

Answers to Frequently Asked Questions About OSHA's Emergency Vaccine Regulation Affecting Large Employers

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On Nov. 4, 2021, the Occupational Safety and Health Administration (OSHA) issued an Emergency Temporary Standard (ETS) requiring employees of large employers either to get vaccinated or to test negative on a weekly basis. Despite OSHA publishing 490 pages of guidance and 32 pages of FAQs, employers remain plagued by questions about the new ETS.

For an in-depth discussion of this topic and additional related questions, see our recent webinar replay: OSHA ETS Employee COVID-19 Vaccination and Testing Mandates New Requirements, Tips and Traps for Large Employers.

How do employers determine if they employ at least 100 employees?

Employers should count all of their employees, companywide across their U.S. work locations. This count includes:

- Off-site employees
- Remote employees
- Part-time employees
- Temporary and seasonal employees
- Outdoor employees
- Minor employees

As importantly, OSHA explained who is *not* counted when determining coverage:

- Independent contractors are not counted toward the total number of employees.
- Franchisors and franchisees are considered separately. Thus, under a traditional model, the franchisor would count only “corporate” employees, and each franchisee would count only employees of that individual franchise.
- Staffing agency employees are not counted by a host employer. But the staffing agency must count its employees, including those placed at a host employer site, to determine if the staffing agency is a covered employer.
- Other companies’ employees are not counted. On a typical multi-employer work site such as a construction site, each company represented — the host employer, the general contractor and each subcontractor — would count only its own respective employees. The host employer and general contractor would not count the total number of overall workers at each site.

On what date is the 100-employee headcount calculated for purposes of determining coverage?

Determination of whether an employer falls within the scope of the ETS is initially based on the number of employees as of Nov. 5, 2021. If the employer had at least 100 employees on that date, then the employer is covered by the ETS and remains covered for the duration of the ETS, even if the employer’s headcount later drops below 100 employees. If the employer had fewer than 100 employees on Nov. 5, 2021, but later hires more workers and hits the 100-employee threshold for coverage, the employer will be required to comply with the ETS requirements as of that date and moving forward — again, for the duration of the ETS.

Does the ETS apply to employers covered by EO 14042 (for certain federal contractors and subcontractors) issued in September 2021 and the OSHA Healthcare ETS (for certain healthcare facilities) issued in July 2021?

Generally, no. EO 14042 and the OSHA Healthcare ETS issued in June 2021 each override the obligations outlined under the new ETS. *However*, these requirements supersede the new OSHA ETS *only* for employees in covered “workplaces” under EO 14042 and covered “settings” under the OSHA Healthcare ETS. Or, put another way, the regulatory override is not necessarily employer-wide or company-wide. Thus, for example, an employer may have some employees covered by EO 14042 (which requires mandatory vaccinations unless exempted as a disability or religious accommodation) *and* other employees covered by the ETS (which provides a potential “test” alternative to mandatory vaccination and sets forth detailed requirements and limits on the types of tests that may be used that are not in the EO).

What kind of COVID-19 tests are permitted under the ETS?

An approved COVID-19 test must: (1) be cleared, approved or authorized, including in an Emergency Use Authorization (EUA), by the Food and Drug Administration (FDA) to detect current infection with COVID-19; (2) be administered in accordance with the authorized instructions; *and* (3) *not* be *both* self-administered and self-read, unless observed by the employer or an authorized telehealth proctor.

Per OSHA, examples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory (including home or on-site collected specimens that are processed either individually or as pooled specimens), proctored over-the-counter tests, point-of-care tests and tests where specimen collection and processing is either done or observed by an employer.

Although the *language* “not both self-administered and self-read” suggests that a self-administered test that is “read” by a third party (like HR) would suffice, the *examples* of approved tests suggest that the employer must be more involved by either performing or observing both test collection and processing. We anticipate OSHA may update its FAQs to address this issue.

Also, notably, approved COVID-19 tests *cannot* include:

- Antibody tests
- NAAT tests, if self-administered (i.e., only antigen tests can be self-administered)

What medical record collection and retention issues do employers face?

Employers must maintain: (1) a record of each employee's vaccination status; (2) acceptable proof of vaccination for each employee per specified ETS parameters; (3) a roster of all employees' vaccination status; and (4) a record of each COVID-19 test result. These records are considered an "employee medical record" and must be maintained in accordance with existing OSHA rules for employee medical records and the Americans with Disabilities Act (ADA). However, unlike other employee medical records under OSHA, employers are not required to preserve these medical records for 30 years after separation from employment. Instead, per OSHA, these medical records must be maintained and preserved only while the ETS is in effect (albeit *other* federal and state employee record-keeping timelines will still apply).

Are state employers or political subdivisions of the state affected by the ETS?

As a general rule, state or local government employers, and political subdivisions of the state, are exempt from federal OSHA coverage. *However*, in states with OSHA-approved occupational safety and health programs (i.e., "State Plans"), employers in those states who meet the 100-employee threshold — including state and local government employers — will be covered by State occupational safety and health requirements. And those State Plans, in turn, must adopt requirements that are "at least as effective" as federal OSHA requirements in the new ETS. Thus, for state and local employers in the 28 states that have State Plans, the large majority of the requirements outlined in the federal ETS should apply.

How will employers verify workers' vaccination status?

Employers must determine the vaccination status of each employee (vaccinated and unvaccinated) and must require each vaccinated employee to provide acceptable proof of vaccination status per OSHA standards. Acceptable proof is: (1) the record of immunization from a healthcare provider or pharmacy; (2) a copy of the COVID-19 Vaccination Record Card; (3) a copy of medical records documenting the vaccination; (4) a copy of immunization records from a public health, state or tribal immunization information system; or (5) a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name(s) of the healthcare professional(s) or clinic site(s) administering the vaccine(s). If an employee cannot provide such acceptable proof, special rules apply allowing the employee to self-certify they have been vaccinated. Special rules also apply regarding documentation collected by employers prior to Nov. 5, 2021, and the particular "data points" that must be contained in collected records.

What obligations do employers have under collective bargaining agreements in unionized workplaces?

Employers in unionized workplaces with 100 or more employees must, like all covered employers, follow the minimum requirements established by the ETS. However, nothing in the ETS prevents employers from agreeing with employees and their representatives to implement additional measures, nor does the ETS displace collectively bargained agreements that exceed the requirements of the ETS. As examples of additional measures that could be implemented via collective bargaining, employers might agree to cover the costs of face coverings, or to adopt a requirement that all employees, regardless of vaccination status, wear face coverings while working indoors.

Can employers require vaccinations (without giving employees the opportunity to test)?

Yes. The ETS permits employers to choose a "VAX-only" or "VAX/Test" program, subject to religious and disability-based accommodation requirements. OSHA also recognizes there may be employers who develop and implement "mix and match" mandatory vaccination policies (i.e., a vaccination-only policy that applies to only a portion of their workforce, with other employees having the option to test). An example might be a retail corporate employer that has a mixture of staff working at the corporate headquarters, performing intermittent telework from home, and working in stores serving customers. In this type of situation, the employer may choose to require vaccination of only a subset of its employees (e.g., those working in stores), and to treat vaccination as optional for others (e.g., those non-public-facing employees who work from headquarters or who perform intermittent telework).

What happens to employees who refuse to vaccinate or test?

If an employee does not provide either proof of vaccination or documentation of a COVID-19 test result on a weekly basis (i.e., per the vaccination program adopted by an employer), the employer must *at a minimum* keep that employee removed from the workplace until the employee provides a negative test result or becomes fully vaccinated. Further, depending on the facts at issue, applicable state and federal law, and the employer's policy, disciplinary measures may apply as well, up to and including termination.

What are the penalties for noncompliance?

OSHA could fine noncomplying businesses up to \$13,653 per violation. For willful or repeat violations, OSHA could fine employers 10 times that amount.

Can employers require employees to pay for the cost of COVID-19 tests?

While OSHA states that the ETS *itself* does not prohibit employers from requiring employees to pay for the cost of COVID-19 tests, employers should be mindful of *other* federal or state laws that could require employers to do so. By way of example:

- Many states, such as California and Illinois, have business-expense reimbursement laws that may require an employer to pay for COVID-19 testing costs.
- Non-exempt employees who are paid the minimum wage may claim that requiring them to pay for an employer-required test violates the applicable minimum-wage law in certain circumstances.
- Many states require employers to pay for work-related medical tests.
- The Equal Employment Opportunity Commission (EEOC) takes the position that employers (not employees) should bear the cost of accommodations under the ADA.
- Exempt employees under the federal Fair Labor Standards Act (FLSA) may contend they are not receiving their weekly salary "free and clear" if they are required to pay for weekly COVID-19 testing, in alleged violation of the FLSA's salary-basis test — and in some circumstances, may claim the testing cost causes an FLSA salary-level violation as well.

Must employers pay employees for the time spent getting tested?

In most cases, employers will need to pay for the time it takes non-exempt employees (as defined by the FLSA and applicable state law) to test for COVID-19. According to the [U.S. Department of Labor](#), this includes tests that occur during off-duty hours if the testing is necessary for the employee to perform his or her job safely and effectively during the pandemic.

Under the ETS, are face coverings required for unvaccinated employees, even in areas where state or local officials have lifted such requirements?

Yes, per OSHA (albeit there may be some later nuances with respect to states with OSHA State Plans).

Under the ETS, are face coverings required for fully vaccinated employees in areas of high transmission where CDC guidance recommends even fully vaccinated employees wear masks when indoors?

No. However, the ETS does **not** preempt any state or local requirements that are more stringent than the ETS, requiring, for example, that face coverings be worn in indoor public spaces regardless of vaccination status.

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