

Morgan Lewis

NAVIGATING THE NEXT.

Occupational Health and Safety Administration
(OSHA) Emergency Temporary Standard (ETS):
What Employers Need to Know

November 16, 2021

Presenters



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Topics to Cover

- The Legal Landscape
 - Challenges in Federal Court
 - State Law Developments
- State Plan Obligations
 - Adoption and Notification Requirements
- Preemption Issues
 - Conflicting State and Local Laws
- Requirements Under the ETS
 - Scope and Applicability
 - Mandatory Vaccine Policy
 - Testing for Unvaccinated Employees
 - Recordkeeping Requirements
 - Employer Support for Vaccination
 - Positive Test Notification, Removal, and Return to Work
 - Face Coverings
 - Reporting Requirements
 - Employee Disclosures
- Enforcement and Penalties
 - Monetary and Criminal Penalties
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- Related Issues
 - Accommodations for Vaccination/Testing
 - Labor Issues
 - Federal Contractor Executive Order and Guidance
 - Centers for Medicare and Medicaid Services (CMS) Emergency Regulation

Landmark OSHA ETS Requires COVID-19 Vaccination or Testing

- By **December 6, 2021**, covered employers with 100+ employees must establish a vaccine policy that requires (by **January 4, 2022**):
 - Mandatory vaccination, or
 - Weekly testing for unvaccinated employees



ETS

- Effective upon publication
- OSHA must establish grave danger and that emergency standard is necessary
- “Grave danger,” used 191 times in the 490-page preamble, is defined as:

[T]he danger of incurable, permanent, or fatal consequences to workers, as opposed to easily curable and fleeting effects on their health

The Legal Landscape

The image is a composite background. At the top, a bright sun or star is on the horizon, casting a glow over a dark, starry space. Below this, a city skyline is visible at night, with lights from buildings and streets. Overlaid on the city is a network of glowing lines and nodes, resembling a digital or legal network. The nodes are small circles of various colors (orange, blue, purple) connected by thin lines. The overall color palette is dominated by blues, oranges, and purples.

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Fifth Circuit Court of Appeals Decision

- On November 12, 2021, the Fifth Circuit Court of Appeals granted a motion for stay enforcement pending final review of request for permanent injunction

Finding: statutory and constitutional challenges "show a great likelihood of success on the merits" and denial of the proposed stay "would do them irreparable harm."

- The order applies nationwide and enjoins federal agencies from enforcing the ETS

"IT IS FURTHER ORDERED that OSHA take no steps to implement or enforce" the ETS "until further Court order."

- OSHA's [website](#) on the ETS now says:

*"On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit . . . ordered that OSHA 'take no steps to implement or enforce' the ETS 'until further court order.' **While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.**"*

Fifth Circuit Court of Appeals Decision

- Because different petitioners have filed petitions in different circuit courts around the country, consolidation proceeding with the Judicial Panel on Multidistrict Litigation likely this week.
- Potential Outcomes:
 - Prior to consolidation, another circuit court rules on the requested stay leading to potentially conflicting orders
 - The case may be transferred out of the Fifth Circuit, and the transferee court dissolves the stay, upholds the stay, tolls deadlines, etc.
 - The federal government asks for the US Supreme Court to dissolve this temporary stay
 - An appeal to the US Supreme Court following final decision on merits
- Because most of the ETS requirements are set to take effect on December 6, many employers will continue to plan and take steps to ensure that they are able to comply with the published ETS deadlines while we await a final resolution of these issues.

State Plan Obligations

The image is a composite background. The top half shows a dark blue space filled with stars and a bright, glowing sun or star on the horizon, creating a lens flare effect. The bottom half shows a night view of a city with illuminated buildings and streets. A network of glowing lines, in shades of blue and orange, is overlaid on the city, connecting various points, suggesting a global or digital network.

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State-Plan States Adoption and Notification Requirements

- States with their own OSHA-approved occupational safety and health plans (State Plans) must adopt the ETS, or an ETS that is “at least as effective” as the federal ETS, within 30 days of issuance of the federal standard.
- The following 22 states or territories have OSHA-approved State Plans that cover private as well as state and local government workers:
 - Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, Wyoming
- The following six states and territories cover only state and local government employees:
 - Connecticut, Illinois, Maine, New Jersey, New York, and the Virgin Islands
- State Plans must also notify OSHA within 15 days of their plans to comply with the OSH Act requirements.

State-Plan States Adoption and Notification Requirements

- The State Plan standard must remain in effect for the duration of the federal ETS.
- All State Plans must be approved by federal OSHA.
- If a State Plan does not comply with its obligations under the OSH Act, OSHA can begin the process of decertifying the state charter, which would mean federal OSHA would take over jurisdiction in that state.
- For example, this process has already been initiated in UT, AZ, and SC, as those three states have not adopted the federal OSHA Healthcare ETS that was issued in June 2021.

Preemption Issues

The image is a composite background. The top half shows a dark, starry space with a bright, glowing sun or star on the horizon, creating a lens flare effect. The bottom half shows a night view of a city with illuminated buildings and streets. A network of glowing lines, in shades of blue and orange, is overlaid on the city, connecting various points, suggesting a global or digital network.

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State Laws Passed to Limit Employer COVID-19 Vaccine Mandates

- Alabama, Arkansas, Iowa, Tennessee, Utah, and West Virginia legislatures recently passed bills aiming to limit an employer's ability to mandate vaccination or expand the grounds for exemption from a vaccine mandate.
- These states follow Montana's passage of a law in May prohibiting discrimination on the basis of vaccination status and the Texas governor's issuance of an executive order in early October purporting to expand exemptions to vaccine mandates.
- Illinois's 1998 Health Care Rights of Conscience Act also has been used to challenge vaccine mandates.
- Florida will consider similar measures in a special session starting November 15, and other states will likely consider similar legislation when their legislatures reconvene in the new year.

OSHA's Position on Preemption

- OSHA explained in the preamble to its COVID-19 ETS that state and local requirements that “ban or otherwise limit workplace vaccination, face covering, or testing clearly ‘relate’ to the occupational safety and health ‘issues’ that OSHA is regulating in this ETS.”
- According to OSHA, any state and local laws on those topics would be in direct conflict with the ETS and are therefore preempted – unless they were passed by a federally approved OSHA State Plan and meet or exceed federal OSHA ETS requirements.
- According to OSHA, “[T]his is true even for State or local requirements that may not prevent employers from compliance with the ETS, but that prescribe or limit the employer’s ability to mandate vaccination for its workforce as the employer’s chosen means of compliance.”
- OSHA made clear that just because OSHA allows vaccination or weekly testing it does not mean that a state can ban vaccine mandates in favor of testing (or limit an employer’s ability to enact other safety measures such as mandatory face coverings).

State Laws, ETS, and Impact of Existing Stay

- If ETS had not been stayed, OSHA preemption would be a strong basis for not complying with state statutes and executive orders
- However, given the current stay, failure to comply with certain laws and executive orders raises greater risks
- Factors to consider include:
 - Specific requirements
 - Statute vs executive order (and governor's authority to issue an order)
 - Effective date
 - Enforcement mechanism and remedies
 - Whether employer is covered by Federal Contractor EO or CMS IFR

State Laws, ETS and Impact of Existing Stay – cont'd

- Biggest risk is when employers have chosen to implement “hard” mandates (i.e., no testing alternative)
 - Options
 - Accept the risk and continue implementing current policy
 - Tread carefully (e.g., issue temporary accommodations until a date is certain)
 - Comply with state law unless and until ETS stay is lifted
- Consult with counsel prior to taking adverse employment actions in states with conflicting laws

ETS FAQs Say Follow More Protective State Laws

- 1.B. Does the ETS preempt State or local requirements mandating face coverings in indoor public spaces, or that members of the public provide proof of vaccination or recent COVID-19 testing to enter restaurants, bars, or other public spaces?
- *No, the ETS does not preempt generally applicable requirements meant to protect public health by helping to prevent the spread of COVID-19 in public spaces. This includes requirements mandating that everyone wear face coverings in indoor spaces, such as businesses, government buildings, and schools, or that members of the public provide proof of vaccination or recent COVID-19 testing to enter restaurants, bars, or other public spaces. OSHA recognizes that the OSH Act does not allow, and OSHA does not intend, for the ETS to preempt such non-conflicting State or local requirements of general applicability that apply to “workers and nonworkers alike,” that “regulate workers simply as member[s] of the general public,” and that are consistent with the federal standard. Gade, 505 U.S. at 107.*

ETS Requirements

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Effective Dates for Key Requirements

- By December 6, 2021:
 - Establish a vaccine policy.
 - Determine the vaccination status of each employee.
 - Provide support for employee vaccination.
 - Implement procedures for positive-test notification, removal, and return to work.
 - Implement face-covering requirement for unvaccinated employees.
 - Provide required employee disclosures.
 - Implement procedures for reporting work-related fatalities and hospitalizations to OSHA.
 - Ensure compliance with recordkeeping requirements.
 - Make available certain records as requested by employees or OSHA.
- By January 4, 2022:
 - Begin weekly testing for employees who are not fully vaccinated.

100-Employee Threshold – The Basics

- OSHA ETS applies to all employers with 100+ US-based employees
 - Employers **must** count:
 - All employees (not just those at a single location)
 - All employees, regardless of vaccination status
 - Seasonal workers
 - Part-time workers
 - Minors
 - Remote workers (who are then otherwise exempt from substantive requirements as long as they are remote)
- Employers should **not** count:
 - Independent contractors
 - Workers employed by staffing agencies

100-Employee Threshold – The Details

- **Fluctuating Numbers.**
 - When an employer crosses the 100-employee threshold, it is covered while ETS is in effect.
- **Franchise Situations.**
 - In the “traditional” franchisor/franchisee situation, franchisors do **not** need to count the employees of franchisees and vice versa.
- **Multiemployer Worksites.**
 - Each employer should only count **its own** employees.
- **Related businesses.**
 - ETS does not squarely address subsidiaries and related entities.
 - The Occupational Safety and Health Review Commission (OSHRC) has different tests to determine who is an “employer.”
 - Ex: economic realities test. **Focus:** who controls the worker
 - Ex: single-employer test. **Focus:** interrelated operations

Exemptions from the ETS

- The ETS does not apply to:
 - **Workplaces** covered under the Safer Federal Workforce Task Force COVID–19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (i.e., **the Federal Contractor EO**)
 - **Settings** where any employee provides healthcare services or healthcare support services subject to 29 CFR § 1910.502 (i.e., **OSHA Healthcare ETS**)

Mandatory Vaccine Policy

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Vaccine Policy – What Approach Makes Sense for Your Business?

- First requirement of the ETS is to develop and implement a **written** vaccine policy
- By **December 6, 2021**, employers must establish a vaccine policy that requires either:
 - Mandatory vaccination (hard mandate); or
 - Weekly testing for unvaccinated employees (soft mandate).
- OSHA has also noted that employers may enforce different policies for different operations or worksites (i.e., a partial mandatory vaccination policy).

Developing a Written Vaccine Policy

- OSHA instructs that a vaccine policy **must be in writing** and **should** address all applicable requirements of the ETS:
 - Vaccination requirements (i.e., hard or soft mandate)
 - Applicable exclusions (i.e., accommodations)
 - Determining vaccination status (i.e., acceptable proof and how to be collected)
 - Vaccine PTO
 - Testing and face coverings (don't forget about accommodated employees)
 - Positive tests, removal, return-to-work criteria
 - Mandatory disclosures to employees (including what information employees are entitled to and how it can be requested)
 - Discipline policy for noncompliance

Developing a Written Vaccine Policy – cont'd

- What else should a vaccine policy contain?
- OSHA instructs that an effective written policy should also contain:
 - Policy's effective date
 - Whom the policy covers
 - Deadlines (e.g., to be vaccinated, to submit proof)
- OSHA published templates
- *Practical tips:*
 - Update/revise existing policies to address gaps
 - Consider developing a compliant written policy even if your business plans to wait for legal challenges to resolve

Determining Vaccine Status

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Acceptable Forms of Proof

- Regardless of whether you impose a mandatory vaccine policy or a test-out option, you must determine vaccination status of all employees by December 6, 2021.
- The ETS identifies specific methods of acceptable proof of vaccination:
 - **Record of immunization** from a healthcare provider or pharmacy;
 - Copy of US COVID-19 **Vaccination Record Card**;
 - Copy of **medical records documenting 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 healthcare professional(s) or clinic site(s) administering the vaccine(s).
- You must retain either a physical or digital copy of the documentation.
- *Practical Tips*
 - Review existing policy (e.g., expand to include all acceptable forms)
 - Consider asking about vaccination status (including currently remote workers) even if you are waiting to implement policies until legal challenges resolve

Two Exceptions: (1) Lost Card/Records

- If an employee is unable to produce acceptable proof of vaccination (for example, because their card was lost or stolen), they can submit a signed and dated statement confirming vaccination that:
 - Attests that they have lost or are otherwise unable to produce proof required by the ETS, **and**
 - Includes the following statement: “I declare 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.**”
 - The statement also should include, to the best of the employee’s recollection:
 - The type of vaccine administered
 - Date(s) of administration
 - The name of the healthcare professional(s) or clinic site(s) administering the vaccine(s)
- *Practical Tips:*
 - No need to affirmatively announce this exception
 - Consider developing a template attestation

Two Exceptions: (2) Prior Proof

- The ETS provides a limited exemption for employers who previously collected employee vaccination information using forms of proof not accepted under the ETS.
 - Employer must have ascertained vaccination status prior to the issuance of the ETS (**Nov. 5**); and
 - Employer must have retained records of that ascertainment.
- **What constitutes a record?**

Testing for Unvaccinated Employees

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What Types of Tests Are Allowed?

- Starting January 4, 2022, workers who are not fully vaccinated must undergo weekly COVID-19 testing
- Tests must be:
 - Cleared, approved, or authorized, including in an Emergency Use Authorization, by the FDA to detect current infection of COVID-19;
 - Administered in accordance with the authorized instructions; and
 - **Not** both self-administered and self-read **unless** observed by the employer or an authorized telehealth proctor.
- ETS does not require employers to pay for COVID-19 tests subject to state/local laws and any CBAs (more to come)

Testing Takeaways

- FDA-approved rapid antigen tests **are** permitted (if administered as described above)
- Antibody tests are **not** permitted
- Self-administered tests (for example, at home tests) are **only** allowed if:
 - (1) sent to a laboratory for results, or
 - (2) collection and results are observed by the employer or an authorized telehealth proctor

Testing for Remote Workers

- Fully remote workers are not subject to the ETS's vaccine or testing requirements
- **If** an unvaccinated remote worker reports to the workplace, **then** they must have been tested within seven days prior to going into the workplace

Practical tip: plan now for remote workers returning to the workplace

Recordkeeping Requirements:

- (1) What to Maintain, and**
- (2) Who Can Ask for It**

(1) What to Maintain

- While the ETS remains in effect:
 - The records of **each** COVID-19 test result for **each** unvaccinated employee
 - Vaccine records
- A roster (**by worksite**) of the vaccination status of all employees
- FAQs say roster should show if employees are:
 - Fully vaccinated,
 - Partially (not fully) vaccinated,
 - Not fully vaccinated because of a medical or religious accommodation, or
 - Not fully vaccinated because they have not provided acceptable proof of their vaccination status
- ***If required to "maintain a record" of each test result, what should employers do if a test option does not yield a record?***
 - OSHA states in the preamble that test-result records should include "information that identifies the worker (i.e., full name plus at least one other identifier, such as date of birth), the specimen collection date, the type of test, the entity issuing the result (e.g., laboratory, healthcare entity), and the test result."

(2) Who Can Ask for It?

- Employees (**end of next business day**) after request:
 - Provide copies of their own vaccine documentation and own COVID-19 test results upon request
 - Number of fully vaccinated employees and the total number of employees at a workplace
- OSHA after request:
 - A copy of the employer's (1) **written policy** and (2) number of fully vaccinated employees and the total number of employees at a workplace, **within four hours** after a request.
 - All other records and other documents required to be maintained by the ETS, by the end of the next business day after a request.

**Vaccine and testing records are confidential employee medical records.*

Practical Tip: implement protocols for regular updating of records/rosters (e.g., new hires, end of remote work, previously unvaccinated)

Positive Test:

(1) Notification

(2) Removal from Workplace, and

(3) Return to Work

Positive Test: (1) Notification

- Employers must establish policies requiring employees to notify them when:
 - They have tested positive for COVID-19; or
 - They have been diagnosed with COVID-19 by a licensed healthcare provider.
- If an employee learns of the test or diagnosis while at a company facility, they should immediately depart and contact their supervisor via phone or email.

Positive Test: (2) Removal from Workplace

- Regardless of vaccination status, employees who test positive for COVID-19 or are “diagnosed with COVID–19 by a licensed healthcare provider” must be immediately removed from the workplace.
- ETS does not address:
 - Contact tracing or removal of close contacts
 - CDC guidance addresses these topics
 - State and local law may require
 - PTO for removed employees

Positive Test: (3) Return to Work

- Employees may only return after they:
 - 1) Meet the return-to-work criteria published in the CDC's Isolation Guidance
 - For symptomatic cases, at least 10 days since symptoms first appear, no fever for 24 hours without fever-reducing medication, and other symptoms have improved
 - For asymptomatic cases, at least 10 days since test specimen was provided;
 - 2) Receive a recommendation to return to work from a licensed healthcare provider; **or**
 - 3) Obtain a negative test result on an NAAT (i.e., PCR) test after having received a positive antigen test result.

Face Coverings:

- (1) Requirements**
- (2) Exceptions**
- (3) Voluntary Use**

Face Coverings: (1) Requirements

- Employers must ensure that unvaccinated employees wear face coverings when indoors or in a car with another person for work purposes.
- Face coverings must:
 - Completely cover the nose and mouth;
 - Be made with two or more layers of fabric that is tightly woven;
 - Be secured to the head with ties, ear loops, or elastic bands that go behind the head. If gaiters are worn, they should have two layers of fabric or be folded to make two layers;
 - Fit snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and
 - Be a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings.
- Notes:
 - The ETS does **not** require that employers provide or pay for face coverings
 - Difference between ETS rules and rules for covered federal contractors

Face Coverings: (2) Exceptions

- Unvaccinated individuals may remove their face coverings in certain situations:
 - When alone in a room with floor-to-ceiling walls and a closed door;
 - While actively eating or drinking;
 - For identification purposes;
 - When wearing a respirator or face mask (i.e., a medical-procedure mask); or
 - When the employer can demonstrate that use of face coverings is infeasible or creates a greater hazard that would excuse compliance

Face Coverings: (3) Voluntary Use

- Must not prevent any employee from voluntarily wearing a face covering unless the employer can demonstrate that doing so would create a hazard.
- But, employers may require vaccinated employees to wear face coverings.

Face Coverings: (3) Voluntary Use Cont'd – Respirators

- Employers must permit workers to wear a **respirator** (e.g., N95) instead of a face covering
- Mini Respiratory Protection Program, **if employer provides respirator:**
 - Provide training to the employee on:
 - How to inspect, put on and remove, and use a respirator;
 - The limitations and capabilities of the respirator;
 - Procedures and schedules for storing, maintaining, and inspecting respirators;
 - How to perform a user seal check; and
 - How to recognize medical signs and symptoms that may limit or prevent the effective use of respirators and what to do if the employee experiences signs and symptoms.
 - Ensure that employees who use a tight-fitting respirator perform a user seal check each time it is put on.
 - Comply with requirements around the reuse and discontinuance of respirators.

Practical Tip: consider whether to have unvaccinated employees who choose to wear a respirator sign acknowledgment that it is voluntary, the employer has not provided it, and they are responsible for proper use and maintenance

Reporting Work-Related Fatalities and Hospitalizations

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Reporting Rules

- Must report each **work-related** COVID-19:
 - fatality to OSHA within 8 hours of **learning about** the fatality
 - in-patient hospitalization within 24 hours of **learning about** the in-patient hospitalization
- Different than traditional reporting rules under OSHA Standard 1904.39
 - Is not limited to 24 hours (for hospitalization) and 30 days (for fatality) following work-related incident

Reporting Rules

- Learns of
 - FAQ example: “Receives such information from a family member or medical professional of the affected employee”
- Work-Related
 - Archived May 19, 2020 OSHA Guidance says employers should make a good-faith inquiry, and, if they “cannot determine whether it is **more likely than not** that exposure in the workplace played a causal role,” no need to record
 - Factors: interactions with public, physical distancing, ventilation, known exposures

Employee Disclosures:

- (1) ETS Requirements and Employer Policies**
- (2) CDC Vaccine Information, and**
- (3) Antiretaliation and Criminal Penalties**

Employee Disclosures: (1) ETS Requirements and Employer Policies

- Must inform each employee of:
 - Requirements of the ETS
 - Any employer policies implemented to comply with the ETS:
 - The process used to determine employee vaccination status;
 - Time and pay/leave that employees are entitled to for vaccination or side effects;
 - Procedures for providing notice of a positive COVID-19 test or diagnosis;
 - Procedures to be used for requesting records under the ETS; and
 - Policies and procedures applicable to unvaccinated employees, including for COVID-19 testing and face coverings.

Employee Disclosures: (2) CDC Vaccine Information

- Must provide the CDC's "*Key Things to Know About COVID-19 Vaccines*"
 - Available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
 - Includes information on COVID-19 vaccine efficacy, safety, and the benefits of vaccination

Employee Disclosures: (3) Antiretaliation and Criminal Penalties

- Must inform employees of antiretaliation protections for reporting injuries/illness and for exercising any right under the OSHA Act (e.g., complaint about employer's failure to comply with ETS)
- Must inform employees about potential criminal penalties for knowingly providing false statements or documents (18 U.S.C. § 1001(a) and Section 17(g) of OSH Act)

Compliance Options

- This is **not** a formal training requirement
- Employers have flexibility in how to communicate this information to employees
- *Practical Tips:*
 - Employers can make this very simple by including all required communications and information in their written vaccine policy
 - Maintain record of distribution

Wage and Hour Considerations Regarding Vaccination and Testing

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Providing Employees Time for Vaccination

- Employers are required to support COVID-19 vaccination for each employee by:
 - Providing **reasonable time** to each employee **during work hours** for each of their primary vaccination dose(s), including **up to four hours** of paid time, at the employee's **regular rate of pay**, for the purposes of vaccination.
 - Reasonable time may include, but is not limited to, time spent related to the vaccination appointment(s), such as registering, completing required paperwork, all time spent at the vaccination site (e.g., receiving the vaccination dose, post-vaccination monitoring by the vaccine provider), and time spent traveling to and from the location for vaccination (including travel to an off-site location (e.g., a pharmacy)).
 - Employers **cannot** offset this benefit with other PTO the employee has accrued.
 - Requirement is not retroactive
- Under the ETS, if an employee **chooses** to get vaccinated outside of work hours, employers are not required to provide the employee with pay for receiving the vaccine during nonwork hours.

Providing Employees Time for Vaccination – cont'd

- Low risk to treat time getting vaccinated as PTO under federal law.
 - State law may require time to be counted as “**hours worked**” regardless of when the vaccination occurs.
 - Consider potential **contractual agreements** with employees.
- Under the ETS, employers are not obligated to reimburse employees for transportation costs (e.g., gas money, train/bus fare, etc.) incurred to receive the vaccination.
 - State law may require reimbursement for these costs
 - Increased risk if cost takes employee below minimum wage

Designing the Vaccination Policy and Procedures

- Consider **administrative costs and burdens** in designing the company's vaccination policy:
 - Plan employee schedules accordingly
 - Potential need to create new payroll codes for vaccination time
 - Consider administrative ease of on-site vaccinations where employees are “on the clock”
 - Consider process for reporting vaccination status:
 - When this will be performed
 - Is the time compensable?

Required PTO Benefits – Time for Recovery

- Employers must also provide “reasonable time and paid sick leave” to **recover from side effects** associated with each primary vaccine dose.
 - Employers may set a “reasonable” cap on the amount of paid sick leave available. OSHA has indicated that **two days per dose** would be considered reasonable.

Required PTO Benefits – Time for Recovery – cont'd

- This leave **can** be offset by an employee's already accrued sick leave, unless state/local law provides otherwise.
- An employer **cannot** require an employee to **accrue negative paid sick leave or borrow against future paid sick leave** to recover from vaccination side effects.
- If the employer does not distinguish between different types of leave (i.e., employees are granted only one type of leave), the employer may require the employee to use that leave when recovering from vaccine side effects.
- However, if an employer provides multiple types of leave, such as sick leave and vacation leave, it can only require employees to use their accrued sick leave to recover from vaccine side effects.

Compensation and Costs Associated with Testing

- The level of risk associated with not paying nonexempt employees for time spent associated with testing outside of work hours will vary.
 - Lower risk under the Fair Labor Standard Act (FLSA) and in states that generally follow the FLSA with regard to what constitutes “work.”
 - Higher risk in states that more broadly define “work.”
- With regard to the cost of the test, the ETS does not require employers to pay for any costs associated with testing.
 - However, the ETS notes that employers may be required to cover the cost of testing pursuant to other laws, regulations, or collective-bargaining agreements or other collectively negotiated agreements.

Risk Associated with the Cost of Testing

- As for covering the costs associated with testing, consider:
 - The risk of not paying for the cost of a test to the extent that the cost drops an employee's gross wages below **minimum wage** or below **the salary threshold to be exempt**
 - Whether risk increases if the employer limits the type of testing it will accept
 - The risk of not paying for the cost of a test where no minimum-wage issue exists (assuming not an accommodation)
 - Certain states mandate that employers reimburse employees for required business expenses
 - Certain states mandate that employers pay for required medical exams
 - The risk of not paying for the cost of a test where a disability prevents vaccination (Disability Accommodation)
 - The risk of not paying for the cost of a test where an employee requests an accommodation for a sincerely held religious belief (Religious Accommodation)

Designing the Testing Policy and Procedures

- Consider **administrative costs and burdens** in designing the company's vaccination policy:
 - What will be the **procedure for reporting test results** and will employees incur additional expenses in reporting the results?
 - If paying for the testing time, consider **how employees will record this time**
 - Consider whether the additional hours worked will trigger different **meal and rest-break obligations**
 - Consider whether the restrictions on testing create risk under **the continuous workday rule**
 - If paying for the testing costs, consider how employees will **request reimbursement**
 - If **not paying** for the cost of the test, consider making employees pay out of pocket
 - If deducting cost from pay, consider **state-law prohibitions on deductions**

Enforcement and Penalties

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Monetary Penalties Under ETS

- Employers may be subject to the following penalties for violating the ETS:
 - Up to \$13,653 per Serious or Other-Than-Serious (OTS) violations
 - Up to \$136,653 per Willful or Repeat violations
 - Potential use of “egregious violation” policy
- The proposed penalty amount will be determined by the severity of the violation, including willfulness.
 - OSHA will “determine whether an employer has intentionally disregarded its obligations or exhibited a plain indifference to employee safety or health. In such instances, OSHA can classify the citations as ‘willful,’ allowing it to propose higher penalties, with increased deterrent effects.”

Monetary Penalties Under ETS – cont'd

- OSHA has also adopted its “**egregious violation**” policy “to impose sufficiently large penalties that achieve appropriate deterrence against bad actor employers who willfully disregard their obligation to protect their employees when certain **aggravating circumstances** are present, **such as a large number of injuries or illnesses, bad faith, or an extensive history of noncompliance.**”
- OSHA further notes that the “provisions of this ETS have been intentionally drafted to make clear OSHA’s authority to separately cite employers for each instance of the employer’s failure to protect employees and for each affected employee, where appropriate.”
- Such penalties (per employee and/or per instance) have potential to be significant if a COVID-19 outbreak occurred in the workplace.
 - Ex: if OSHA finds that 5 unvaccinated employees were not tested at least weekly and were not wearing face coverings in the workplace, OSHA could theoretically issue 10 different citations, each with its own penalty (5 citations for failure to do routine testing, and 5 citations for failure to enforce face-covering requirements).

Criminal Penalties Under the ETS

- The ETS requires that employers collect vaccination status of employees. If an employee is unable to show proof of vaccination as discussed in the ETS, they may attest to their status by a signed statement with specific language provided.
- **Employees** may be subject to criminal penalties for knowingly *providing* false information to employers regarding vaccine status.
- **Employers** may be subject to criminal penalties for knowingly *accepting* false documentation related to vaccine status.
 - *"If an employer knows that proof submitted by an employee is fraudulent, and even with this knowledge, accepts and maintains the fraudulent proof as a record of compliance with this ETS, [the employer] may be subject to the penalties in 18 U.S.C. 1001 and 17(g) of the OSH Act."*
- Section 17(g) of the OSH Act provides for fines up to \$10,000, imprisonment for not more than six months, or both, and 18 U.S.C. 1001 allows for fines and imprisonment of no more than five years.

Related Issues

The image is a composite background. At the top, a bright sun or star is on the horizon, casting a glow over a dark, starry space. Below this, a cityscape is visible at night, with lights from buildings and streets. A network of glowing lines, in shades of blue and orange, is overlaid on the city, connecting various points, suggesting a global or digital network. The overall color palette is dominated by blues, oranges, and whites.

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Accommodations for Vaccination Requirements

- If the employer requires mandatory vaccination, it must still provide legally required accommodations.
- The following categories of employees are entitled to a reasonable accommodation:
 - Employees for whom a vaccine is medically contraindicated;
 - Employees for whom medical necessity requires a delay in vaccination; and
 - Employees entitled to a reasonable accommodation because they have a sincerely held religious belief that conflicts with the vaccination requirement.
- Individuals who are unvaccinated due to such an accommodation must comply with the testing rules of the ETS.

Considerations for Medical Accommodations

- If initial documentation for request is insufficient (e.g., because it is vague or conclusory), employer may request additional information.
- Only need to provide accommodations that do not impose an **undue hardship** on the finances or operations of the employer.
 - Defined under the ADA as “significant difficulty or expense.” Relevant considerations may include:
 - Inability to maintain social distancing given the nature of the job, diminished capacity needed to implement social distancing, and concomitant decreased productivity;
 - Operational challenges of tracking who is unvaccinated and ensuring compliance with testing and masking protocols; and
 - Increased costs associated with cleaning and testing protocols.
- It is also an undue hardship if employees pose a **direct threat** to the health and safety of themselves or others.
 - Key question here is whether there are measures that can sufficiently mitigate the threat posed.

Considerations for Religious Accommodations

- Title VII protects *sincerely* held religious beliefs.
 - Employers can ask for follow-up information to assess sincerity (e.g., whether an employee has received vaccines in the past, or whether an employee has taken other medication tested on fetal cells, etc.).
- Only need to provide accommodations that do not impose an **undue hardship** on the finances or operations of the employer.
 - “Undue hardship” is defined under Title VII as more than *de minimis* costs.
 - Some states (e.g., California) define undue hardship as the same for disability accommodations.
- Employers can also require that employees not pose a **safety risk**, which is the same as direct threat.

Accommodations to Testing Requirements

- If an employee seeks an accommodation from the testing requirement, employers must engage in an interactive process to determine whether the employee is entitled to an accommodation and whether one can be provided.
- In general, exemption from the testing requirement will pose an undue hardship and/or a direct threat to the health or safety of others.
- Where possible, fully remote work may be an option.
 - Otherwise an employer may consider denying the request and placing the employee on unpaid leave or terminating employment.

Labor Issues

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OM Memo 22-03 – Bargaining Obligations

- On November 10, 2021, National Labor Relations Board General Counsel Jennifer Abruzzo issued Operations Management Memo 22-03 addressing bargaining obligations in connection with the ETS.
- It is the general counsel's position that:
 - Even though the ETS is federally mandated, any aspect of the ETS that grants employers discretion on implementation is subject to decision bargaining.
 - Employers have an effects bargaining obligation for any nondiscretionary aspect of the ETS.
- Unionized employers must give unions *reasonable* notice and an opportunity to bargain over changes stemming from reasons related to the ETS.
- There is no bright-line standard for determining what constitutes "reasonable" notice, but the board has found 2-3 weeks' notice to be reasonable in circumstances where (like here) swift action is required.

Federal Contractor Executive Order and Guidance

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Vaccine Mandate for Federal Contractors & Subcontractors

- On September 9, 2021, President Biden issued an executive order mandating that federal contractors and subcontractors require their employees to be fully vaccinated against COVID-19.
- Worksites subject to the federal contractor executive order and related guidelines are not covered by the ETS.
- Compliance deadline: Extended from December 8, 2021 to January 4, 2022.
- Covered contractors and subcontractors:
 - Working under new federal contracts or contract-like instruments awarded on or after November 14, 2021 whose contracts contain a clause requiring compliance with the guidance; and
 - existing contracts for which options to extend are exercised on or after October 15, 2021 and which modify the contract to include the clause.
- “Covered Workplace”:
 - Any worksite controlled by a contractor or subcontractor where an employee of the covered contractor or subcontractor working on or in connection with a covered contract is likely to be present during the period of performance.
 - Employees performing duties necessary to the performance of a covered contract, but not directly engaged in the specific work called for by the covered contract (e.g., human resources, legal review, billing), qualify as working “on or in connection with” the contract.

Vaccine Mandate for Federal Contractors & Subcontractors – cont'd

- Vaccination Requirement:
 - Covered contractors must ensure that all of their employees working at a covered worksite—or working remotely on or in connection with a covered contract—are “fully vaccinated” for COVID-19 (unless legally entitled to an accommodation).
 - Must verify vaccination status with proof of vaccination.
- Masking and Social Distancing Requirement:
 - Covered contractors must ensure that all individuals, including covered employees and visitors, comply with published CDC guidance for masking and social distancing at covered contractor workplaces.
 - In areas of high or substantial community transmission (as defined by the CDC), all persons—including those fully vaccinated—must wear masks indoors.
 - People in any work setting who are not fully vaccinated should maintain six feet of distance from others.
- COVID-19 Workplace Safety Coordinator Requirement:
 - Covered contractors must designate a person or persons to coordinate implementation and compliance with this guidance at covered contractor workplaces, including compliance with vaccination documentation requirements.

Centers for Medicare and Medicaid Services (CMS) Emergency Regulation

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CMS Interim Final Rule For Healthcare Workers

- Alongside the OSHA ETS, the Centers for Medicare and Medicaid Services (CMS) at the Department of Health and Human Services (HHS) published a parallel interim final rule (IFR) governing the same COVID-19 vaccination requirements but specifically applied to healthcare workers.
- The CMS IFR and the OSHA ETS must be read together for companies and employees that work with healthcare facilities, as the CMS IFR is intended to take priority for certain healthcare facilities and staff of nonhealthcare entities that have service arrangements with designated healthcare facilities, and does not incorporate a testing requirement as an option.
- CMS makes clear that its IFR will take priority when determining the interaction between the OSHA ETS and the CMS IFR.

CMS Interim Final Rule For Healthcare Workers – cont'd

- The CMS's IFR requires healthcare workers at facilities participating in the Medicare and Medicaid programs to be fully vaccinated.
- Covered facilities include a large array of entities that are certified by CMS, and penalties for failure to comply include termination and, potentially, closure.
- Covered entities include hospitals, ambulatory surgery centers, dialysis facilities, home health agencies, and long-term care facilities, as well as a range of clinics including federally qualified health centers, rural health clinics, and other certified providers.
- The CMS rule, which does not contain a "test out" option, is expected to cover 17 million workers and contains the same January 4, 2022 deadline as the OSHA ETS.
- The rule applies to employees regardless of whether their positions are clinical or nonclinical and also covers students, trainees, volunteers, and contractors.
- As noted above, staff on service contracts with covered facilities or physicians who may serve on medical staffs of institutions are indirectly covered, as the CMS rule would apply to these individuals and these entities.

Resources

Coronavirus COVID-19 Resources

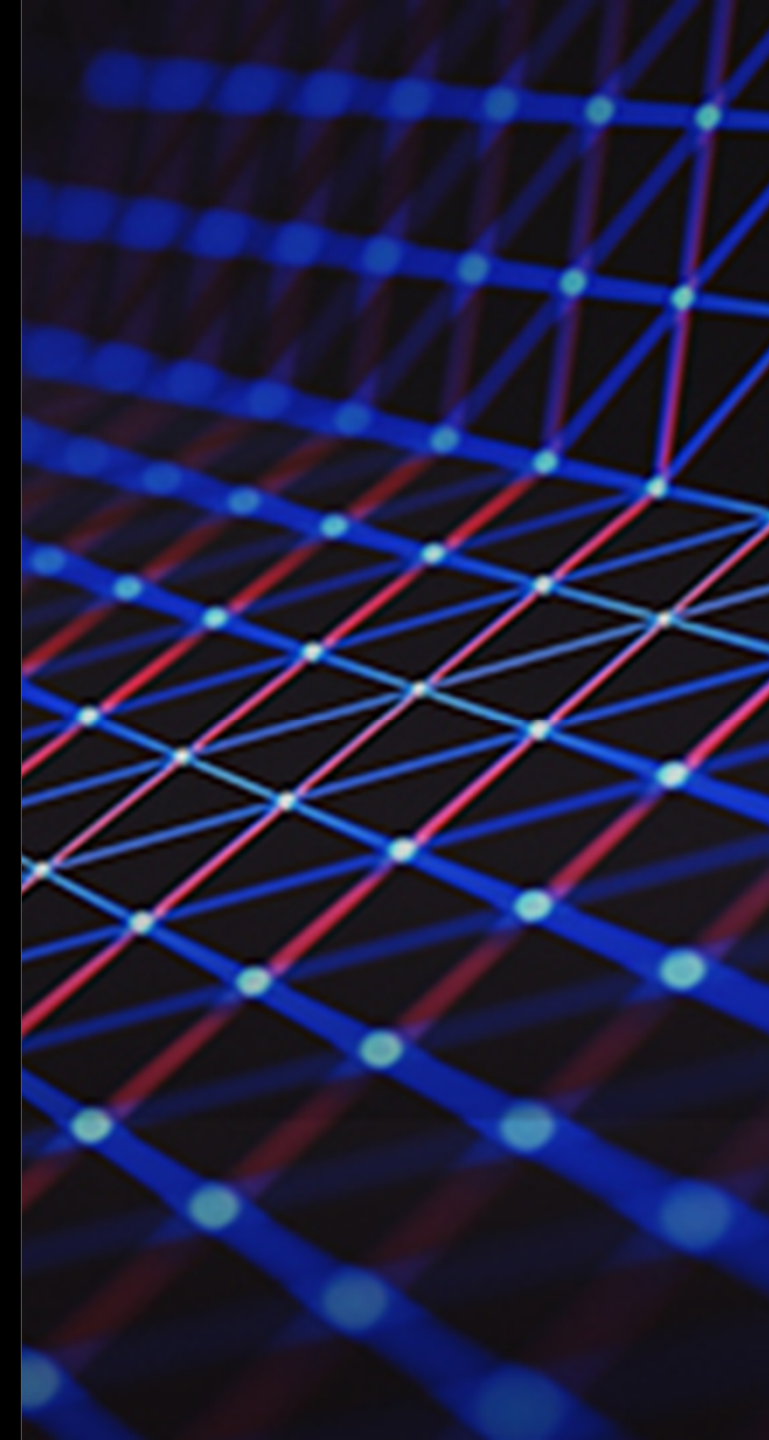
We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

[www.morganlewis.com/
topics/coronavirus-
covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.



Vaccine-Related Resources

- ETS-Compliant Policies and Attestation Form
- Vaccine Toolkit (including ETS-compliant policies; guidance re accommodations; template accommodation request forms, medical provider forms, approval letters, and denial letters)
- COVID-19 Test Reimbursement – 50 State Survey
- Compensability of Time Spent Taking COVID-19 Tests – 50 State Survey

Questions?

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THANK YOU

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