

OSHA's Vaccine Mandate Rules Are Here. Is This the Final Word?

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In September, the Biden administration [announced](#) that the Department of Labor would mandate that all businesses with 100 or more workers require their employees to either get vaccinated against the Coronavirus or face mandatory weekly testing. For many employers, the announcement raised more questions than answers to their Covid woes. Fortunately, the emergency temporary standard (ETS) is finally here to provide clarity.

The ETS is effective immediately upon its publication in the Federal Register. The emergency temporary standard covers employers with 100 or more employees – firm or company-wide – and provides options for compliance. The ETS does not apply to employees who do not report to a workplace where other individuals (such as coworkers or customers) are present, employees working from home, or employees who work exclusively outdoors. Employers must comply with most requirements within 30 days and with testing requirements within 60 days of publication, which is January 4, 2022.

The ETS also requires employers to do the following:

- **Determine the vaccination status** of each employee, obtain acceptable proof of vaccination status from vaccinated employees, and maintain records and a roster of each employee's vaccination status.
- **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 COVID-positive employees to return to work until they meet required criteria.
- **Ensure each worker who is not fully vaccinated is tested** for COVID-19 at least weekly (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). To be fully vaccinated, an employee must have received either two doses of Pfizer or Moderna's vaccine or one dose of Johnson & Johnson's vaccine.
- Ensure that 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 (in most circumstances).

Who pays?

The ETS does not require employers to pay for testing. However, the ETS does require employers to provide paid time to workers to get vaccinated and to allow for paid leave to recover from any side effects. Although not required by the ETS, employers may be required to pay for testing to comply with other laws, regulations, collective bargaining agreements, or other collectively negotiated agreements.

Can states get around it?

One of the main challenges to the ETS is its enforceability. The Biden Administration maintains that the ETS is intended to preempt states and political subdivisions from adopting and enforcing workplace requirements relating to these issues, except under the authority of a federally-approved state plan. In particular, OSHA intends to preempt any state or local requirements that ban or limit an employer from requiring vaccination, face covering, or testing. So, vaccination bans, like the one in Texas, would be unenforceable.

Employers should stay tuned as OSHA may revise or update the ETS based on trends in COVID-19 infections and death rates.

For questions about how to implement a mandatory vaccination policy, please contact any member of McGlinchey's [Labor and Employment Team](#).

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