan. 4, 2022.
- Acceptable tests
  - FDA-approved (e.g., viral test).
  - Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.
- No antibody tests.

## Paid Leave & Costs

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- Employers are not required to pay for any costs associated with testing.
- Employers required to pay for time spent testing?
  - Open question; additional guidance forthcoming.

## Positive COVID-19 Test and Removal

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- Employer must immediately remove from the workplace any employee who receives a positive COVID-19 test.
- Keep the employee removed until the employee:
  1. Receives a negative test;
  2. Meets the return to work criteria in CDC's "Isolation Guidance"; or
  3. Receives a recommendation to return to work from a healthcare provider.
- No paid time off required.

# Face Coverings

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- **General Rule**

- Employees who are not fully vaccinated must wear a face covering when indoors or when occupying a vehicle with another person for work purposes.

- **Exceptions**

1. When an employee is alone in a room with floor to ceiling walls and a closed door.
2. 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.
3. When an employee is wearing a respirator or face covering.

# Information Provided to Employees

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- Provide information about:
  - Requirements of the ETS and workplace policies and procedures established;
  - Vaccine efficacy, safety, and the benefits of being vaccinated (by providing the CDC document “[Key Things to Know About COVID-19 Vaccines](#)”);
  - Protections against retaliation and discrimination; and
  - Laws that provide for criminal penalties for knowingly supplying false statements or documentation.



## Reporting COVID-19 Fatalities and Hospitalizations to OSHA

- Employers must report work-related COVID-19 **fatalities** to OSHA **within 8 hours** of learning about them.
- Report work-related COVID-19 in-patient **hospitalizations within 24 hours** of the employer learning about the hospitalization

# Availability of Records

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- Employers must provide employees with access to their COVID-19 test records **by the end of the next business day after a request.**
- Employers must maintain and preserve records and vaccination rosters while the ETS is in effect.
- OSHA Right Access
  - Employers must provide, **within 4 business hours** of an OSHA request, the following:
    - Written policy;
    - Aggregate number of fully vaccinated employees at a workplace; and
    - Total number of employees at that workplace.

## Looking Ahead

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- Possibility of expansion from large to smaller employers.
- Possible permanent standard.

## PRIORITY ITEMS

1. Develop a **policy**.
2. **Educate** employees.
3. Determine employees' **vaccination status**.
4. Provide **paid time off** to support employee vaccination.
5. Set up a **system for tracking COVID-19 tests**.
6. Develop a plan for handling **accommodation requests**.

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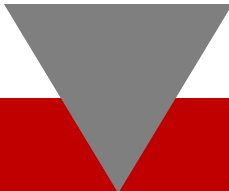
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# THANK YOU

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