



OSHA's New COVID-19 Emergency Temporary Standard – November 8, 2021

Felicity Fowler – Eric Johnston – Traci Clements – Ashton Cumberbatch – Daniel Atkinson

On November 5, 2021, the United States Department of Labor (“DOL”) Occupational Safety and Health Administration (“OSHA”) issued its anticipated emergency temporary standard (“ETS”) regarding COVID-19 and vaccination of the nation’s workforce. The full November 5 COVID-19 Vaccination and Testing ETS issued by OSHA can be accessed [here](#).

Among other things, the ETS mandates that all businesses who employ 100 or more employees to either require their workers to be fully vaccinated (14 days after receiving all required doses of any vaccine) against COVID-19 or assure that all unvaccinated employees are tested for the coronavirus at least once a week and wear approved face masks in the workplace. Notably, the ETS contains substantial penalties for businesses that violate the ETS.

The ETS is a further extension of President Joseph R. Biden’s executive orders pertaining to vaccinating the American workforce. Initially, on September 9, 2021, President Biden signed an executive order requiring full vaccination of all federal executive branch workers, which can be accessed [here](#). Additionally, the same day, the President signed an executive order requiring full vaccination of employees of businesses that have federal contracts or subcontracts, which can be accessed [here](#). The President also outlined in his COVID-19 plan, which can be accessed [here](#), that his administration would require nursing homes and other health facilities that receive Medicare and Medicaid funds to ensure their employees are fully vaccinated. OSHA also issued a COVID-19 Healthcare ETS (“Healthcare ETS”), specific to workers in healthcare settings, on June 21, 2021, which can be accessed [here](#). Recently, The Centers for Medicare & Medicaid Services (“CMS”) issued an interim final rule regarding Medicare and Medicaid COVID-19 Health Care Staff Vaccination, which can be accessed [here](#).

The November 5 ETS was temporarily stayed (put on hold) by the Fifth Circuit Court of Appeals on November 6, 2021, after several states, including Texas, filed lawsuits challenging the lawfulness of the ETS. As the Fifth Circuit required briefing on this issue to be filed by the parties early this week, we anticipate a decision from the Fifth Circuit regarding the enforceability of the ETS will be issued soon.

Who is covered by the ETS?

Covered employers include all employers that have a total of 100 or more employees company-wide in the United States. The industries covered include, but are not limited to, manufacturing, retail, delivery services, warehouses, meat packing, agriculture, construction, logging, maritime, and healthcare. The ETS does not apply to workplaces who are federal contractors or subcontractors or to settings where employees provide healthcare services or healthcare support services in facilities that receive Medicare or Medicaid funds, because these types of employers are covered under separate executive orders or other regulations.

The ETS applies to all employees of covered employers who report to a workplace where other individuals are present. However, the ETS does not apply to employees who do not report to a workplace where other coworkers or customers are present, such as where employees are exclusively working from home, or to employees who work exclusively outdoors.

What are the requirements for companies with 100 or more employees?

A summary of the key requirements of the ETS are as follows:

- **Vaccination Policies:** Covered employers are required to develop, implement, and enforce a mandatory COVID-19 vaccination policy, with a limited exception for employers that instead establish, implement, and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace, rather than receive vaccinations for COVID-19.
- **Verifying Employee Vaccination Status:** The ETS requires covered employers to verify the vaccination status of its employees by obtaining acceptable proof of vaccination.
- **Vaccine Related PTO:** Covered employers are required to provide employees with up to four hours of paid time to receive each vaccination dose. Additionally, covered companies are required to provide reasonable paid sick leave for employees to recover from the side effects of each vaccine dose. The ETS does not require employers to provide paid time to get the vaccine if an employee chooses to receive the vaccine during non-work hours, but OSHA specifically notes that other laws may include additional requirements for employers, which includes the Fair Labor Standards Act. Further, the ETS does not require employers to provide paid time off to any employee for removal as a result of the employee's refusal/failure to provide documentation of a COVID-19 test result as required by the ETS.
- **COVID-19 Testing for Unvaccinated Employees:** Covered employers must ensure that each employee who is not fully vaccinated is tested at least weekly.
- **Face Masks:** Covered employers must require unvaccinated employees to wear face coverings indoors or when in a vehicle for work purposes with another person. Unvaccinated employees in the workplace who are alone in a room with floor to ceiling windows and a closed door may remove their face coverings.

- **Reporting and Recordkeeping Requirements:** Covered employers are required to report work-related COVID-19 fatalities to OSHA within 8 hours of learning about them, and work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization. Covered employers must maintain a list of employees that denotes whether they are fully vaccinated, partially vaccinated, not fully vaccinated because of a medical or religious accommodation, or not fully vaccinated because they have not provided acceptable proof of vaccination status. This list must be provided to OSHA upon request. Employers must also maintain applicable testing records for all unvaccinated employees, which must also be provided to OSHA upon request. Please note that any such records are “medical records” and should be kept confidential and separate from general employee files.
- **Dissemination of Information:** The ETS requires employers to provide employees the following: (1) information about the requirements of the ETS and workplace policies and procedures established to implement the ETS; (2) the CDC document “Key Things to Know About COVID-19 Vaccines”; (3) information about protections against retaliation and discrimination; and (4) information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.

What are the deadlines?

The ETS became effective as soon as it was published in the Federal Register, which occurred on Friday, November 5, 2021. The ETS requires compliance from all covered employers by the following dates:

- **December 6, 2021:** Covered employers must implement all OSHA ETS requirements other than testing for employees who are not “fully vaccinated” (i.e., have not received *all* required doses of a vaccine). As such, by December 6, 2021, covered employers are required to verify employee vaccination status, implement vaccination policies, implement vaccination related PTO, require unvaccinated employees to wear face coverings in the workplace, and disseminate the mandatory information to employees.
- **January 4, 2022:** Covered employers must ensure their employees are either “fully vaccinated” or commence weekly testing on or before January 4, 2022.

Proof of Vaccination and Testing Requirements

Under the new ETS, covered employers must require employees to provide proof of their vaccination status, including whether the employee is fully or partially vaccinated. Under Section (e)(2) of the ETS, acceptable forms of proof include:

- (i) the record of immunization from a health care provider or pharmacy;
- (ii) a copy of the COVID-19 Vaccination Record Card;
- (iii) a copy of medical records documenting the vaccination; and

(iv) a copy of immunization records from a public health, state, or tribal immunization information system; or a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

If the employee is unable to produce one of the aforementioned forms of proof, the employee may provide a signed and dated attestation. The employee's statement must:

(A) attest to their vaccination status (fully vaccinated or partially vaccinated);

(B) attest that they have lost or are otherwise unable to produce proof required by the standard; and

(C) include the following language: *"I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties."*

The OSHA ETS requires that all unvaccinated employees of a covered employer who report at least once every seven days to a workplace where other individuals are present must be tested for COVID-19 at least once every seven days and provide documentation of their most recent COVID-19 test result no later than the seventh day following their last test. These tests cannot be self-administered or self-read unless observed by the employer. For unvaccinated employees who are in the workplace less frequently, these individuals must be tested for COVID-19 at least seven days prior to returning to the workplace and provide this test result to the employer upon their return to the workplace. Importantly, the ETS does not require the employer to pay for any costs associated with testing for COVID-19.

Penalties

Under Section 5(a)(1) of Occupational Health and Safety Act ("OSHA"), commonly referred to as the General Duty clause, OSHA may only cite a hazardous condition once, regardless of its scope or the number of workers affected. *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1199 (5th Cir. 1997). Thus, even where OSHA finds that an employer willfully failed to protect a large number of employees from a COVID-19 hazard, OSHA may not cite the employer on a per-instance basis for each employee affected by the violation or failure. However, the provisions of this ETS have been intentionally drafted to allow OSHA to separately cite employers for each instance of the employer's failure to protect employees and for each affected employee.

Employer violations of any OSHA ETS or permanent standard carry penalties for (among other things) reporting violations, failure to timely comply with the requirements of the standard, and failure to timely make records available to OSHA. The current OSHA penalties are listed below; however, again, unlike the penalties issued for violations under the General Duties clause which allows fines per-violation, *the November 5 ETS allows OSHA to issue a separate penalty for each instance of noncompliance, in other words per violation and per person.*

Current Maximum and Minimum Amounts for Civil Penalties

| Type of Violation | Penalty Minimum | Penalty Maximum |
|----------------------|--------------------------------|--|
| Serious | *GBP per violation | \$13,653 per violation |
| Other-Than-Serious | \$0 per violation unless a GBP | \$13,653 per violation |
| Willful or Repeated | *\$9,753 per violation | \$13,653 per violation |
| Posting Requirements | \$0 per violation | \$13,653 per violation |
| Failure to Abate | N/A | \$13,653 per day unabated beyond the abatement date (generally limited to 30 days' maximum) |

* Gravity Based Penalties (GBP). For a repeated other-than-serious violation that otherwise would have no initial penalty, a GBP of \$390 shall be proposed for the first repeated violation, \$975 for the second repeated violation, and \$1,950 for a third repetition.

The penalties allowed under OSHA, however, may also apply to employees. OSHA 17(g) and 18 U.S.C. 1001 provide that anyone who knowingly makes a false statement, representation, or certification can be subject to fines and/or criminal penalties. False statements made in an employee's proof of vaccination status submitted under paragraph (e)(2) of the ETS could fall under either or both 18 U.S.C. 1001 (criminal penalties of fines and up to 5 years in prison) or section 17(g) of OSHA (a fine of up to \$10,000, or six months in prison, or both).

By requiring a specific declaration about the truth and accuracy of the employee's vaccination status under paragraph (e)(2)(vi) of the ETS, employees are held to the standards of truthfulness in 18 U.S.C. 1001 and OSHA 17(g). OSHA notes, however, these same prohibitions on false statements and documentation also apply to employers. If an employer knows that the proof submitted by the employee is fraudulent, and accepts the false record as compliance with this ETS, such employer may be subject to the penalties in 18 U.S.C. 1001 and 17(g) of OSHA.

Healthcare ETS, June 21, 2021 (29 CFR 1910.502) and the CMS Interim Final Rule Regarding Medicare and Medicaid

On June 21, 2021, OSHA issued a COVID-19 Healthcare ETS ("Healthcare ETS") applicable to workers in healthcare settings. The Healthcare ETS will stay in effect for six months and is set to expire on December 21, 2021. After that time, to continue in effect it must be replaced by a permanent OSHA standard, which must undergo the formal rulemaking process, involving a lengthy notice and comment period.

Employees covered under the Healthcare ETS are exempted from this new ETS while the Healthcare ETS is in effect. Once the Healthcare ETS is no longer in effect, the workers covered by it and who remain unvaccinated will be covered by the new ETS. The temporary standards under both rules are similar in that they both encourage vaccination by requiring employers to

provide paid time off to receive vaccination doses and to recover from the side effects. However, the November 5 ETS expressly requires employers to implement mandatory vaccination policies or alternative policies that require unvaccinated workers to be regularly tested for COVID-19 and to wear face coverings in most situations when they work near others.

Notably, the CMS interim final rule regarding Medicare and Medicaid COVID-19 Health Care Staff Vaccination requires implementation by January 4, 2022. CMS notes that staff who have completed a primary vaccination series by this date are considered to have met these requirements, even if they have not yet completed the 14-day waiting period required for full vaccination.

Federal Contractors

President Biden signed Executive Order 14042 on September 9, 2021, requiring the formation of the Safer Worker Federal Workforce Task Force, and directing the Task Force to issue official guidance regarding federal contractor vaccine mandates by September 24, 2021. The Task Force guidance requires the federal government and federal agencies to include a clause in their contracts (regardless of the form of instrument) stating all covered contractor employees at every tier must be vaccinated against COVID-19 unless the employee is legally entitled to an accommodation. There is no minimum number of employees and the mandate applies to any full-time or part-time employee who is working on or in connection with the covered contract, who perform duties necessary to the performance of the contract, even if not directly engaged in performing the specific work called for under the contract. For example, employees such as human resources employees, billing employees, and even in-house counsel performing legal review of the contract are all included. If the employee's work is in any way related to the federal contract relationship, no matter how attenuated, that employee must be vaccinated under the Safer Worker Federal Workforce Task Force rule unless the employee is legally entitled to an accommodation. Unlike the ETS, the Federal Task Force Guidance, which can be accessed [here](#), does not allow employers/employees to undergo weekly coronavirus testing rather than receive the vaccinations, unless they are entitled to an accommodation. Accommodations are only available to those who have a disability or medical condition that is protected by the Americans with Disabilities Act, or that have a sincerely-held religious belief or practice that is protected by Title VII of the Civil Rights Act. Outside of those legal protections, the person must be vaccinated.

Implementation of the Task Force contract language requirements will be phased in as follows:

- Existing Contracts awarded prior to October 15, 2021, where performance is ongoing, must be incorporated at the point at which an option is exercised or an extension is made;
- For solicitations between October 15, 2021, and November 14, 2021, the agencies must include the clause in the solicitation and are encouraged to include it in contracts awarded between October 15, 2021, and November 14, 2021;
- New Contracts awarded on or after November 14, 2021 must include the clause mandating these protocols.

The Task Force Guidance also includes mandates regarding masking and physical distancing by employees and visitors to the workplace. It is important to note that these mandates flow

downward to all lower tiered contractors. If the contractors do not comply with the contractual language mandates, they risk losing the contract.

All covered employees under the Guidance (except those legally entitled to an accommodation) were originally required to be fully vaccinated no later than December 8, 2021. After that date they must be vaccinated:

- By the first day of the period of performance on a newly awarded covered contract; or
- By the first day of the period of performance on an exercised option or an extended/renewed contract; or
- Within 60 days of beginning work if otherwise allowed to start working pursuant to a limited exception for an “urgent mission-critical” covered contract.

In connection with OSHA’s issuance of the November 5, 2021, ETS, the Biden Administration issued guidance that the requirement for covered federal contractor employees to be fully vaccinated by December 8, 2021, has now been extended to **January 4, 2022**, to align the requirements amongst various employers/workforces.

OSHA’s ETS, Title VII, the ADA and the FLSA

OSHA’s ETS, as well as the Healthcare ETS, and Federal Contractor Guidance, requiring that covered employers implement mandatory vaccination policies or weekly testing for all employees may also implicate other federal laws, including Title VII of the Civil Rights Act (“Title VII”), the Americans with Disabilities Act (“ADA”), and even the Fair Labor Standards Act (“FLSA”).

Under Title VII and the ADA, employees of covered employers who have a sincerely held religious belief, practice, or observance, (Title VII) or a disability (ADA) that conflicts with the vaccination, testing, and/or face covering requirements under the OSHA ETS may request a *reasonable accommodation* from their employer. Once an employee requests an accommodation related to a sincerely held religious belief or disability, the employer should engage in the interactive process and discuss potential accommodation. Whether an accommodation request is reasonable will be determined on an ad hoc/case by case basis and whether any potential accommodation, or the requested accommodation, imposes an undue hardship on the employer. An employer is not required to provide the employee in question their requested accommodation, but employers are required to provide employees with *reasonable accommodations* (i.e., those that do not impose an undue hardship on the employer).

The threshold for undue hardship differs when evaluating accommodations requests under Title VII and the ADA. For example, under Title VII, for accommodation requests related to a sincerely held religious belief, employers are not required to provide an accommodation that would impose more “than a de minimis” cost or burden on the employer as such accommodations would be an undue hardship on the employer, which is a lower standard for undue hardship than the ADA, where employers are not required to provide an accommodation related to a disability that would cause “significant difficulty or expense.” Accommodation requests that would result in undue hardship under Title VII or the ADA, respectively, are not *reasonable accommodations*.

Employers should carefully review any accommodation requests from employees, especially in light of the OSHA ETS, and engage in the interactive process for each request to determine whether a *reasonable accommodation* can be made in light of the ETS's requirements and specific business factors of the industry.

Under the FLSA, employers are generally required to pay all non-exempt employees at least 1.5 times their regular rate of pay for all hours worked in excess of 40 hours in a single workweek. As OSHA has outlined in the ETS, employers are required to compensate employees for the time it takes to be tested or receive the vaccine during an employee's working time. While the ETS does not require the employer to pay for any costs associated with testing, it is not clear from the ETS whether time spent outside of working hours related to mandatory COVID-19 vaccination and/or testing requirements is viewed as compensable time under the FLSA, and OSHA specifically notes that employers may be required to pay for testing by "other laws, regulations, or collective bargaining agreements." The DOL Wage and Hour Division has issued guidance (prior to the ETS) outlining that employers are required to pay employees for all hours worked, including time spent on days off completing tasks if the task an employee is required to perform is necessary for the work the employee is paid to do, including undergoing COVID-19 testing. Thus, based on the ETS and the recent Wage and Hour Guidance, employers should treat all time spent related to COVID-19 testing during and outside of normal working hours as compensable time, unless the DOL expressly advises otherwise.

Legal Action

On Friday, November 5, 2021, twenty-six states—including Texas—and several affected businesses filed lawsuits challenging the lawfulness of the ETS. On Saturday, November 6, the Fifth Circuit Court of Appeals in New Orleans temporarily blocked the ETS mandating vaccination-or-testing policies for businesses with 100 or more employees. **Therefore, as of the date of this publication, the November 5 ETS is on hold.** If implemented, the OSHA ETS would preempt any inconsistent or conflicting state or local laws. The Fifth Circuit noted that it was staying the ETS "[b]ecause the petitions give cause to believe there are grave statutory and constitutional issues with the [ETS]." The Order requires the parties to file their initial and responsive briefs early during the week of November 8, 2021. Thus, we believe that the Fifth Circuit will issue its decision of whether the ETS is lawful soon. Regardless of what the Fifth Circuit decides, we expect that the decision will be appealed to the Supreme Court of the United States.

Texas—along with several other states—also filed a lawsuit challenging the lawfulness of the President's executive order requiring full vaccination of employees of businesses with federal contracts and subcontracts. This matter currently remains pending in the United States District Court for the Southern District of Texas, Galveston Division (see *State of Texas v. Defendant Joseph R. Biden, et. al*, Case No. 3:21-cv-0309).

Additionally, although the Healthcare ETS has been challenged, the court has not yet ruled on OSHA's authority under section (6)(c) of the OSH Act (29 U.S.C. 655(c)) to implement the

Healthcare ETS, nor has briefing been submitted (see *United Food & Commercial Workers Int'l Union, AFL- CIO, CLC and AFL-CIO v. OSHA, Dep't of Labor*, D.C. Circuit No. 21-1143).

OSHA Frequently Asked Questions and Sample Policies

OSHA has released helpful guidance in the form of frequently asked questions in connection with its ETS and Sample COVID-19 Policies:

- **COVID-19 Vaccination and Testing ETS FAQs**
 - <https://www.osha.gov/coronavirus/ets2/faqs>
- **COVID-19 Healthcare ETS FAQs**
 - <https://www.osha.gov/coronavirus/ets/faqs>
- **COVID-19 Mandatory Vaccination Sample Policy**
 - <https://www.osha.gov/sites/default/files/covid-19-ets2-sample-mandatory-vaccination-policy.docx>
- **COVID-19 Employee Choice Sample Policy**
 - <https://www.osha.gov/sites/default/files/covid-19-ets2-sample-employee-choice-vaccination-policy.docx>

For more information on how these new regulations could impact your business, contact:

Felicity A. Fowler, Partner

- (ffowler@mcginnislaw.com, 214-307-6961)

Eric A. Johnston, Partner

- (ejohnston@mcginnislaw.com, 512-495-6064)

Traci M. Clements, Partner

- (tclements@mcginnislaw.com, 214-307-6962)

Ashton G. Cumberbatch, Jr., Special Counsel

- (acumberbatch@mcginnislaw.com, 512-395-6063)

Daniel R Atkinson, Attorney

- (datkinson@mcginnislaw.com, 214-307-6963)