

# OSHA ISSUES COVID-19 EMERGENCY TEMPORARY STANDARD FOR PRIVATE EMPLOYERS

Today, The U.S. Department of Labor's Occupational Safety and Health Administration announced a new Emergency Temporary Standard (29 CFR §1910.501) that will require private employers with 100+ employees to develop, implement and enforce a mandatory COVID-19 vaccination policy, unless they adopt a policy requiring employees to choose to either be vaccinated or undergo regular COVID-19 testing and wear a face covering at work. The ETS will be published in the Federal Register on November 5, 2021. Covered employers will be required to comply with all provisions by December 5, 2021, save for the vaccination and testing requirements for unvaccinated workers, which take effect on January 4, 2022.

## Covered Employers

Any employer that has a total of at least 100 employees as of November 5<sup>th</sup> and at any time while the ETS is in effect will be covered by the ETS. For purposes of the 100-employee threshold for coverage, the employee count will be based on the total number of employees an employer has across all of its U.S. locations, regardless of where employees perform their work. Part-time employees do count towards the company total, but independent contractors do not. With regard to temporary employees, only the staffing agency would count the jointly employed employees. The host employer, however, would still be covered by the ETS if it has 100 or more of its own employees in addition to the employees of the staffing agency. For a single corporate entity with multiple locations, all employees at all locations are counted for purposes of the 100-employee threshold for coverage under this ETS. On multi-employer worksites, including construction sites, each company represented need only count its *own* employees. But, if an employer has more than 100 employees spread out over multiple construction sites, for example, that employer is covered even if it does not have 100 or more employees present at any one worksite.

## Covered Employees

Although an employer may be covered by the ETS, individual employees of those employers may not be covered by the standard. Employers have no duties under the ETS with respect to employees who:

1. Do not report to a workplace where other individuals such as coworkers or customers are present;
2. Work from home; or
3. Work exclusively outdoors. While "exclusively outdoors" is not defined, OSHA's guidance indicates that work is "exclusively outdoors" only if minimal time is spent indoors using the restroom, punching a time clock, etc. Outdoor construction work in a partially constructed building is not considered "outdoors." Likewise, any indoor periods such as breaks taken in a job trailer would preclude the work from being classified as "exclusively outdoors."

## Summary of Requirements

Among other things, the ETS requires covered employers to:

- Establish, implement and enforce a *written* vaccination policy that either: (1) requires employees to be vaccinated; OR (2) allows employees to choose to either become fully vaccinated or undergo regular (weekly) COVID-19 testing and wear a face covering in lieu of vaccination.

- Determine and maintain a record of each employee's vaccination status, obtain proof of vaccination for vaccinated employees, and preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated.
- Treat all such records concerning employee vaccination as confidential medical records.
- For employers having both vaccinated and unvaccinated employees, develop a written plan that includes different policies and procedures for vaccinated and unvaccinated employees.
- Provide each employee with reasonable time, including up to four hours of paid time at the employee's regular rate of pay, to receive each vaccine dose if the vaccine is received during work hours. Employers may not offset this time with accrued sick leave or vacation leave.
- Provide each employee with "reasonable time" and paid sick leave to recover from side effects of the vaccine. The amount of paid sick leave may be capped so long as the cap is reasonable. (OSHA suggests up to two days of paid sick leave per dose may be reasonable, though this would be subject to other federal, state or local laws or CBAs).
- Require unvaccinated employees to be tested for COVID-19 at least once every seven days (if the worker is in the workplace at least once a week) or within 7 days before returning to work (if the worker is away from the workplace for a week or longer). Employees may not self-administer and self-read the test unless this is observed by the employer or an authorized telehealth proctor.
- Remove any unvaccinated employee who fails to provide weekly COVID-19 test results from the workplace until the employee provides a negative test result.
- Ensure that, in most circumstances, each employee who has not been fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes.
- For employers who implement a vaccination policy that allows testing in lieu of vaccination, employers must maintain and preserve records of employee test results while the ETS is in effect. These records must be treated as confidential medical records.
- Require employees to provide prompt notice when they test positive for COVID-19 or receive a COVID-19 diagnosis. Employers must then remove the employee from the workplace, regardless of vaccination status; employers must not allow them to return to work until they meet required criteria.
- Make a determination as to the work-relatedness of an employee's reported case of COVID-19 and record work-related cases of COVID-19 on the OSHA forms 200, 300A and 301. We urge you to do this carefully and IMMEDIATELY after any employee reports he/she has tested positive for COVID-19.
- Report work-related cases of COVID-19 that result in in-patient hospitalization within 24 hours of when the employer learns of the work-related hospitalization, *without regard to whether the employee was hospitalized within 24 hours of the work-related exposure to COVID-19.*

- Report work-related cases of COVID-19 that result in fatalities within 8 hours of when the employer learns of the work-related fatality, *without regard to whether the death occurred within 30 days of the work-related exposure to COVID-19.*
- Train each employee in the requirements of the ETS and on the employer's policies and procedures established to comply with the ETS. Be sure to document this training.
- Provide information to each employee about COVID-19 vaccine efficacy, safety and the benefits of being vaccinated. Be sure to document this distribution of information.
- Inform each employee about the anti-retaliation requirements found in 29 CFR 1904.35(b)(1)(iv) and in §11(c) of the OSH Act. Be sure to document this action.
- Inform each employee of the prohibitions in 18 U.S.C. 1001 and of section 17(g) of the OSH Act, which provide for criminal penalties associated with knowingly supplying false statements or documentation (such as falsification of COVID-19 vaccination documents). Be sure to document compliance with this requirement.

Note, the ETS does not require employers to pay for testing if employees are permitted to elect weekly testing in lieu of vaccination. BUT, employers may be required to pay for testing and/or pay for the time it takes an employee to be tested, in order to comply with other laws, regulations, collective bargaining agreements, or other collectively negotiated agreements. We anticipate further guidance from the Department of Labor will be issued in the near future, to clarify this issue.

### **Federal Contractors**

Employers covered by the *Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* are excluded from coverage by the ETS. The vaccine mandate deadline for Federal Contractors was pushed back to January 4 to be consistent with the effective date for vaccination/testing in the ETS.

### **Healthcare Services**

The ETS does not apply in settings where employees provide healthcare services or healthcare support services and are covered by 29 CFR 1910.502 (the previously issued ETS for the Healthcare Industry). Healthcare employers with 100+ employees will need to follow the ETS with regard to any employees not covered by 1910.502.

**This is a dynamic situation and legal challenges are likely, including possible court injunctions. We will continue to keep you advised as additional information becomes available. For any questions, please contact Gary Auman ([gwa@amfdayton.com](mailto:gwa@amfdayton.com)), Abbie White ([akw@amfdayton.com](mailto:akw@amfdayton.com)), Doug Jenks ([dsj@amfdayton.com](mailto:dsj@amfdayton.com)) or Amy Mitchell ([acm@amfdayton.com](mailto:acm@amfdayton.com)) at 937-223-6003.**