

COVID-19 Alert: Federal Vaccine Mandates

What You Need to Know, Now

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As has been widely reported, on November 4, 2021, the federal Occupational Safety and Health Administration (“OSHA”) issued an **Emergency Temporary Standard (“ETS”)** that requires all private employers, with 100 or more employees, to implement a mandatory employee vaccination program, or require unvaccinated employees to receive weekly COVID-19 testing. The compliance standards provided for in the ETS, which covers 253 pages, are complex and impose significant and time-consuming administrative obligations on covered employers. The ETS was announced simultaneously with a **Centers for Medicare & Medicaid Services** issued vaccine mandate that applies to healthcare workers (the “Healthcare Mandate”), and was preceded by a **Presidential Executive Order** that applies a vaccine mandate to employees of government contractors (the “Government Contractor Mandate”).

Because of its target (private-sector employers) and its scope (covering an estimated 84 million workers), the ETS has generated significant public attention and discussion, with numerous legal challenges filed coincident with its issuance.

On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit (covering Louisiana, Mississippi, and Texas) issued a nation-wide preliminary injunction enjoining the ETS. Under the Fifth Circuit’s order, OSHA is barred from both enforcing the ETS and taking any steps to implement the ETS until further proceedings – which will likely include Supreme Court adjudication. It is unknown how long the Fifth Circuit’s injunction will remain in place or whether the Fifth Circuit, or another federal court, will ultimately deem the ETS to be unlawful.

Employers covered by the ETS now find themselves in a difficult position: (a) delay implementation of ETS standards pending resolution of legal challenges and face significant time pressure and other compliance challenges if the ETS is ultimately approved; or (b) commence compliance efforts now, and risk time and financial loss if the ETS is discarded wholesale by the Courts.

It is our recommendation that covered employers hedge and take steps now to comply with the *material* elements of the ETS. We believe it likely that some form of vaccine mandate will apply to private-sector employers in the relative short term, and that compliance with such potential standards will require significant preparation.

To that end, a summary of the material elements of the ETS, with compliance recommendations, are provided below. This summary is designed to complement the **plain language ETS** digest recently published by OSHA.

Are You Covered By the ETS?

The ETS applies to all private-sector employers, who are not otherwise covered by the Healthcare Mandate or the Government Contractor Mandate, that employ 100 or more

employees.

The ETS details how employers must count employees for purposes of the 100-employee threshold. *The ETS requires that employers count all employees located in the United States, regardless of where they perform their work and regardless of their vaccination status.* Employers should count all employees at every location, including those who may work at multi-employer sites. The headcount includes employees working remotely, traveling employees who never or rarely report to a physical office, minors, temporary and seasonal employees, and part-time employees. Independent contractors, however, are not counted towards the headcount. Employers with fluctuating headcounts will fall under the purview of the ETS if they meet the 100-employee threshold at any point while the ETS is in effect.

Franchises and staffing agencies have more complex rules on determining the employee threshold and should consult counsel to ensure compliance with the ETS. For employers that are related, but separate entities, the entities should each count only its own employees – unless the two related entities historically handle safety issues as one, then they may be required to count all employees as one entity under the ETS.

It is important to note that the ETS confirms that while an employer may be subject to the ETS, employees in certain categories may not. For example, employees who work fully remotely and do not come into a physical work location, or do not otherwise physically interact with other employees or customers, will not be required to show proof of vaccination, nor will they be required to submit to regular testing. Similarly, employees who work exclusively outside will also not be subject to the ETS requirements.

Written Policy Requirements

Under the ETS, covered employers must develop a written vaccination policy that must contain, *at a minimum*, the following:

- Information on the requirements for COVID-19 vaccination;
- Information related to exclusions from the policy (e.g., reasonable accommodations for workers with disabilities or sincerely held religious beliefs);
- Information on determining an employee's vaccination status and how this information will be collected;
- Information on the availability of paid time and sick leave for vaccination purposes;
- Information on the procedures related to notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace;
- How information is to be provided to employees (e.g., email, postings on online platforms, etc.); and
- Information on disciplinary procedures for employees who do not comply with the policy.

The employer should include all relevant information regarding the policy's effective date, who the policy applies to, deadlines (e.g., for submitting vaccination information, for getting vaccinated), and procedures for compliance and enforcement, all of which are considered by the ETS to be "necessary components of an effective plan."

OSHA is not requiring employers to submit their written policies or plans to them, unless requested; but in the instance of an OSHA request, the employer is expected to submit a copy within 4 business hours of the request.

The [Morse Employment Law team](#) has developed a template written policy based on ETS

standards. However, the ETS anticipates that covered employers adopt written policies that are bespoke to their workforce and work environment – which will take time to develop. As such, employers are encouraged to start the process of drafting appropriate vaccine policies now.

Collection and Storage of Employee Vaccination Information

The ETS requires covered employers collect and store employee vaccination status information. This includes obtaining and storing proof of vaccination from vaccinated employees, and recording the identity of unvaccinated employees.

To prove vaccination status, the employee may produce a physical or digital copy of a vaccination record. Acceptable documentation includes the following:

- Record of immunization from a health care provider or pharmacy;
- Copy of the U.S. COVID-19 Vaccination Record Card;
- Copy of medical records documenting the vaccination;
- Copy of immunization records from a public health, state, or tribal immunization information system; or
- 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).

An employee who cannot produce an acceptable document as proof of vaccination may be able to produce a signed and dated statement attesting to their vaccination status and that they have lost or otherwise been unable to produce proof required by the ETS.

The employer must retain either a physical or digital copy of the documentation, and the documentation must be stored for the duration of the effective period of the ETS. The vaccination records are considered confidential employee medical records and must be maintained securely and separate from the personnel file. Additionally, access must be limited, and the records must not be disclosed, except as required by the ETS, or other federal law. While the ETS requires that employers maintain an accurate record of employees' vaccination status, the employer is not required to track and store information related to any booster doses.

Testing Protocols

The ETS provides covered employers with compliance options: (1) Require that all employees be vaccinated unless the employee qualifies for a medical or religious exemption (exempt employees must participate in at least once-weekly testing and wear face coverings); or (2) Provide employees with the option/choice of either showing proof of vaccination status or participating in at least once-weekly (every 7 days) testing.

Under this framework:

- Acceptable COVID-19 tests are limited tests that are cleared, approved, or authorized by the federal Food and Drug Administration (the "FDA") and that are administered in accordance with authorized instructions.
- Employers do not need to cover the costs of employee testing.
- Employers will be required to keep confidential records of employees' tests results, and maintain them during the effective period of the ETS. Employees must be provided access to their records.

- All unvaccinated employees, whether due to an allowable exemption or other personal reasons, must submit to weekly testing – unless they will be working remotely that week. As an example, hybrid employees who only come to the workplace once a month need only get tested within 7 days prior to coming to the workplace, and not during the other weeks when working remotely. Additionally, employees who are not yet fully vaccinated (meaning they may have only received one of two vaccine doses of a two-dose vaccine), must submit to testing until they are considered fully vaccinated.
- For employees who test positive or have been diagnosed with COVID-19, the employer cannot require that employee to undergo weekly testing during the 90 days following the positive test or diagnosis, as the potential for false positives during this period of time remains high. The employee must continue to wear a face covering while at the workplace, however.

Paid Time Off

The ETS requires employers to provide “reasonable time” to each employee to receive each dose of the vaccine, including up to 4 hours of paid time, at the employee’s regular rate. Employers cannot require employees to use their own personal or sick time to receive the primary doses of the vaccine.

If an employee requests time off to recover from any side effects of the vaccine, the employer may require the employee to use any accrued paid sick leave – but the employer cannot require the employee to use any advanced sick leave. Massachusetts employers should note that Massachusetts enacted a stricter Emergency Paid Sick Leave program which remains in effect until April 2022. A more detailed article on the Massachusetts program may be found [here](#).

Removal of Positive Employees

Regardless of vaccination status, any employee who tests positive or is diagnosed with COVID-19 must be removed from the workplace immediately. The employee may not return until he or she receives a negative COVID-19 test, is cleared by a healthcare professional to return, or has complied with the [return to work guidelines](#) recommended by the Centers for Disease Control. Employers need to provide paid time off to employees to recover or isolate, though employers should allow employees to use any accrued leave. Employees may be allowed to work remotely while isolating or after receiving a diagnosis.

The ETS does not impose any requirements on employers to conduct contact tracing, nor does it contain any requirements to notify other employees of the positive result, though OSHA urges employers to follow any state or local guidance on these issues.

Notifications to Employees

The ETS requires employers to provide employees notice to employees, in a language and at a literacy level the employees understand, information about the requirements of the ETS and the employer’s workplace policies and procedures established to implement the ETS. The ETS also requires employers provide the CDC document “[Key Things to Know About COVID-19 Vaccines](#)” and information about protections against retaliation and discrimination. Lastly, employer must provide information about laws that provide for criminal penalties for knowingly supplying false statements or documentation. Employers have flexibility in how they communicate this information, including through electronic means or by printed materials. Any time an employer policy is updated or added, the update or new policy must be communicated to employees.

Timing

The ETS provides for tight deadlines for compliance: employees to be vaccinated and/or to begin weekly testing by **January 4, 2022**; all other requirements of the ETS complied with by

December 6, 2021.

Given pending legal action, it is unlikely that these deadlines will be enforced. However, if a private-sector employer vaccine mandate is ultimately approved, we anticipate that such mandates will require compliance in the first quarter of 2022.

What to Do Next

Employers should immediately begin with the following action items:

- Collect information related to employee headcount;
- Identify and train a management team to oversee ETS compliance, including record management;
 - Develop a compliant written policy, including forms related to requesting medical or religious exemptions or accommodations;
- Issue information about the policy and ETS to employees; and
- Collect employee vaccination status and relevant records.

Employers should continue to monitor any new announcements from the U.S. Department of Labor and OSHA, especially in light of the current legal challenge and anticipated others.

Morse is focused on assisting our clients through these unprecedented times. Please contact [Matthew Mitchell](#) or [Amanda Thibodeau](#) should you have questions concerning this subject, or any other COVID-19 response matters.

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