

# OSHA COVID-19 Vaccination Mandate For Large Private-Sector Employers

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# Quick points

- Yesterday, OSHA rolled out **Emergency Temporary Standard** for large employers. Penalties for noncompliance as high as \$13,650 per violation (or higher).
- CMS also released standards for Medicare and Medicaid providers. Same deadline as OSHA rule.
- No updates to federal contractor guidelines **but** deadline extended.
- Employers covered by CMS rules and federal contractor guidelines not affected by OSHA rule.
- Lawsuits could delay implementation.
- Alabama Legislature active.



# OSHA ETS: Who is affected?

- Employers with 100 or more total employees are covered.
  - Includes full-time, part-time, and temporary employees.
  - Includes all worksites aggregated.
  - Includes those who have 100 employees “at any time this section is in effect.”
  - OSHA may consider whether 1099 workers are misclassified.
- OSHA ETS exempts workplaces covered by:
  - The Safer Federal Workforce Task Force COVID-19 Workplace Safety Guidance for Federal Contractors and Subcontractors.
  - Settings where any employee provides healthcare services or healthcare support services subject to separate standard (Section 1910.502).
    - Separate emergency regulation for CMS-certified providers, available <https://www.cms.gov/files/document/cms-omnibus-staff-vax-requirements-2021.pdf>

# Who is exempt from OSHA ETS?

- OSHA ETS **preempts** any inconsistent state or local laws (including any forthcoming Alabama laws).
  - Federal law is supreme.
- OSHA ETS does not apply to employees of covered employers:
  - Who do not report to a workplace where other individuals such as coworkers or customers are present.
  - While employees are working from home.
  - Who work exclusively outdoors.

# ETS action items

- Covered employers must establish, implement, and enforce a **written** mandatory vaccination policy.
  - Only exception to this policy requirement is for those large employers who enforce a **separate written** policy requiring **all** employees (vaccinated or not) to be masked and provide weekly test results.
  - Policy must include anti-retaliation and anti-discrimination guidance set out in rule.
  - Policy must also mention criminal penalties set out in OSH Act for providing false information or documentation.
  - Employers must provide accommodations for religious or medical issues.
  - Policy need not actually mention accommodations rules.
- Covered employers must **distribute** copies of CDC guidance on COVID-19 vaccines.
  - Available here: <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
- Covered employers must **determine** the vaccination status of all employees through specified documents or attestation.
- Covered employers must **maintain** records of each employee's vaccination status.
- Covered employers must **ensure paid leave** available to employees to obtain vaccination and to recover from any side effects (establish leave bank or prepare payroll codes).

# Accommodations

- ETS notes that “under federal law, including the Americans with Disabilities Act and the Civil Rights Act of 1964, workers **may be** entitled to a reasonable accommodation from their employer, absent undue hardship.”
  - “If the worker requesting a reasonable accommodation cannot be vaccinated and/or wear a face covering because of a **disability**, as defined by the ADA, the worker **may be** entitled to a reasonable accommodation.”
    - *Note that a mere medical condition does not suffice; it must constitute a disability under the ADA.*
  - “In addition, if the vaccination, and/or testing for COVID-19, and/or wearing a face covering conflicts with a worker’s sincerely held religious belief, practice or observance, the worker **may be** entitled to a reasonable accommodation.”
  - OSHA standard **does not contain rules for when accommodations are due.** Employers must consult EEOC guidance.
  - Mandatory vaccination policy need not *mention* accommodation alternative.

# What to do with holdouts?

- If exception requested for medical or religious reasons, the standard accommodations are baked into the rule:
  - Weekly testing.
  - Masking.
  - Work from home.
  - In theory, other accommodations could be provided (e.g., objection to mask rule).
- Other alternatives may be available for holdouts who do not claim medical or religious accommodations:
  - Paid leave.
  - Unpaid leave or furlough.
  - Termination.

# Alternative testing or masking rules

- Covered employers given choice to adopt separate written policy requiring testing every 7 days and masking in workplaces.
- Whether testing or masking rules adopted voluntarily or due to accommodation, a few limitations apply:
  - Unvaccinated employees are covered by the weekly testing requirement only if they report to the workplace at least once every 7 days.
    - In the case of an employee who normally does not report to workplace, still must obtain negative test no greater than 7 days prior to any appearance at workplace.
  - Once employee has a positive test, no more testing shall be required for 90 days from diagnosis.
    - Upon positive test, employer must follow return-to-work guidance, which partially incorporates CDC Isolation Rules.



# Testing

- Unclear who pays for weekly COVID test.
  - ETS states that employers **may** —but are not required to—pay.
  - ETS also **warns** that “employer payment for testing may be required by other laws.”
- FLSA issues on costs of test itself are murky—under kickback rules, if expense is primarily for the benefit or convenience of the employer, there are limitations on deductions from wages.
  - EEOC guidance under ADA also suggests cost of test may be employer expense.
- FLSA guidance fairly clear that time spent testing is compensable.

# Masking rules

- Face covering requirement applies solely to unvaccinated.
- Requirement applies only while in vehicles and indoors (exception for those in room with floor-to-ceiling walls and closed door).
  - Employers must police wearing of masks to keep them over noises, in good condition, etc.
  - Can allow them to remove when dangers present or eating or drinking.
  - Employer is BARRED from preventing employee from voluntarily wearing mask except where danger posed.
  - Employer CANNOT prohibit customers or visitors from wearing face covering.
  - Employer does not have to purchase face coverings, but see above re: FLSA.

# New OSHA paid-leave rules

- ETS requires that covered employer provide “a reasonable amount of time” to employees “for each of their primary vaccination doses”
  - Separately states that employers must provide “up to 4 hours paid time” for this purpose.
  - Rule unclear if the “up to 4 hours” is for *each* dose, or collectively.
  - Either way, rule suggests that even greater than 4 hours may need to be permitted if reasonable, even if unpaid.
- ETS separately requires that employees receive “reasonable time and paid sick leave” for any side effects experienced following a primary vaccination dose.
  - Rule does not state what is “reasonable time.”
  - Rule also does not seem to place a cap on “paid sick leave” for side-effect recovery except whatever is “reasonable.”
- No requirement that employers provide ANY paid leave time to employees who test positive for COVID-19 (vaccinated or not).

# New OSHA reporting rules

- Covered employers must report “work-related” COVID-19 deaths to OSHA within 8 hours.
- All “work-related” COVID-19 in-patient hospitalizations must be reported within 24 hours.
- Within 1 business day, must make records available **to any employee** who requests information as to the “aggregate number” of fully-vaccinated employees at a workplace and the total number of employees at that workplace.
  - Same information and a full copy of mandatory vaccination policy must be provided upon request to OSHA within 4 business hours.

# Deadlines

## ■ December 5, 2021

- Determine vaccination status of all employees and obtain proof.
- Provide leave for those seeking vaccination or experiencing side effects.
- Require notification for any positive tests and exclude employee.
- Unvaccinated employees must be masked in workplace or vehicle (subject to limited exceptions).
- Mandatory tolerance of face masks for employees and customers and visitors.
- Finalize and roll out mandatory policies, and distribute CDC information on vaccines.
- Begin reporting of workplace-related COVID-19 hospitalizations and deaths.
- Make available information regarding number of vaccinated employees upon employee request.

## ■ January 4, 2022

- Commencement of testing and masking rules for unvaccinated.
  - Same deadline applies for CMS rule and federal contractors per White House fact sheet: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/>

# Resources

- Download ETS from the Federal Register website:
  - <https://www.federalregister.gov/public-inspection/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard>
- Summary sheet available at OSHA website:
  - <https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf>
- Download ETS from Lanier Ford website:
  - <https://www.lanierford.com/services/osha-guidance>
  - Also visit Lanier Ford COVID-19 Task Force page at <https://www.lanierford.com/services/covid-19-task-force>

# Alabama legislative action

- **SB15** passed Alabama Senate and before Alabama House today. Expected to be signed by Governor.
  - Requires parental consent for vaccination or any minor student.
  - Schools may not inquire as to vaccination status without consent to parent or guardian.
- **SB9** passed by Alabama Senate and before Alabama House today. Business Council of Alabama opposes.
  - Would provide standard vaccine “exemption” form for all employees.
  - Employers would be required to distribute if vaccine is mandated at workplace.
  - Employees who fill out form would be **automatically** exempt.
  - Employees who fill out form could not be fired except with advance approval of Alabama Department of Labor. ADOL would require hearing before Administrative Law Judge before any termination would be permitted.
    - No standards provided for when ADOL would sign off on termination.

# Questions?

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