

OSHA Emergency Temporary Standard

COVID-19 Vaccination and Testing Requirements for Larger Employers

The U.S. Labor Department's Occupational Safety and Health Administration on November 4 made public an [Emergency Temporary Standard](#) (standard or ETS) requiring employers with 100 or more employees to ensure that workers are vaccinated or are regularly tested for COVID-19. The standard explains the requirements and exceptions, providing examples, rationales, and legal citations. It does not expressly offer guidance and examples relevant to nonprofit workplaces. This summary is intended to answer most nonprofit questions and provide assistance to nonprofit employers seeking to determine coverage and comply with the standard.¹

What Nonprofits Need to Know

Barring court intervention blocking the ETS, nonprofit employers with 100 or more employees will be required starting January 4, 2022 to ensure their workers are vaccinated or regularly tested for COVID-19, with exceptions for certain employees. Employers have a choice: they may mandate that all workers (with exceptions listed in the ETS) be vaccinated; in the alternative they require vaccinations or regular testing and masking.

The number of employees triggering coverage is based on all employees, fulltime and part-time workers combined. Employees working remotely or outdoors are counted for employer coverage purposes, but they may not necessarily be required to get vaccinated or tested if they do not come in contact (or have only *de minimis* contact) with coworkers or clients/customers. Individuals who have certain medical conditions or sincerely held religious objections (as [defined by the EEOC](#)) will not have to be vaccinated, but still must be tested and wear face coverings in group settings. Employers may require employees pay the costs of testing, except where other legal or collective bargaining obligations require otherwise.

Compliance Tips

As a first step, employers should determine whether their organization employs 100 or more fulltime and/or part-time employees anywhere in the US? If so, the organization must adopt a written COVID policy that either mandates vaccinations for all relevant employees or requires vaccination and testing/masking. Either written policy must address requirements, procedures documentation, and reporting. OSHA has posted templates for a [Mandatory Vaccination Policy](#) and a [Vaccination or Testing and Face Covering Policy](#).

A next step is to determine which employees are and are not subject to the vaccination and testing/masking requirements. There are exceptions for individuals with medical conditions and religious objections that will exempt them from vaccinations, but not testing. Employees working remotely or outdoors may also be excused from vaccinations, testing, and face coverings in certain circumstances.

The remaining steps involve implementing the standard by way of determining vaccination status of relevant employees, ensuring testing (as appropriate) is conducted, and keeping up with the documentation and disclosure requirements.

¹ The Centers for Medicare and Medicaid Services also released on November 4 an [Omnibus COVID-19 Health Care Staff Vaccination](#). The White House [explains the two new vaccination policies in a fact sheet](#).

Analysis of the Emergency Temporary Standard

The purpose of this analysis is to provide answer to nonprofit questions about Emergency Temporary Standard. The following information is based on a review of the ETS, related documents, and background information. Before getting into what is actually required by the standard, this analysis starts with a focus on coverage of employers and employees.

Which Employers are Covered?

The new standard imposes the vaccination and testing requirements on all employers that have a total of at least 100 employees at any time that the ETS is in effect. The applicability of the standard is based on the size of an employer, in terms of number of employees, rather than on the type or number of workplaces.

- **All Employees Counted:** In determining the number of employees, employers must include all employees – fulltime as well as part-time – across all of the employer’s U.S. locations, regardless of employees’ vaccination status or where they perform their work. Independent contractors are not counted towards the 100-employee coverage total.
- **Counting Remote Workers:** For coverage purposes remote workers who do not come into the workplace are still counted toward the 100-employee threshold. One of the 11 examples in the ETS states: “If an employer has 102 employees and only 3 ever report to an office location, that employer would be covered.” As discussed below, the ETS does not require that all remote employees of covered employees be vaccinated or tested.
- **Multi-Site Workplaces:** For a single corporate entity with multiple locations, all employees at all locations are counted for purposes of the 100-employee threshold.² If an employer has more than 100 employees spread out over multiple sites, that employer is covered under the ETS even if it does not have 100 or more employees present at any one worksite.
- **Determination of Coverage:** Employers with 100 or more employees on the effective date of the ETS are covered for the duration of the standard. However, if an employer subsequently hires more workers and hits the 100-employee threshold, the employer will then be expected to come into compliance with the standard’s requirements for the duration of the standard. In short, employment fluctuations can bring employers into coverage but not eliminate coverage once determined.
- **Overlap with Other Federal Rules:** This standard does not apply to workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors 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).

Which Employees are Covered?

Most, but not all employees are covered by the vaccination and testing requirements. There are exclusions.

² For nonprofits with independent affiliate operations, the following text appears analogous and helpful: “In a traditional franchisor-franchisee relationship in which each franchise location is independently owned and operated, the franchisor and franchisees would be separate entities for coverage purposes, such that the franchisor would only count “corporate” employees, and each franchisee would only count employees of that individual franchise.”

- **Health and Religious Exclusions:** The ETS also explains three categories of exclusions for employees: (1) those for whom a vaccine is medically contraindicated, (2) those for whom medical necessity requires a delay in vaccination, and (3) those who are legally entitled to a reasonable accommodation under federal civil rights laws because they have a **disability** or **sincerely held religious beliefs, practices, or observances** that conflict with the vaccination requirement. The ETS states that OSHA does not enforce matters of reasonable accommodation and provides reverence to [guidance from the Equal Employment Opportunity Commission](#). **NOTE:** Those excluded from the vaccination requirement are still required to be tested on a regular basis. See [FAQ 6.H](#).
- **Location-Based Exceptions for Individual Employees:** The ETS vaccination and testing requirements do not apply to (1) employees who do not report to a workplace where other individuals such as coworkers or customers are present, (2) employees while they are working from home, or (3) employees who work exclusively outdoors. An employee who switches back and forth from teleworking to working in a setting where other people are present (e.g., an office) must either be vaccinated or complete testing and wear a face covering in accordance with their employer's policy. Testing frequency depends on how often employees go to a workplace with other employees.

What is Required of Covered Employers and Employees?

The ETS requires covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception that employers may instead establish, implement, and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace. Here is what this requirement means in real terms:

- **Written Vaccination Policy:** Covered employers must adopt policies that include the following: (1) requirements for COVID-19 vaccination; (2) applicable exclusions from the written policy (e.g., medical contraindications, medical necessity requiring delay in vaccination, or reasonable accommodations for workers with disabilities or sincerely held religious beliefs); (3) information on determining an employee's vaccination status and how this information will be collected; (4) paid time and sick leave for vaccination purposes; (5) notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace; (6) information to be provided to employees; and (7) disciplinary action for employees who do not abide by the policy.
- **Proof of Vaccination:** Covered employers must require each vaccinated employee to provide acceptable proof of vaccination status, including whether they are fully or partially vaccinated. This means covered employers must maintain records of each employee's vaccination status and maintain an employee roster keeping track of vaccination status. Employees will have to provide proof of vaccinations or attest to their vaccination status. The ETS does not require employers to monitor for or detect fraud, but false attestations can be subject to penalties and employers can be on the hook if they know of fraud.
- **Getting Vaccinated:** Covered employers must give employees reasonable time off, including up to four hours of paid time, to receive each vaccination dose, and reasonable time and paid sick leave to recover from side effects experienced following each dose.
- **Testing Unvaccinated Employees:** Covered employers must ensure that each employee who is not fully vaccinated is tested for COVID-19 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).

- **Paying for Testing:** While employers may cover the costs of testing, the ETS does not require employers to pay for any costs associated with testing. However employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements.
- **Positive COVID Test or Diagnosis:** Covered employers must require employees to promptly provide notice when they receive a positive COVID19 test or are diagnosed with COVID-19. The employer must 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 and keep removed employees out of the workplace until they meet criteria for returning to work.
- **Face Coverings for Unvaccinated Employees:** Covered employers must make sure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances. Interestingly, the ETS makes clear that employers **must not prevent** any employee, regardless of vaccination status, from voluntarily wearing a face covering unless it creates a serious workplace hazard (e.g., interfering with the safe operation of equipment).
- **Reporting Requirements:** In addition to existing OSHA reporting requirements, the ETS provides that covered employers must report each work-related COVID-19 fatality within 8 hours of the employer learning about the fatality, and each work-related COVID-19 in-patient hospitalization within 24 hours of the employer learning about the in-patient hospitalization.
- **Effective Dates:** The ETS is effective upon publication in the Federal Register [November 5, 2021]. The compliance date for all provisions in the ETS is 30 days after the effective date [December 4, 2021], except for COVID-19 testing for employees who are not fully vaccinated, which requires compliance within 60 days of the effective date [January 4, 2021].

Federal Preemption

The ETS states at the outset that the standard is intended “to preempt inconsistent state and local requirements relating to these issues, including requirements that ban or limit employers’ authority to require vaccination, face covering, or testing, regardless of the number of employees.”³ Several state attorneys general and others have promised lawsuits challenging this principle and questioning the authority of OSHA to issue an emergency temporary standard on this issue.

Additional Resources

- [COVID-19 Vaccination and Testing; Emergency Temporary Standard](#), Occupational Safety and Health Administration, Nov. 4, 2021.
- **Fact Sheets**
 - [About the ETS](#)
 - [ETS Summary](#)
 - [How You Can Provide Comments \(Spanish\)](#)
- [ETS Frequently Asked Questions](#)
- [White House Fact Sheet](#)

³ § 1910.501(a) Vaccination, testing, and face coverings