

**MEMORANDUM**

DATE: November 9, 2021

RE: Recent COVID-19 related OSHA mandate

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On November 4, 2021, Federal OSHA released the long-anticipated Emergency Temporary Standard (ETS) mandating all employers with 100 or more employees to either require their workers to be fully vaccinated against COVID-19 by January 4, 2022, or participate in weekly testing.

Then, on November 7, the US Court of Appeals for the Fifth Circuit granted an emergency motion to stop the enforcement of the ETS after several states and businesses asserted that the ETS raises “grave statutory and constitutional issues.” Accordingly, the ETS is currently on hold.

Meanwhile, because Oregon manages its own occupational safety and health regulations (referred to as a “State Plan”), by December 5, OR-OSHA must either amend its standards to be identical or “at least as effective as” the ETS, or show that an existing Oregon standard is “at least as effective” as the federal ETS. We do not currently know OR-OSHA’s plans, but we will share that information when we do.

Finally, the ETS does not apply to (a) federal contractors covered under the [Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors](#), or (b) healthcare employers participating in Medicare or Medicaid, which are covered by [their own ETS](#). We will send out a separate update for healthcare employers.

So, as with everything else about COVID-19 in the workplace, things are in flux. We will notify you when and if we have more clarity on the implementation of the ETS and whether OR-OSHA issues its own related rules. However, we strongly suggest that all employers review the basics of the federal ETS so they are prepared to comply with it if and when it is allowed to go forward.

Here are the highlights of the ETS:

**WHO IS SUBJECT TO THE ETS**

- The 100-employee threshold is based upon a company-wide headcount, not the number of employees at a particular worksite. Nearly all employees are included, whether they are full time, part time, remote, or working on a temporary basis. However, independent contractors and leased employees are not counted.

- The ETS states that “two or more related entities may be regarded as a single employer . . . if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted.” The standard does not elaborate on what “safety matters” means, nor does it say if OSHA will look at whether an employer is considered an “integrated employer” under other employment laws like FMLA.
- The determination of whether you meet the 100-employee threshold should initially be made as of the effective date of the ETS (November 5, 2021). If you have 100 or more employees on November 5, the ETS applies. If you have fewer than 100 employees on November 5, the ETS does not apply. However, if you later hire more workers and hit the 100-employee threshold, you must come into compliance with the ETS. And once you come within the scope of the ETS, it continues to apply regardless of fluctuations in the size of your workforce.

## WHAT IS REQUIRED

- Employers can comply with the ETS in one of two ways: (1) require all employees to be vaccinated unless they qualify for a medical or religious exemption (in which case they must submit to weekly testing and wear face coverings); or (2) provide employees with the choice of either getting fully vaccinated or participating in weekly testing.
- Employees who perform 100% remote work, who work exclusively outside, or who work at a worksite where no other individuals are present, do not have to comply with the vaccination or testing requirements (but they are included in the headcount).
- By December 5, 2021, employers must check each employee’s vaccination status, maintain those vaccination records (physical or electronic form) in a confidential manner, and maintain a roster of employees’ vaccination status.
- By January 4, 2022, all covered employees must either be fully vaccinated or start weekly testing.
- Any employee who is not fully vaccinated and reports to a workplace as of January 4, 2022, must submit to a COVID-19 weekly testing protocol. The employee must take and provide proof of a negative test at least once every seven days.
- If an unvaccinated employee frequents the office less often than every seven days, they must be tested for COVID-19 within seven days before returning to the workplace and must provide proof of negative test upon return to the workplace.
- Also by December 5, employers must:
  - Ensure that all unvaccinated employees wear a face covering while indoors or when occupying a vehicle with another person for work purposes.
  - Require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19.
  - Immediately remove from the workplace any employee, regardless of vaccination status, who receives a positive COVID-19 test or is diagnosed with COVID-19 by

a licensed health care provider, and keep the employee out of the workplace until the return-to-work criteria are met.

- Provide each employee with information they can understand about the requirements of the ETS and the workplace policies and procedures established to implement the ETS; vaccine efficacy, safety and the benefits of being vaccinated by providing the CDC document [Key Things to Know About COVID-19 Vaccines](#); protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false statements or documentation.
- Report work-related COVID-19 fatalities to OSHA within eight hours of the employer learning about them, and work-related COVID-19 in-patient hospitalizations within 24 hours of learning about them.
- Make records available to an employee or an employee representative for examination and copying.
- The ETS does not require employers to pay for any costs associated with testing. However, under an existing Oregon law, it is unlawful for employers to require employees to pay the cost of any “medical examination” or “health certificate” as a condition of employment. Currently, it is unclear whether BOLI or an Oregon court would (a) consider testing a medical examination or health certificate, or (b) conclude that an employee’s payment for testing is required when vaccination is an alternative. We are seeking guidance from BOLI on those points, but even that won’t be definitive without a court ruling.

## PROTECTED LEAVE

- Employers must provide employees with up to four hours of paid time off to receive each primary vaccination dose and paid sick leave to recover from any side effects experienced following each primary vaccination dose. Booster shots are not covered in this requirement.

## PENALTIES

- Employers that do not comply with the ETS could be fined up to \$13,653 per violation. A willful violation could lead to a fine of up to \$136,532.

## FAQs

- Here is a link to the FAQs that were published by Federal OSHA: [COVID-19 Vaccination and Testing ETS - Frequently Asked Questions](#).

For more information, please contact our attorneys, [Amanda Walkup](#), [Andy Lewis](#), and [Mario Conte](#).

*This summary provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, you are urged to consult with your attorney concerning your own situation.*