



## **Fact Sheet: OSHA COVID-19 Vaccination and Testing Emergency Temporary Standard**

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) released an emergency temporary standard (ETS) mandating COVID-19 vaccination and testing in the workplace. The ETS covers employers with more than 100 employees. The notice states that covered employers are required to comply with all requirements by January 4, 2022. In addition, OSHA is requesting comment on the ETS as it considers creating a final rule.

### **What is the status of the ETS? Is it still going into effect?**

On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit temporarily halted implementation of the ETS. Additional lawsuits have been filed to challenge the legality of the ETS. As of this writing, the cases have been consolidated and are being considered by the U.S. Court of Appeals for the Sixth Circuit.

### **Who is considered a “covered employer” under the ETS?**

A “covered employer” is defined as a private employer with more than 100 employees. An employer with multiple sites would be covered if the number of total workers across all sites is over 100.

### **What are the obligations of a covered employer?**

Covered employers are required to implement a mandatory COVID-19 vaccination policy. To encourage vaccination, employers must provide up to four hours of paid time off for each vaccination dose and a reasonable amount of paid time off to recover from side effects following each vaccination dose. Though not defined, OSHA presumes up to two days of paid sick leave as a “reasonable amount of time” to recover from side effects based on recent studies.

Employers can establish a policy that allows unvaccinated employees to forgo mandatory vaccination as long as they get tested weekly for COVID-19 and wear face coverings. Employers are not required to pay for their workers’ weekly tests or provide face coverings. Face coverings are not considered personal protective equipment under the ETS.

### **What are the obligations of workers at a covered employer?**

All employees, with limited exception, must be vaccinated against COVID-19. They must provide proof of vaccination to their employer for recordkeeping.<sup>1</sup> If workers are unable to provide acceptable vaccination documentation, they are able to attest to their vaccination status with a written statement. Unvaccinated workers must provide their weekly COVID-19 test results to their employer.

### **Are agricultural employers covered under the ETS?**

If an agricultural employer has more than 100 workers, then it is required to meet the requirements of the ETS. Temporary and seasonal workers are counted towards the 100 worker threshold. An employer that has more than 100 workers at any time while the ETS is in effect is considered a covered employer for the duration of the standard, regardless of any subsequent fluctuations in the size of the workforce.

### **What are the obligations of labor contractors?**

Labor contractors would be considered an independent contractor and would count its own workers to determine its status as a covered employer. Labor contractors that meet the covered employer definition would be responsible for meeting the ETS requirement for its own workers. Workers across multiple sites are counted towards the 100 worker threshold if they have the same direct employer.<sup>2</sup>

### **Are there exemptions for agricultural employers?**

Agricultural employers are covered by the ETS. However, there are exemptions that will affect many agricultural employers and their farmworkers, as discussed below.

### **What are the exemptions from the ETS that would affect farmworkers?**

The ETS vaccination requirements do not apply to workers who work exclusively outdoors, even though they are counted towards the 100 worker threshold. OSHA specifically states that to qualify for this exemption, all of the work must truly be outdoors with only extremely brief periods of time spent indoors. Workers who share employer-provided transportation would not be considered to work exclusively outdoors. While OSHA does not explicitly discuss employer-provided housing in the ETS, it states that the workplace includes the entire work site, any area where work or work-related occurs, and the entirety of any space associated with the site. Further, OSHA writes that workplaces that are truly outdoors do not include characteristics that enable COVID-19 transmission such as poor ventilation, enclosed spaces, and crowding. It is not clear if exempted workers are eligible for paid sick leave to get vaccinated.

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<sup>1</sup> A worker is considered fully vaccinated 2 weeks after completion of the regimen of a vaccine approved or authorized for emergency use by FDA or WHO.

<sup>2</sup> If a labor contractor hires more than 100 workers across multiple farms, that contractor would be considered a covered employer under the ETS.

## **What are the requirements if a worker tests positive for COVID-19?**

If a worker tests positive for or is diagnosed with COVID-19, they are required to notify their employer. Any employee with COVID-19 must be temporarily removed from the workplace, regardless of their vaccination status. OSHA clearly states that the removal is not meant to be permanent; workers are expected to be reinstated. To return to work, they must either receive a negative COVID-19 test or meet the CDC's return to work criteria outlined in their "Isolation Guidance".<sup>3</sup> Although their removal is required by the ETS, employers are not required to provide these workers paid time off. However, if the worker is covered by the ETS and believes that they were exposed to COVID-19 in the workplace and received a positive diagnosis, then they may be entitled to workers' compensation benefits. Employers are required to report to OSHA work-related COVID-19 fatalities within 8 hours of learning about the fatality, and any work-related COVID-19 hospitalization within 24 hours of learning about the hospitalization.

## **What information needs to be provided to workers?**

Employers must provide information about the ETS in an appropriate language and literacy level for all workers. In addition to information about the policies of the ETS, they must also provide information about the safety and efficacy of the COVID-19 vaccine, retaliation protections, and penalties for providing false statements or documentation. Employers are prohibited from retaliating against workers who assert their rights under the ETS.

## **Are there any additional protections required under the ETS?**

The ETS does not cover any additional workplace protections outside of the vaccination and paid leave requirements.

More information about the ETS can be found on the OSHA website at <https://www.osha.gov/coronavirus/ets2>. In addition to a summary of the ETS, there is also a Frequently Asked Questions page.

*Published November 18, 2021*

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<sup>3</sup> This criteria is met when: (1) at least 10 days have passed since the first appearance of symptoms; (2) the person has gone at least 24 hours without a fever; and (3) the other COVID-19 symptoms (excluding loss of taste and smell) are improving.