

# Path Out of The Pandemic: What You Need To Know About OSHA's New Rules And Response to COVID

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## Path out of the Pandemic

- President Biden's six-pronged strategy to combat COVID-19
  - Includes vaccine mandates for federal contractors and many healthcare workers;
  - Requiring all employers with 100+ employees to ensure their employees are vaccinated or tested weekly;
  - Requiring employers to provide paid time off to get vaccinated.

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## Vaccine Mandate

- Biden's plan involves OSHA issuing a vaccine/testing rule that will apply to all private employers with more than 100 employees.
- Rule was released on 11/4, published 11/5, and is effective immediately, with a 30 day period of non-enforcement for all requirements except for the testing requirement, which has a 60 day period of non-enforcement
- Key dates – December 5 and January 5
- Estimated to impact two-thirds of the country's workforce.

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## Vaccine Mandate

- Rule takes the form of an Emergency Temporary Standard.
  - Allows the agency to enact regulations it can enforce immediately if a “grave danger” to worker safety is present.
  - This is where you will see challenges brought – stay tuned on lawsuits
  - ETS may remain effective for 6 months before it must be replaced by permanent standard – unlikely to occur
  - Note – May attempt to put in place successive emergency temporary standards
- Covered employers who ignore the standard could face OSHA citations and penalties of up to \$14,000 per violation.

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## What Is Required by the ETS?

- Employees must be vaccinated, or be tested weekly for COVID-19
  - Deadline of January 4 to be fully vaccinated – but no testing if fully vaccinated but not completed 2 week waiting period by that date
- Employer must implement policy, communicate policy and required documents to employees, inquire about vaccine status of employees, maintain appropriate records of vaccination status, and require masks be worn by non-vaccinated employees by December 5.

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## FAQ's - Which employers are covered?

- ALL employers covered by the OSH Act must comply with the forthcoming ETS.
- Includes agricultural employers.
- Many employers who do not regularly interact with OSHA.

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## FAQ's - Which employers are covered?

- Who counts towards 100 employee requirement?
  - **NOT LOCATION SPECIFIC**
  - All full time and part-time employees that work in US
  - If two or more related companies handle safety matters as one company, aggregate all employees – consider joint employment issues
  - Staffing agencies – temporary employees count **ONLY** towards the staffing agency and not to the employer where they are placed
  - Independent contractors do not count

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## FAQ's – Which Employees are Covered?

- The ETS does not apply to employees who only work from home or who do not work where others (co-workers or customers) are present.
- The ETS does not apply to those who work exclusively outside, but be cautious on this exception.
- Note – ETS may not apply, but employee still counts for purposes of 100 employee threshold.



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## What Should You Do Now?

- **Adopt Procedures for Determining Employees' Vaccination Status**
  - Maintain confidential records of employee vaccination status.
  - ETS requires that you collect proof of vaccination.
  - Create a confidential list of vaccinated and unvaccinated workers.
  - Review state laws regarding confidentiality and privacy of medical records.
- **Prepare Policies to Comply With ETS**
  - Work with your employment attorneys on this document
  - Pandemic response plans – identify ETS requirements, educate employees on vaccination benefits (required documents), inform employees of pay for vaccinations, require reporting of positive test and mandated CDC criteria on return to work, notify of no retaliation guarantee, and warn of criminal penalties for knowingly supplying false statements or documentation.

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## What Else Should You Do?

- **Determine if you will mandate the vaccine or allow unvaccinated employees to be tested weekly.**
  - Collecting and tracking weekly test results may burden you such that you decide to adopt a mandatory vaccination policy.
  - OSHA says employers may require vaccinations without providing the alternative for weekly testing (subject to accommodations)

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## FAQ's – What Records Must Be Kept

- **Inquiry to employees regarding vaccination status – must maintain**
  - Evidence of vaccine record from vaccinated employees;
  - Roster of responses for all employees.
- **Records are confidential – but must be maintained for duration of ETS**
- **Must maintain records of testing as well**



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## FAQ's – What Records Are Sufficient

- **To identify an employee as vaccinated on your roster, they must provide:**
  - Record of immunization from HC provider or pharmacy;
  - COVID-19 Vaccination Record;
  - Copy of medical records documenting vaccination;
  - Copy of immunization records from health, state or tribal immunization system;
  - Other official document that shows vaccine type, date and HC professional or clinic that administered; OR
  - Attestation under criminal penalty that proof has been lost, and otherwise unable to get proof.



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## FAQ's On Testing

- Allows use of all EUA and testing approved by FDA;
- Must be tested every 7 days and provide documentation of test result to employer no later than every 7 days
- Cannot be self-administered and self-read unless observed by employer or authorized telehealth proctor
- Can include antigen (instant) tests – cannot include antibody tests
- Partially vaccinated employees still must be tested until fully vaccinated status is achieved
- If you get COVID – free pass for 90 days
- “No requirement to pay for testing” – Unless required by other laws – FLSA considerations
- No required PTO for positive test result



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## What Should You Do?

- **Have a plan for tracking test results.**
  - You should have a plan in place for collecting and tracking test results.
  - Who is going to collect the results?
  - When will the test results need to be collected?
  - How will you track the results?

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## Who Pays For Time It Takes to Get Vaccinated?

- Employers – up to 4 hours per shot
- Assumes a time period of 55 minutes – but must pay for additional time if needed
- If needed, you must pay for recovery time from vaccine side effects
- Can require use of PTO / sick pay if any is available
- What about testing?
  - OSHA seems to say no, but be careful - time spent by employees receiving employer-required tests should be treated as compensable
  - Is testing required during work day or at work?
  - May be de minimis, but also may be necessary to perform the job safely and effectively.



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## FAQ's - Mask Requirements

- Beginning Dec. 5, all non-vaccinated employees must wear a mask indoors or when in a vehicle with others for work purposes.
- Exceptions:
  - Work alone in a room with floor to ceiling walls and a door;
  - For a limited time, to eat or drink;
  - For a limited time, for identification purposes;
  - When face covering is infeasible due to the need to see an employee's mouth to perform their job;
  - When face covering creates a greater hazard such that it excuses compliance.
  - NOTE – must allow employees to wear respirator if they want to.

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## Unanswered Questions

- **Will the ETS face legal challenges?**
  - Most likely.
  - Governors of many states have already indicated they intend to challenge the ETS.
  - Courts may block enforcement of the emergency rule, or parts of the rule, until legal challenges are resolved.
  - OSHA will have to prove that there is a “grave danger” to workers.
  - But do not count on being relieved of all obligations – you should prepare now.



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## What Should You Do?

- **Have a plan for addressing noncompliance by employees.**
  - What happens to an employee who does not get tested?
  - What happens to an employee who refuses to get vaccinated?
  - Rule requires that employees be sent home – but then what?

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## What Should You Do?

- **Develop a plan for handling accommodation requests.**
  - Employees may request accommodations for disabilities or for religious reasons under federal or state laws.
  - Develop a robust and clear reasonable accommodation policy to address religious and disability issues.
  - Communicate and administer the accommodation process thoughtfully, emphasizing individualized, confidential consideration of each request.
  - Be prepared for employees to request an accommodation from the weekly testing requirement.

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## What Should You Do?

- **Prepare for OSHA Complaints and Inspections**
  - The vaccination ETS will not displace current compliance duties related to COVID-19 prevention and mitigation.
  - OSHA will likely ask for your COVID-19 response plan and training records.
  - ETS requires you to produce written policy and aggregate numbers within 4 hours.
  - ETS requires you to produce all other ETS records by end of next business day.
  - Train managers and supervisors on what to do and say if OSHA arrives for an inspection.
- Employees can request their own documentation (or anyone to whom they give written authority) – end of next business day
- Employees can request number of fully vaccinated employees and total number of employees at that workplace – end of next business day

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## Other Mandate Considerations

- Federal Contractors
  - New EO goes beyond those working on federal property
  - Effective with contracts with pending solicitations , extensions, renewals, or new contracts entered on or after October 15
  
- Recipients of Medicare and Medicaid
  - Scope is broad
  - Many healthcare providers will also be covered by the OSHA ETS – CMS will control

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### Trending Issues



#### Cryptocurrency and Blockchain

Business and workplace operations are becoming technology driven and data-intensive. Cryptocurrency and blockchain technologies are radically altering the way many companies do business, learn more on how Fisher Phillips can help your workplace.

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#### Vaccine Resource Center

Fisher Phillips continues to prepare resources to aid employers with issues related to the COVID-19 vaccines, including sample policies, how to promote vaccination, employee relations, and guidance on relevant, ever-evolving federal, state, and local laws.

[Learn More →](#)

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# Thank You



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