

November 10, 2021

# **OSHA's COVID-19 Emergency Temporary Standard: What Employers with 100+ Employees Need to Know**

Suzanne King

Katy Rand

# COVID-19 ETS: Preliminary Issues

- Emergency *Temporary* Standard (“ETS”) in effect for 6 months only
- But, federal register notice includes request for comments on whether the ETS should become a final rule (comments due on December 6)
- On Saturday, November 6, the US Court of Appeals for the 5<sup>th</sup> Circuit issued an emergency stay of the ETS pending further legal briefing
  - Court referenced “grave statutory and constitutional issues” with the vaccine mandate
  - “Multi-circuit lottery” expected on Nov. 16 to assign the consolidated cases to one federal appeals court
  - OSHA is urging employers to move ahead with implementing the ETS

# ETS Gives *Employers* a Choice

Mandatory  
vaccination for all

Employees choose  
between vaccine  
and testing + mask

# Option 1

## Mandatory vaccination for all

- Subject to specified exceptions
- Unvaccinated with approved exemption must test + mask

# Exceptions to Mandatory Vaccine

- Vaccine is medically contraindicated
- Medical necessity requires a delay in vaccination
- Employee is legally entitled to a reasonable accommodation under federal civil rights laws because of a disability or sincerely held religious belief
- If employee is covered by exception, employee must test + mask

## Option 2

### Employee choice: vaccine or test + mask

- COVID test at least every 7 days
- Masking in the workplace subject to narrow exception
- Removal from workplace if test positive

# Testing

- Employees who work *exclusively* remotely or outdoors are not required to be vaccinated or tested
- All other employees, testing every 7 days
  - Unless employee does not go into the workplace weekly, in which case testing must be done within 7 days prior to returning to workplace
- Employer must maintain record of each test result (treat as medical record)
- See question 6.J for full discussion of what types of tests satisfy the requirement

# Who Pays for Testing?

- ETS states:  
“This section does not require the employer to pay for any costs associated with testing; however employer payment for testing may be required by other laws, regulations, or collective bargaining agreements.”
- Consider state laws regarding employer obligation to cover costs of medical examination
- Consider wage and hour laws if the cost of the test brings an employee’s pay below minimum wage
  - Anticipate further guidance from DOL regarding wage and hour issues including whether time it takes to get tested is compensable
- Consider whether payment may be required if testing is part of an accommodation for medical or religious reasons



# Mask Requirement At All Times For Unvaccinated Employees

- Mask must:
  - Completely cover face and nose
  - Consist of two or more layers of breathable fabric
  - Be secured to the head with ties, ear loops, etc.
  - Fit snugly over the nose, mouth, and chin
  - Be a solid piece of material with no slits, holes, etc.
- Exceptions:
  - Employee is alone in a room with floor to ceiling walls and a closed door
  - For a limited time when eating and drinking
  - When employee is wearing a respirator or facemask
  - Where employer can show that use of face covering is infeasible or creates a greater hazard
- Only employees who are not fully vaccinated subject to masking requirement

# Covered Employers

- Private employers with 100+ employees
- Excludes employers covered by Guidance for Federal Contractors (Executive Order 14042) or CMS rule
- Count employees as of November 5
  - Count all employees (part-time, temporary) as long as they work within the 6-month ETS window (i.e., Nov 5, 2021 – May 5, 2022)
  - Employees of staffing agency generally counted with staffing agency
  - Don't include independent contractors
  - Employer with 100 employees on Nov 5, in for duration even if subsequently falls below 100
  - If <100 on day 1 but reach 100 subsequently (within 6 months), then covered for duration once reach 100

# Covered Employees

- All employees except those:
  - Who do not report to a workplace where other individuals such as co-workers or customers are present
  - Who work *exclusively* from home
  - Who work *exclusively* outdoors
  - Seasonal employees who will not be working during the 6 months that the ETS will be in effect

# Timeline

November 5

- ETS in effect

December 5

- Establish policy on vaccination
- Determine vaccination status of each employee and develop roster
- Obtain proof of vaccination
- Provide “support” for vaccination
- Provide employees with required notice

January 4, 2022

- Begin weekly testing of all employees who are not fully vaccinated

# Establishing a Policy: Factors to Consider in Choosing Option 1 or 2

- Nature of organization
- How many employees work remotely
- Risk of transmission in your area/given workplace physical structure
- Current vaccination status of employees
- Impact of requiring vaccine on organization's staffing or ability to attract employees

# Determining Vaccination Status and Proof of Vaccination

- Employer must retain either a physical or digital copy of the documentation confirming vaccination!
  - See question 4.G for list of acceptable documentation
- Employer must also maintain a roster of all employees that clearly indicates whether they are
  - Fully vaccinated
  - Partially vaccinated
  - Not vaccinated because of a medical or religious accommodation
  - Not vaccinated because they have not provided proof of vaccination
- See question 4.A regarding how to handle a lost vaccination record.

## Definition of “Fully Vaccinated”

- 2 weeks after completing primary vaccination with at least the minimum recommended interval between doses
- Vaccines are acceptable if approved or authorized for emergency use by the FDA, or listed for emergency use by the WHO
- Prior COVID infection (i.e., antibodies) is not sufficient
- Booster shots and additional doses are NOT included in the definition of “fully vaccinated” under the ETS

# Paid Time Off Required (“Support for Vaccination”)

Employers must “support employee vaccination” by providing:

Up to **4 hours of paid time off** (including travel time) during work hours to be paid at employee’s regular rate of pay *for each primary vaccination dose*

- Cannot require employee to use any other accrued leave
- Paid leave not required if *employee chooses* to get vaccination outside of work hours
- Pay actual time it takes, not a guarantee of 4 hours

Reasonable time and **paid sick leave** to recover from side effects experienced following any primary vaccination

- Can require employee to use available sick time or PTO but cannot require employee to borrow from future sick time if no accrued time is available and cannot require use of vacation
- Permissible to set a cap on amount of time available to recover from vaccine – OSHA presumes **2 days** is reasonable

Note – if you elect the vaccine/testing option, this paid time off is still required for getting the vaccine (but is not required for getting tested)!



# Notice Requirements

Employers must provide the following to all employees (in a language and literacy level that the employee understands):

- Employer policy
- Process used to determine vaccination status
- Time and pay/leave employees are entitled to for vaccinations and side effects of vaccination
- Procedures to follow to provide notice of a positive COVID-19 test
- Procedures to be used for requesting records
- Information about testing and face coverings

## Notice Requirements cont'd

- Must provide *Key Things to Know About COVID-19 Vaccines*
- Requirements of 29 CFR 1904.35(b)((1)(iv) (i.e., prohibits retaliation for reporting workplace injuries or illnesses) and Section 11(c) (i.e., prohibits retaliation for filing complaint) – see fact sheet
- Prohibitions of 18 USC 1001 and Section 17(g) of OSH Act (i.e., criminal penalties for knowingly supplying false statements) - see fact sheet

# Getting Started

- Decide on policy
  - Consider using OSHA template
- Gather vaccination status/proof and develop roster
- Identify exemption request process
  - Recommend: request form, designated individual or committee to review requests, standard approval/denial email/letter
- Pay attention to what is happening with injunction
- Plan as if the ETS is going to go into effect
- Determine how you will handle testing
  - Note – even if you go with option 1, you will likely still have testing required for unvaccinated employees who have approved exemptions
  - Unclear how easy it will be to get tested – start thinking about logistics early!

# What Is Needed if You Have Already Implemented a Vaccine Mandate?

Review your current materials and confirm that you have:

- Records of attestation or proof of vaccination obtained prior to ETS
- Roster that includes all required information
- Paid leave for vaccination/recovery from side effects
- Weekly testing and mandatory mask use if you have approved any exemptions from vaccine
- Requirement to notify employer of positive COVID-19 test and return to work criteria
- Specified information provided to employees (see slide 18)
- Address confidentiality

# CMS Interim Final Rule

- Applies to most Medicare and Medicaid-certified providers / suppliers.
- Requires all staff who interact with other staff or patients / residents / clients to be vaccinated.
  - 100% remote workers excluded.
  - First dose required by December 5; full vaccination by January 4, 2022.
- No testing alternative.

# Federal contractors – Order 14042

- Requires federal agencies to add vaccination requirements to existing and new federal contracts.
- Vaccination required for:
  - Any employee working on or in connection with a covered contract.
    - “In connection with” includes support functions such as HR, legal, accounting.
  - Any employee entering a covered contractor workplace.
    - A building where any person working on or in connection with a covered contract might be present or pass through.
- No testing alternative.

# Religious Exemptions

## (slide applicable only to Maine DHCs)

- Maine Immunization Requirements Rule: employees present in Designated Healthcare Facilities must be fully vaccinated unless eligible for medical exemption.
- Religious exemptions are unavailable.
  - Currently being litigated, but absence of religious exemption has been upheld at each level.
  - Note: absence of religious exemption doesn't mean no obligation to entertain requests or consider other accommodations.

# Reconciling Maine Immunization Requirements Rule with CMS rule and Order 14042

- The federal mandates permit exemptions as required under ADA and Title VII.
- First Circuit Court of Appeals has opined that violating Maine's Immunization Requirements Rule would be an undue hardship.
- Thus, Title VII likely does not require employers to extend religious exemptions to employees working in DHCFS.



# Presenters

**Suzanne W. King**

[sking@pierceatwood.com](mailto:sking@pierceatwood.com)

100 Summer Street  
22nd Floor  
Boston, MA 02110

One New Hampshire Avenue  
Suite 350  
Portsmouth, NH 03301

PH / 617.488.8159

**Katy Rand**

[krand@pierceatwood.com](mailto:krand@pierceatwood.com)

Merrill's Wharf  
254 Commercial Street  
Portland, ME 04101

PH / 207.791.1267