

# OSHA Issues Its Long-Awaited (Dreaded?) Vax-or-Test Rule

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Apparently intent on avoiding the holiday rush, OSHA today issued its COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS). Covered employers must comply with all requirements other than testing by December 5, and by January 4 for the testing requirements.

The details of the ETS are too numerous to cover in this blog post, but here are highlights of the new rule and suggestions for what to do now.

## **Scope and Application**

- Generally applies to all private employers with 100 or more employees company-wide. Part-time employees are included in this number, but independent contractors are not.
- Does not apply to:
  - Settings where the employee provides healthcare services or supports – *but note that the Centers for Medicare & Medicaid Services today issued similar emergency regulation, generally requiring that health care workers at hospitals and certain other facilities that participate in Medicare & Medicaid be fully vaccinated (with no test-out option);*
  - Federal contractors who are subject to separate vaccination rules issued by the Safer Federal Workforce Task Force; or
  - Employees who do not interact with others indoors or employees while they are working from home.
- The ETS preempts inconsistent state and local requirements.

## **Key Requirements**

Employers must:

- Implement a written policy mandating vaccinations for all employees (unless exempted for medical or religious reasons), or establish a policy that requires employees who are not fully vaccinated to undergo weekly testing and wear a face covering at the

workplace.

- Determine the vaccination status of all of their employees by obtaining acceptable proof of vaccination and maintain records and a roster of employee vaccination status.
- Provide employees reasonable paid time, up to 4 hours, to get fully vaccinated.
- Provide employees reasonable time and paid sick leave to recover from any side effects of the vaccine (employers may require that employees use paid sick leave benefits otherwise provided by the employer).
- Require any employee who is not fully vaccinated and goes to the workplace at least once a week to:
  - wear a mask indoors at the workplace or in a vehicle with another person; and
  - show proof of a negative test to the employer at least once a week (note that the employer is not required to pay the cost of this testing).
- Require employees to notify the employer immediately if they receive a positive test, whether vaccinated or not. Employers must immediately remove any employee who receives a positive test from the workplace until the employee meets the criteria for returning to work.
- Provide employees with notice of: (1) the requirements of 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 criminal penalties for knowingly providing false statements/documents.
- Report work-related COVID-19 deaths within 8 hours of learning of the death, and report work-related COVID-19 hospitalizations within 24 hours of learning of the hospitalization.
- Make available to employees or employee representatives the aggregate number of fully vaccinated employees at a workplace, as well as the total number of employees at that workplace.

## **Next Steps**

Take a deep breath, exhale slowly, and repeat “All will be well, All will be well...”

While it is entirely possible that the ETS will be challenged in court and perhaps put on hold or blocked entirely, here are a few items that employers can do now to prepare for compliance:

- Identify a point person, or better yet a team, to spearhead your compliance efforts.
- Determine whether your company is covered by the ETS.
- Discuss whether your company wants to implement a mandatory vaccination policy, or go the vax-with-test-out route.

- If you decide to allow the test-out option, think about how you will accomplish the required weekly testing, *i.e.* require employees to get a test on their own, provide a testing option on-site, etc.

Our team is here to assist you in understanding and complying with these new requirements.

[Click here](#) for OSHA's resources on the ETS.