

## OSHA's COVID-19 Vaccination Mandate: What This Means for Your Workplace

On November 4, 2021, the Occupational Health and Safety Administration ("OSHA") [issued](#) an emergency temporary standard ("ETS") requiring all large employers to adopt a mandatory COVID-19 vaccination policy for all employees or else require that all employees receive weekly COVID-19 testing and wear face coverings in the workplace. The policy, which was first announced by the Biden administration in September 2021, represents the first vaccination mandate of its kind by OSHA.

### ***Who Is Covered by the ETS?***

The ETS applies to all private employers with 100 or more employees at any time during which the ETS is in effect. According to [guidance](#) issued by OSHA when the ETS was announced, this includes all employees across all U.S. workplaces, regardless of an employee's vaccination status or where they perform their work. Thus, employers with 100 or more employees company-wide will be subject to the ETS even if no single worksite has more than 100 employees. Part-time employees and employees who work exclusively outside of the workplace—such as employees who work from home or from an offsite location—also count toward the 100-employee threshold. By contrast, (lawfully classified) independent contractors need not be included as "employees" for purposes of making this determination.

Although employees who work from home, who work exclusively outdoors, or who do not report to a workplace where other individuals are present, count toward the 100-employee threshold, the ETS does not apply to such employees. A covered employer may choose to exempt them from vaccination or testing requirements unless and until they return to an indoor worksite where other individuals are present. For example, a covered employer does not need to require an unvaccinated employee who is working exclusively from home during a given week to comply with the testing and face covering requirements of the ETS while they are working from home. Such employee would, however, either need to be fully vaccinated before returning to the office or be tested for COVID-19 within seven days prior to returning to the workplace and to provide documentation of that test result upon their return. They would also need to wear a face covering while at the worksite.

### ***What Must Employers Do?***

Pursuant to the ETS, covered employers must develop, implement and enforce a policy that either mandates COVID-19 vaccination for all employees, or requires unvaccinated employees to undergo weekly COVID-19 testing and wear a face covering within the workplace. OSHA has published templates for both mandatory vaccination and vaccination or testing policies on its [website](#). Under the ETS, unvaccinated workers are expected to pay for their own testing and face coverings unless there are other laws or collective bargaining agreements that would require an employer to cover these expenses. Employees may still be entitled to reasonable accommodations with respect to either policy when a vaccine is medically contraindicated or a medical necessity requires a delay in vaccination, or on the basis of a disability or sincerely held religious belief, practice or observance. The Equal Employment Opportunity Commission previously issued [guidance](#) for employers evaluating reasonable accommodation requests and recently published a [model form](#) that can be used for employees to submit a religious accommodation request.

Under the ETS, employers must also:

- Determine the vaccination status of each employee and maintain a roster of each employee's vaccination status. For purposes of the ETS, an employee is "fully vaccinated" two weeks after receiving the final dose of a vaccine that has been: (i) approved or authorized for emergency use by the FDA, (ii) listed for emergency use by the World Health Organization, or (iii) administered as part of a clinical trial in the U.S. Employees who are eligible to receive a booster shot need not obtain a booster in order to qualify as "fully vaccinated" under the ETS.
- Obtain acceptable proof of vaccination from vaccinated employees and maintain records of each employee's vaccination status. Acceptable proof of vaccination status includes a vaccine card, medical records documenting the vaccination or a record of immunization from a health care provider or pharmacy. Employees who have lost their vaccine cards may submit a signed and dated attestation of their vaccination status and their inability to produce other proof, which includes the following language: "I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties." While the ETS is in effect, employers must preserve acceptable proof of vaccination for all fully and partially vaccinated employees and maintain a roster of each employee's vaccination status. These records are considered employee medical records and should be segregated from other personnel records and maintained confidentially.
- Support vaccination by providing employees reasonable time, including up to four hours of paid time, to receive each primary vaccination dose and reasonable time and paid sick leave to recover from any side effects experienced following each primary vaccine dose. Employers may not require an employee to use personal time or sick leave to get vaccinated, although they may require an employee to use accrued sick leave when recovering from any side effects from vaccination. Employers may also cap the amount of paid leave available for such recovery. OSHA generally presumes that if an employer makes available up to two days of paid sick leave per primary vaccination dose for side effects, the employer would be in compliance with this requirement. Employers may not require an employee to borrow against future leave or otherwise go into the negative for paid sick leave if the employee does not have accrued paid sick leave when they need to recover from side effects experienced following a primary vaccination dose.
- Ensure that each employee who is not fully vaccinated is tested for COVID-19 at least weekly if the employee is coming to the workplace at least once a week. An employee who has been away from the workplace for a week or longer must be tested within 7 days before returning to work. Employers must also ensure that all unvaccinated employees wear a face covering—such as a cloth mask or surgical mask—when indoors or when occupying a vehicle with another person for work purposes. The ETS includes a detailed list of requirements for acceptable face coverings, including that they be made of two or more layers, fit snugly over the nose, mouth and chin, and that they contain no slits, valves, holes or other openings.
- Require employees to promptly provide notice when they receive a positive COVID-19 test result or are otherwise diagnosed with COVID-19. Employers must immediately remove from the workplace any employee who has tested positive for or been diagnosed with COVID-19, regardless of vaccination status, and keep them out of the workplace until they meet the requirements to return to the workplace set forth in the ETS. The ETS does not require employers to provide paid sick leave for employees who have been removed from the workplace as a result of a COVID-19 diagnosis, but paid time off may be required by other laws, regulations, or collective bargaining agreements, and employers should allow their employees to make use of any accrued leave in accordance with the employer's policies and practices on use of leave.
- Provide each employee with information, in a language and at a literacy level the employee understands, about the requirements of the ETS and any workplace policies and procedures established to implement the

ETS. Employers must also provide employees with information about the efficacy, safety and benefits of being vaccinated as well as information about protections against retaliation and the laws that provide for criminal penalties for knowingly supplying false statements or documentation. OSHA has published several fact sheets for employees on its [website](#) (in both English and Spanish) that explain much of this information.

- Report all work-related COVID-19 fatalities to OSHA within 8 hours of learning about them. Employers must also report all work-related COVID-19 in-patient hospitalizations within 24 hours of learning about them. OSHA guidance recognizes that it is inherently difficult to determine whether COVID-19 infections are work-related, and has issued a [fact sheet](#) to assist employers in making such determinations.
- Make certain records—including the aggregate number of fully vaccinated employees at the workplace and the total number of employees at that workplace—available for examination and copying to any employee or authorized employee representative. Employers must also provide access to the individual COVID-19 vaccine documentation and any COVID-19 test results required by the ETS for a particular employee to that employee.

Employers could incur steep penalties for failure to comply with the ETS. Each serious violation of the standard could result in a maximum fine of \$13,653, and the maximum fine for willful or repeat violations is \$136,532. A serious violation exists when the workplace hazard could cause an accident or illness that would most likely result in death or serious physical harm, unless the employer did not know or could not have known of the violation. Employers should be aware that if the Build Back Better Act becomes law, the maximum fines for all OSHA rule violations will increase to \$70,000 for serious violations and \$700,000 for willful or repeat violations.

#### ***When Does the ETS Take Effect?***

The effective date for the ETS is November 5, 2021, but employers will not be required to come into compliance with its terms immediately. Rather, employees will have 30 days—until December 5, 2021—to comply with most of the ETS requirements, including adopting a vaccination policy and determining the vaccination status of each employee, requiring face coverings for unvaccinated individuals while indoors and providing support for employee vaccination. Compliance with the weekly testing provisions of the ETS is not required until 60 days after publication. Employers thus have until January 4, 2022 to ensure that all employees who are not fully vaccinated are 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).

\* \* \*

The ETS is anticipated to stay in effect for at least six months from the date of publication in the Federal Register (November 5, 2021). Because the ETS also serves as a proposed final rule under Section 6(b) of the Occupational Safety and Health Act, it may also be adopted on a more permanent basis next year. Nonetheless, there has been vocal opposition to the idea of a federal COVID-19 vaccine mandate for private employers in the past, and prompt legal challenges to the ETS are anticipated. We will continue to closely monitor for future guidance and developments in this space.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

<u><a href="#">Lisa E. Cleary</a></u>	212.336.2159	<u><a href="mailto:lecleary@pbwt.com">lecleary@pbwt.com</a></u>
<u><a href="#">Catherine A. Williams</a></u>	212.336.2207	<u><a href="mailto:cawilliams@pbwt.com">cawilliams@pbwt.com</a></u>
<u><a href="#">Jacqueline L. Bonneau</a></u>	212.336.2564	<u><a href="mailto:jbonneau@pbwt.com">jbonneau@pbwt.com</a></u>
<u><a href="#">Douglas L. Tang</a></u>	212.336.2844	<u><a href="mailto:dtang@pbwt.com">dtang@pbwt.com</a></u>
<u><a href="#">Ryan J. Kurtz</a></u>	212.336.2405	<u><a href="mailto:rkurtz@pbwt.com">rkurtz@pbwt.com</a></u>

To subscribe to any of our publications, call us at 212.336.2813, email [info@pbwt.com](mailto:info@pbwt.com) or sign up on our website, <https://www.pbwt.com/subscribe/>.

This publication may constitute attorney advertising in some jurisdictions.  
© 2021 Patterson Belknap Webb & Tyler LLP