

Services

[Employment Law](#)

[OSHA Compliance & Defense](#)

[Employment Litigation and Arbitration](#)

[FLSA Litigation and Wage and Hour Defense](#)

[Immigration](#)

[Unfair Competition and Trade Secrets](#)

[Labor Law](#)

[Employment Advice, Counseling and Risk Management](#)

OSHA Issues Emergency Temporary Standard Requiring Mandatory Vaccination or Testing For Large Employers

The Occupational Safety and Health Administration's ("OSHA") much-anticipated emergency temporary standard ("ETS") for large employers (100 or more employees) is finally here. The new ETS strongly encourages vaccination as a meaningful way of mitigating the spread of COVID-19 in the workplace.

The ETS was published in the Federal Register and effective on November 5. Employers must comply with the ETS within 30 days after the effective date, except for the obligations related to testing for employees who are not fully vaccinated, which requires compliance within 60 days of the effective date. The ETS will expire six months from issuance, on or around May 5, 2022, if not superseded by a permanent standard. Here are some highlights that impact employer obligations:

1. Coverage for Employers with 100 Employees. The ETS covers all employers with a total number of 100 or more employees at any time the ETS is in effect. In calculating the number of employees, employers must include all employees across all of their U.S. locations, irrespective of employees' vaccination status or where they perform their work. Part-time employees count toward the total, but independent contractors do not. For a single corporate entity with multiple locations, all employees at all locations must be counted.
2. Exceptions to Compliance. Exceptions to compliance exist for workplaces already covered under the *Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* or OSHA's prior ETS for healthcare services or healthcare support services (29 C.F.R. § 1910.502). The ETS also will not apply to employees of covered employers where the employees work alone at the workplace, work remotely or work exclusively outdoors.
3. Mandatory COVID-19 Vaccination Policy. The ETS requires employers to establish, implement and enforce a written mandatory vaccination policy that requires vaccination of all employees, including all new employees as soon as practicable, other than those employees (1) for whom a vaccine is

medically contraindicated, (2) for whom medical necessity requires a delay in vaccination, or (3) who are legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices or observances that conflict with the vaccination requirement. The written mandatory vaccination policy must contain specific provisions setting forth employee rights and employer obligations.

4. Exemption for Testing. The ETS provides an exemption to implementation of a mandatory vaccination program by allowing employers to implement an alternative policy that permits employees to choose either to be fully vaccinated or to be tested regularly for COVID-19 and wear a face covering when they work near others. Unvaccinated (or not fully vaccinated) employees who report to the workplace at least once every seven days must (1) be tested for COVID-19 at least once every seven days, and (2) provide documentation to their employer no later than the seventh day following the date the employee last provided a test result. If employees do not usually report to the workplace once every seven days, but plan to go to that location where others are present, they must (1) be tested for COVID-19 within seven days prior to returning to the workplace, and (2) provide documentation of that test result upon return to the workplace. Employers have an obligation to manage their unvaccinated employees to make sure they are regularly testing for COVID-19 on a weekly basis (or before returning to work), providing timely results and wearing face coverings as required in the workplace. Employers must remove employees who do not provide documentation of a COVID-19 test result until that test result is provided.
5. Paid Time Off for Vaccination. For employers who elect to establish a mandatory vaccination policy, the ETS requires all covered employers provide employees reasonable time, including up to four hours of paid time, to receive each vaccination dose, as well as reasonable time and paid sick leave to recover from any vaccination side effects.
6. Cost of Testing. The ETS does not require employers to pay for any costs associated with regular COVID-19 testing. Employers, however, may have separate obligations to cover such costs under other federal or state laws or collective bargaining obligations. Nothing in the ETS precludes employers from voluntarily paying for COVID-19 testing for any reason, including as part of a reasonable accommodation or negotiation for hiring in a tight labor market. The ETS also notes that, in certain circumstances, the employer may be required under the Fair Labor Standards Act to pay for the time it takes an employee to be tested if, for example, testing is conducted in the middle of a work shift.
7. Face coverings. Employers that do not implement a mandatory vaccination policy must require unvaccinated workers to wear face coverings when they are working near others. Exceptions exist where employees are alone in a closed room, while eating or drinking or briefly to identify employees

for compliance with workplace safety and security requirements. Employers do not need to bear the cost of providing face coverings to employees.

8. Notification of a Positive COVID-19 Test. Employers must require each employee to notify the employer promptly if they receive a positive COVID-19 test or are diagnosed with COVID-19.
9. Removal Following a Positive COVID-19 Test. Employers are obligated to remove employees immediately from the workplace who test positive or are diagnosed with COVID-19. Employers must keep the employees removed until they (1) receive a negative result on a COVID-19 nucleic acid amplification test (“NAAT”) following a positive result on a COVID-19 antigen test (if employees choose to seek a NAAT test for confirmatory testing), (2) meet the return to work criteria in CDC’s “Isolation Guidance,” or (3) receive a recommendation to return to work from a licensed healthcare provider.
10. Costs for Employee Removal. The ETS does not require employers to provide paid time off to any employee for removal from the workplace as a result of a positive COVID-19 test or diagnosis of COVID-19; however, paid time off may be required by other laws, regulations or collective bargaining agreements.
11. Reporting COVID-19 Fatalities and Hospitalizations to OSHA. The ETS requires employers to report each work-related COVID-19 fatality to OSHA within eight hours of the employer learning about the fatality, and each work-related COVID-19 in-patient hospitalization to OSHA within 24 hours of the employer learning about the in-patient hospitalization. This is a change from prior reporting requirements as there is no limitation set on the length of time between workplace exposure and the fatality or hospitalization.
12. Determining Employee Vaccination Status. Employers must determine their employees’ vaccination status by requiring each employee to provide an acceptable proof of vaccination status, including whether they are fully or partially vaccinated. Acceptable proof may include several possible forms, such as copies of an employee’s immunization records or COVID-19 vaccination record card. Employers may also request a signed and dated employee attestation if an employee is unable to produce proof of vaccination.
13. Maintaining Records. Employers must maintain a record and a roster of each employee’s vaccination status. Employers also must maintain a record of each test result provided by each employee. These records must be maintained as confidential medical records and must not be disclosed except as required or authorized by the ETS or other federal law. The records must be maintained and preserved while the ETS is in effect.

The ETS includes additional provisions on other topics, including the availability of records, the manner in which information must be provided to employees and prohibiting retaliation.

Further guidance and information on OSHA's ETS will be presented at Kutak Rock's upcoming employment law webinar *A Whole New World: Navigating the Rapidly Evolving Workplace*, which will take place on November 10 and November 17. A link to register for the webinar may be found [here](#).

You may also contact any member of Kutak Rock's [OSHA Compliance & Workplace Safety Group](#) or [National Employment Law Group](#) if you have questions or need assistance preparing for your obligations under the ETS. You may also visit us at www.KutakRock.com.

