

HRW CLIENT ALERT

November 5
2021

Webinar and Information on OSHA's Emergency Temporary Standard Mandating Vaccination for Employers with 100+ Employees

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued an [emergency temporary standard \(ETS\)](#) to minimize the risk of COVID-19 transmission in the workplace. Pursuant to the ETS, employers with at least 100 employees must either (1) adopt a mandatory COVID-19 vaccination policy or (2) adopt a policy that requires employees to either choose to get vaccinated or undergo weekly testing and wear a face covering at work. The ETS further requires employers to provide paid time off for vaccination and recovery, and to provide written materials to educate their workforce about the requirements of the law and their rights. Employers must be in compliance with most provisions of the ETS by December 5, 2021.

On Wednesday, November 10, 2021, at 12 pm, Hirsch Roberts Weinstein LLP will conduct a webinar for employers. We will review the provisions of the ETS, and steps larger employers need to take now to get into compliance. Please use the [link](#) to register for the webinar in advance.

Please join us for this timely and important presentation. See below for more information about the ETS.

OSHA Resources for Employers

OSHA has created a website devoted to the ETS. The website is chock full of useful information and documentation, including sample policies, fact sheets for employees that can be used to satisfy the notice requirements, and answers to Frequently Asked Questions.

Summary of Employer Requirements

Policy: Employers with at least 100 employees – and all employees company-wide count – have a choice. They can either adopt a mandatory COVID-19 vaccination policy OR adopt a policy that requires employees to either choose to get vaccinated or undergo weekly testing and wear a face covering at work. The only exceptions are for persons for whom a vaccine is medically contraindicated, for whom medical necessity requires a delay in vaccination, or employees legally entitled to a reasonable accommodation on the basis of religion or disability.

Paid Time Off: Employers must provide employees with time off to receive the COVID-19 vaccine, up to four hours of which must be paid. This paid time off is in addition to any sick or vacation time already provided by the employer. The employer must also provide a “reasonable” amount of paid sick leave to employees to recover from any side effects experienced following vaccination. Employers can require employees to use their existing paid time off for this purpose, but if the employee has none left, must still provide the benefit and cannot require the employee to borrow against future accruals or go into a negative balance.

Records of Vaccination Status: Employers must obtain and preserve a record of every employee's vaccination status. Employers must require employees to present proof of vaccination, and the ETS goes into great detail as to what types of proof are acceptable, and what to do if an employee claims they are unable to obtain that proof. These records are considered confidential employee medical records. Employees and unions have the right to information regarding the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at the workplace, but are not permitted to know the vaccination status of individuals (other than their own status).

Weekly Testing: Employers must ensure that employees who are not fully vaccinated are tested for COVID-19 at least weekly. Employers must keep records of the results of the test. The ETS itself does not require that employers pay for the test, but payment may be required in some circumstances under collective bargaining agreements and state law. The ETS goes into detail about what types of tests are considered acceptable. Over the counter tests are permitted, provided that the employer or a telehealth proctor observes the employee taking it.

Reporting of Positive Test Results: Employers must require employees to provide prompt notice when they test positive for COVID-19 and to remove employees from the workplace when they test positive for the virus, regardless of their vaccination status. The ETS does not require that employees be given paid time off when they are so removed, but paid time off may be required under other laws (like the Massachusetts Earned Sick Time law) and Company policy.

Face Coverings: Employers must ensure that employees who are not fully vaccinated wear face coverings when indoors or occupying a vehicle with another person while working. The ETS goes into detail about which types of coverings are and are not permissible, and how they must be worn. Employees may of course also elect to voluntarily wear face coverings regardless of vaccination status.

Remote Workers: Remote workers count for purposes of calculating an employer's workforce, but do not have to be vaccinated or tested if they are 100% remote.

Notice and Education: Employers must provide information to every employee about the requirements of the ETS in a language and at a literacy level that they can understand. Specifically, employers must provide information about the [requirements of the ETS](#), the employer's policies and procedures, a document called "[Key Things to Know About COVID-19 Vaccines](#)", information about [workers' rights under the ETS](#), including the right to be free from retaliation, and [criminal penalties associated with knowingly supplying false statements or documentation](#).

Compliance

The ETS is effective immediately and employers must comply with most provisions of the ETS by December 5, 2021, and the standard's testing requirement by January 4, 2022. As is the case with any OSHA requirement, employers that fail to comply with the requirements of the ETS could face significant penalties and liability.

For Questions/Compliance Assistance

If you have any questions about the Guidance and the potential impact on your business or organization, please contact:

- Janette Ekanem (jekanem@hrwlawyers.com / 617-348-4327);
- Pete Moser (pmoser@hrwlawyers.com / 617-348-4323);
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- Any member of the [HRW Team](#) to discuss your particular situation.