

NOVEMBER 2021

OSHA's Emergency Temporary Standard Leaves It to Employers to Decide Between Vaccination and Testing

Robert Duston | Carolyn Pellegrini | Ashley Miller | Samantha Gross

On November 4, 2021, the U.S. Department of Labor Occupational Safety and Health Administration ("OSHA") released the much anticipated emergency temporary standard ("ETS") regarding vaccination and testing required by an earlier White House Executive Order. The ETS is more than 490 pages in length and will be officially published in the Federal Register on Friday, November 5th. The first 330 pages outline the legal support and defense of the rule and address requirements for similar regulations regarding technical feasibility, economic analysis of impact, regulator flexibility, among others. The discussion in the first part of the rule provides additional details and explanation of its applicability. The last 160 pages of the "preamble" contain significant detail regarding the particulars and implementation of the rule, with the rule itself beginning on page 473.

What You Need To Know:

- By December 5, 2021, every employer with more than 100 employees will need to draft policies, or review and likely revise existing vaccination policies, to address all of the requirements of the new rules.
- The ETS allows employers to choose between instituting a vaccine mandate or a testing mandate.
- Employers must provide paid time off to employees to receive vaccine doses and to recover from side effects of the vaccine.

In determining how to comply with the ETS, employers will need to understand the [ETS](#), the OSHA [Fact Sheets](#) and [FAQs](#), and forthcoming guidance in implementing its requirements. We will continue to provide analysis of the ETS; however, below is a high-level summary as the first step for employers to consider for compliance.

Q1: What is the ETS?

A: OSHA issued the ETS to implement a White House Executive order issued on September 9, 2021. An ETS can be issued without following full notice and rulemaking requirements.

Q2: When is the ETS effective?

A: The ETS is effective on the date of publication – November 5, 2021. All policies and procedures required by the ETS, including paid leave for vaccination, must be in place by **December 5, 2021**. Employees who are not vaccinated by **January 4, 2022**, must be subjected to mandatory testing and other requirements. December 5 is a key date. Every employer with 100+ employees is going to need to either draft new policies, or review and revise existing vaccination policies, to address all of the details covered by OSHA and provide information to their employees about these policies.

Q3: How does this law overlap other requirements, such as the EO for federal contractors?

A: The ETS was written to exclude "workplaces" that are covered under the federal contractor rule (Executive Order EO 14042 on Requiring Coronavirus Disease 2019 Vaccination for Federal Contractors) or the earlier OSHA ETS for health care providers. A separate interim rule was also announced today by the Centers for Medicare & Medicaid Services ("CMS"). See Q22. Employers that have workplaces covered by those rules will need to comply with those laws for those workplaces, then coordinate those obligations with their policies for other workplaces. However, the deadline for complying with the EO for federal contractors was extended to align with the mandatory testing deadline of the ETS—January 4, 2022.

What this exclusion means is that depending on the circumstances, an employer could have a workplace that is subject to the federal contractor rule, a workplace that is subject to the CMS rule and/or a workplace that is subject to the ETS.

LABOR AND EMPLOYMENT AND HIGHER EDUCATION PRACTICES

Q4: Is this a vaccine mandate?

A: No. The ETS presents employers with a choice: (1) institute a “hard” vaccination mandate, which only allows required exemptions for medical/disability and religious reasons; or (2) adopt a policy that permits employees to choose whether to become fully vaccinated or agree to undergo regular testing and provide the results, and that requires face coverings for all unvaccinated employees—a “soft” mandate. It appears that all other provisions, such as testing specifics, leave, etc., apply regardless of the policy employers choose to adopt.

Q5: What employers are covered?

A: Those with 100 or more full or part time employees. Employers must count employees from all U.S. locations, regardless of vaccination status or where they perform work, but not independent contractors. Two or more related business entities may be regarded as a “single employer” if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted. The preamble also discusses how to address questions regarding employee counting for franchisees/franchisors, staffing companies, etc.). Many employers will be covered, even if the majority of their employees are not covered because they work remotely 100 percent of the time.

Q6: Which employees are covered?

A: All of them, including newly hired employees, except for those who:

- Do not report to a workplace where there are other employees or customers;
- Work exclusively from home; or
- Work exclusively outdoors.

An employee’s residence is not considered a workplace under the ETS.

Q7: Do employers have to adopt a policy?

A: Yes. The ETS requires employers to develop a written policy. Existing policies must be reviewed and, if necessary, revised. These policies must address all of the issues covered by the rule, including those where employers have discretion, such as the types of tests. The ETS also identifies information that must be provided to all employees, including information regarding vaccine efficacy, safety, benefits, leave entitlement and anti-retaliation. The written policy must be in place by December 5, 2021. See Q2.

Q8: Must there be one policy for all employees?

A: No. Employers can choose to have different policies for employees in different positions or operations, or have one policy that mandates that all employees be vaccinated, subject to the exemptions for medical/disability and religious reasons. For example, there could be one policy for those employees who have customer contact, and a different one for corporate employees. Or, at facilities facing labor shortages, the company could adopt a soft mandate policy and let the employees choose, while imposing a hard mandate at other locations. See Q19.

Q9: Will employers have to consider exemptions? If so, what is the effect of the exemption?

A: If an employer implements a mandatory vaccination policy as OSHA recommends (a “hard” mandate), then the employer’s policy must exclude from the “mandate” any individuals for whom the vaccine is (i) medically contraindicated; (ii) medically necessary to delay (e.g., after a recent case of COVID-19 or certain treatments); or (iii) legally entitled to a reasonable accommodation based upon disability or sincerely-held religious beliefs (following EEOC guidelines). But granting such an exemption does not change the requirements on these employees. They must still be subjected to testing and masking requirements in the same way as any employee who simply refuses to get vaccinated or to provide proof of vaccination.

Under the “soft” mandate, where the employee can choose whether to get vaccinated or agree to testing and masking, there is no need to consider exemptions for vaccination, because there is no vaccine requirement. There may be the need to consider accommodations for masking. See Q16.

Q10: Must employers require proof of vaccination? What types?

A: Yes. Employers must obtain, and retain, from all covered employees proof of vaccination and maintain a roster of employees’ vaccination status. Employees who do not provide proof must be treated as unvaccinated and subject to testing and masking requirements. The ETS spells out multiple types of documentation that employers can rely upon, including a copy of a vaccination card, records from a health care provider or pharmacy, or other reliable medical records (such as records from a public health agency, etc.). An employee’s attestation is only acceptable if no other records are available, and the employee makes other representations. Employers must be able to produce a roster of employees’ vaccination status upon request by OSHA.

LABOR AND EMPLOYMENT AND HIGHER EDUCATION PRACTICES

Q11: How frequently must unvaccinated employees be tested?

A: Unvaccinated employees physically present in a covered workplace at least once every seven days must be tested once a week. Employees who are physically present in a covered workspace less frequently must be tested within seven days prior to coming to the workplace.

Q12: What type of test can be used?

A: Employers can use any test that has been approved by the CDC, including over-the-counter rapid tests. But they cannot accept self-administered and self-read tests (such as the employee at home) unless it is observed by the employer or an authorized telehealth provider.

Q13: Must employers pay for the cost of the test or the time to get tested?

A: Not under the ETS, but OSHA cautions this may be required under other laws. Neither the USDOL Wage and Hour Division or EEOC have provided clear guidance on this issue, but employers need to consider possible obligations under these and other state or local wage and hour laws. The Wage and Hour Division is expected to issue guidance on this question.

Q14: Are employees required to report positive results?

A: Yes. Under all policies every employee (vaccinated or unvaccinated) must promptly report any positive test result or diagnosis of COVID-19. This is in addition to the required reporting of test results under the rule.

Q15: What happens if an employee tests positive for COVID-19?

A: The employer must immediately exclude the employee from the workplace until the employee meets one of three criteria for returning to work: negative COVID test; adherence to CDC isolation guidance; or recommendation from a healthcare provider.

Q16: Are face coverings required? If so, what types?

A: Unvaccinated employees must wear face coverings that meet certain specifications that appear to be from CDC guidance. The only exceptions are when the employee is alone in an enclosed room, for a limited time while eating and drinking, and where the employer determines it is not feasible for certain types of tasks or jobs. Employers must enforce these rules. Additionally, employers cannot prohibit employees, customers, or visitors from wearing face coverings.

OSHA does discuss the possibility that some employees may be entitled to accommodations from masking and testing requirements. These accommodation requests would be analyzed under EEOC guidance.

Q17: Are employers required to pay for employees to get vaccinated or for time to recover from any side effects of vaccination?

A: Yes. Employers are required to provide a reasonable amount of time for employees to get vaccinated, and up to four hours of paid leave for that time (including travel time, but not travel costs) for each required shot. Employers must also provide a "reasonable" amount of paid time off (two days will meet the "reasonableness" requirement) for recovery from any side effects from each dose of the vaccine that prevent them from working. Employers may require employees to use accrued sick or other leave (except pure vacation leave) before providing additional leave.

Q18: Does the ETS cover booster shots?

A: No. It defines "fully vaccinated" the same way CDC does now: two shots of Pfizer or Moderna or one of J&J. It does not impose any obligations regarding booster shots, or a third shot for immunocompromised individuals.

Q19: Can employers put in place a policy that is more stringent than the ETS?

A: Yes, the ETS makes clear that it is setting a floor for vaccination and mitigation requirements and that employers are free to impose more stringent requirements.

Q20: Does this rule supersede state or local laws that ban employer vaccine mandates?

A: OSHA says that the ETS supersedes any conflicting state or local laws, but would not pre-empt tougher laws. Expect the Department of Justice to challenge any state efforts to block this.

Q21: Is the ETS going to be challenged and, if so, what will be the effect?

A: There are multiple parties lined up to challenge the ETS on various grounds. It is possible that it could be temporarily enjoined in one or more federal courts. It likely will make its way to the appellate courts before we know whether it will take full effect.

LABOR AND EMPLOYMENT AND HIGHER EDUCATION PRACTICES

Q22: CMS also issued a new rule today. To whom does that rule apply?

A: The staff vaccination requirement of the CMS rule applies to the following types of Medicare and Medicaid-certified providers and suppliers: Ambulatory Surgery Centers, Community Mental Health Centers, Comprehensive Outpatient Rehabilitation Facilities, Critical Access Hospitals, End-Stage Renal Disease Facilities, Home Health Agencies, Home Infusion Therapy Suppliers, Hospices, Hospitals, Intermediate Care Facilities for Individuals with Intellectual Disabilities, Clinics, Rehabilitation Agencies, and Public Health Agencies as Providers of Outpatient Physical Therapy and Speech-Language Pathology Services, Psychiatric Residential Treatment Facilities (PRTFs) Programs for All-Inclusive Care for the Elderly Organizations (PACE), Rural Health Clinics/Federally Qualified Health Centers, and Long Term Care facilities.

Q23: Does the CMS rule's requirement apply to staff who work offsite?

A: Yes. All staff who interact with other staff, patients, residents, clients, or PACE program participants in any location beyond the formal clinical setting (such as at a patient's home, clinics, other sites of care, administrative offices, or off-site meetings) must be vaccinated.

Q24: How will the CMS rule's new requirement be enforced against health care facilities?

A: CMS will work directly with state survey agencies and accrediting organizations to regularly review compliance with Medicare/Medicaid regulations across multiple health care settings. State survey agencies will conduct on-site compliance reviews of these requirements during the standard recertification survey and by assessing vaccination status of staff on all complaint surveys.

If you have any questions concerning the ETS, the federal contractor rule or the CMS rule, please consult any member of the Saul Ewing Arnstein & Lehr Labor and Employment Practice.

This alert was written by Robert Duston, Carolyn Pellegrini, and Ashley Miller, all members of the Firm's Labor and Employment Practice; and Samantha Gross, a member of the Firm's Health Care Practice. Robert can be reached at (202) 342-3415 or Robert.Duston@saul.com. Carolyn can be reached at (215) 972-7121 or Carolyn.Pellegrini@saul.com. Ashley can be reached at (202) 295-6679 or Ashley.Miller@saul.com. Samantha can be reached at (215) 972-7161 or Samantha.Gross@saul.com. This alert has been prepared for information purposes only.

Did you find this information useful? Please provide your feedback [here](#) and also let us know if there are other legal topics of interest to you.

The provision and receipt of the information in this publication (a) should not be considered legal advice, (b) does not create a lawyer-client relationship, and (c) should not be acted on without seeking professional counsel who have been informed of the specific facts. Under the rules of certain jurisdictions, this communication may constitute "Attorney Advertising."