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## LEGAL UPDATES

# OSHA Issues Long-Awaited COVID-19 Emergency Temporary Standard

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On November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued its [COVID-19 Vaccination and Testing Emergency Temporary Standard](#) (ETS). Earlier this year, President Biden directed OSHA to issue an ETS for employers addressing vaccination and testing requirements in their workplace. The following is intended to serve as a high-level overview of the major topics covered in the ETS and is not an exhaustive representation of all the information contained in the ETS. For more information or for any questions not covered by the below, we encourage you to contact your Lathrop GPM attorney or a member of our firm's [COVID-19 Client Resource Center](#).

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## What is the ETS?

The ETS is an order issued by OSHA containing requirements employers must adopt in order to minimize the risk of COVID-19 transmission in the workplace. The requirements are binding, but only apply to certain employers.

## Which employers does the ETS cover?

The ETS covers all private employers with 100 or more employees and state and local government employers with 100 or more employees (for states with OSHA-approved state plans).

The ETS does not apply to employers of federal contractors and subcontractors subject to the federal contractor mandate, or healthcare settings covered by the Healthcare ETS.

## Which employees does the ETS cover?

The ETS covers all employees at a covered employer except (1) employees who do not report to a job site where others are present, (2) employees working remotely, or (3) employees who only work in an outdoor environment.

## How is the 100-employee threshold calculated?

All employees at all corporate locations are counted in determining the number of employees of that corporation. Employees who work offsite, part-time employees, remote employees, employees who work exclusively outdoors, and minor employees all must be counted. Temporary and seasonal workers must be counted if they are directly employed by the employer and not obtained through a temporary staffing agency. Independent contractors do not count toward the 100-employee threshold. Additionally, franchisors and franchisees are considered separate employers for the purposes of determining employee count.

The determination of whether the employer meets the 100-employee threshold should be made as of November 5, 2021, and continually thereafter as long as the ETS is in effect. If an employer has 100 or more employees on November 5, 2021, the ETS applies to that employer for the duration of the ETS. If the employer has fewer than 100 employees on November 5, 2021, the ETS does not apply to that employer as of the effective date. However, if the employee count reaches or exceeds 100 at any time after November 5, 2021, the employer must comply with the ETS requirements as long as the ETS is in effect, even if the employer's workforce later decreases to less than 100 employees.

## What does the ETS require?

Under the ETS, employers must adhere to the following requirements:

- Either create and enforce a mandatory COVID-19 vaccination policy or create and enforce a mandatory policy allowing employees to choose to either get vaccinated or to wear a face covering at work and undergo weekly testing. Face shields are not an acceptable face covering under the ETS.
- Collect and maintain information and records from each employee regarding vaccination status and proof of vaccination.
- Provide employees with up to four hours of PTO to receive each dose of the vaccine.
- Require employees who are not fully vaccinated to undergo weekly testing (if in the workplace at least one day a week) or within seven days before returning to work (if away from the work site for more than a week).
- Facilitate a notice provision requirement and removal process for any employee who tests positive for COVID-19 or is diagnosed with COVID-19.
- Require employees who are not fully vaccinated to wear a face covering at all times when inside or in a vehicle with another while on the job.
- Provide employees with information and material about the ETS, the benefits and science of vaccinations, anti-retaliation and anti-discrimination policies, and laws regarding knowingly providing false information or documents.
- Report job-related COVID-19 fatalities and hospitalizations to OSHA.

## Who must pay for weekly COVID-19 testing in the workplace?

Employers are neither required to assume any employee costs associated with testing nor prohibited from doing so. However, individual states may have laws that require payment for testing.

## What methods of COVID-19 testing are acceptable under the ETS?

The ETS establishes specific types of testing that must be used in order to comply with the weekly COVID-19 testing requirement for unvaccinated employees. A COVID-19 test must be a test to detect SARS-CoV-2 that is:



- Approved or authorized by the FDA;
- Administered appropriately; and
- Is not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

Laboratory-processed tests, proctored over-the-counter tests, point of care tests, and employer-observed tests are all acceptable for the purposes of the weekly testing requirement. Antibody tests and any tests where the employee both self-administers and self-reads the test are not sufficient.

The record-keeping onus is on the employer to maintain accurate and current records of each test result from each employee.

### **Do employees that have requested reasonable accommodations (e.g., sincerely held religious belief, medical exemption, disability, etc.) in lieu of vaccination still have to undergo weekly COVID-19 testing?**

Yes. Under the ETS, all employees who are not fully vaccinated, including those entitled to a reasonable accommodation exemption from the vaccine mandate, must submit to weekly COVID-19 testing. However, if COVID-19 testing contradicts an employee's sincerely held religious belief, they may also be entitled to a reasonable accommodation as to testing.

### **When does the ETS take effect?**

The effective date of the ETS is November 5, 2021. However, employers have until December 5, 2021 to comply with all ETS requirements (except for the testing requirements). Employers have until January 4, 2021 to comply with the testing requirements.

*We are committed to helping our clients navigate these uncertain times and have established a cross-disciplinary COVID-19 Client Response Team. The team members serve as subject matter authorities, focused on providing relevant, timely and solution-oriented input responding to clients' questions and needs, as well as providing proactive guidance on emerging issues.*

*As you face questions and new challenges, please feel free to reach out to your Lathrop GPM attorney, any of the [COVID-19 team members](#), or reach out through our [Contact Us](#) page.*