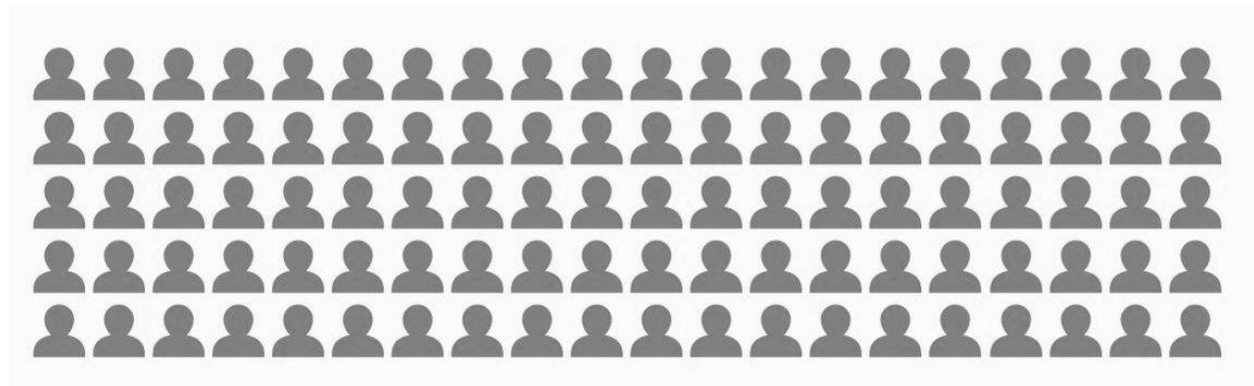


## **OSHA UNVEILS ITS COVID VACCINATION OR TESTING MANDATE**

On November 4, 2021, the Biden Administration issued an Emergency Temporary Standard ("ETS") requiring Covid vaccinations or at least weekly testing for employees of large employers. This is the first time that the Occupational Safety and Health Administration ("OSHA") has required workplace vaccinations for any disease.

### **To whom does it apply?**

The ETS generally applies to employers in all workplaces that are under OSHA's jurisdiction. This includes a broad variety of industries such as manufacturing, retail, delivery services, warehouses, meatpacking, construction, logging, maritime, and healthcare. Within these industries, all employers with a total of at least 100 employees at any time the ETS is in effect, are covered. Both full-time and part-time employees are counted, regardless of whether they are working from home or remotely. Independent contractors and leased employees are not. Closely-related corporate entities may have their employees aggregated to reach the 100 employee threshold. The ETS does not require that there be 100 employees in any one establishment, simply company-wide. Those states which have their own state OSHA agencies—which do *not* include Nebraska—have thirty (30) days to implement the Federal OSHA Standard or issue their own vaccination mandate.



### **To whom does it not apply?**

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 while they are working from home, or employees who work exclusively outdoors. This standard does not apply to federal contractors covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety Guidance or in settings where employees provide healthcare services or healthcare support services when subject to the requirements of the Healthcare ETS (29 CFR 1910.502).

## What is required of covered employers?

- **Develop a Vaccination Program**

The ETS requires covered employers to establish, implement, and enforce a written mandatory COVID-19 vaccination policy, with an exception for employers that instead establish, implement, and enforce a policy allowing employees to choose either (a) to be fully vaccinated or (b) to provide proof of weekly COVID-19 testing and wear a face covering at the workplace.



- **Proof of Vaccination**

The ETS requires employers to determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status.

- **Paid Time Off for Vaccination**

The ETS requires employers to provide employees reasonable time, including up to four (4) hours of paid time, to receive each vaccination dose, and reasonable time and paid sick leave to recover from any side effects experienced following each dose.



## COVID-19 Vaccination or Testing

The ETS requires that all employees either be vaccinated or be tested weekly beginning January 4, 2022. The ETS requires employers to ensure that each employee who is not fully vaccinated wears a face covering in the workplace and is tested for COVID-19 (and provides documentation of the most recent test result) at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer). Employers must maintain a record of each test result provided by each employee and must keep an employee who does not provide documentation of a COVID-19 test result removed from the workplace until the employee provides a test result.

The ETS also requires employers to: (1) require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19; (2) immediately remove any employee from the workplace, regardless of vaccination status, who received a positive COVID-

19 test or is diagnosed with COVID-19 by a licensed healthcare provider; (3) keep removed employees out of the workplace until they meet criteria for returning to work.

## Educating Employees

The ETS also requires employers to inform employees of the requirements of the ETS, the employer's policies and procedures to implement it, information about COVID-19 vaccine efficacy, OSHA's anti-retaliation and antidiscrimination provisions, and OSHA's prohibition on supplying false statements or documentation.

## What are the deadlines?

The ETS takes effect Friday, November 5, 2021, when it is published in the Federal Register.

December						2021
Sun	Mon	Tue	Wed	Thu	Fri	Sat
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31 <small>Christmas Day (obs.)</small>	<small>Christmas Day</small>
					<small>New Year's Day (obs.)</small>	

By December 5, employers must have their compliance program in place, offer paid time off for vaccinations and require unvaccinated workers to wear masks.

January						2022
Sun	Mon	Tue	Wed	Thu	Fri	Sat
						1 <small>New Year's Day</small>
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17 <small>Martin Luther King Day</small>	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

The deadline for workers to be vaccinated or start being tested is January 4, 2022. Employees will need up to six (6) weeks to be fully vaccinated, depending upon which vaccine is selected.

## Who pays for testing?

While employers must provide paid time off for employees to become vaccinated, the costs of testing are borne by employees. Employers do not need to pay for the testing unless there are other

laws or collective bargaining agreements which require the employer to pay for testing. For instance, an employer may be required to pay for testing if the cost of testing would reduce a non-exempt employee's wage below the minimum wage. This is somewhat surprising because other OSHA rules require employers to pay for medical tests involving work-related health hazards such as lead exposure or hearing loss.

### **What if the employer doesn't comply?**

If an employer is inspected and cannot produce records showing it is following the standard, OSHA has six (6) months following the inspection to issue a citation. A "Serious" violation of the standard could result in a maximum fine of \$13,653.00. The cap for "Willful" or "Repeat" violations is \$136,532.00. If, however, the Build Back Better Act becomes law, it could raise maximum fines for all OSHA standards to \$70,000.00 for "Serious" violations and \$700,000.00 for "Willful" or "Repeat" violations. These penalties, like other OSHA penalties, are subject to negotiation with OSHA before filing a Notice of Contest and having the matter resolved before the Occupational Safety and Health Review Commission.



Undoubtedly, the new ETS will be subject to court challenges.

### **Contact Us**

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