

OSHA's ETS for Mandatory Employee Vaccinations



Key Action Items for Employers

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Our Speakers



**Suzanne W.
Decker**

Principal
sdecker@milesstockbridge.com
410 385-3417



**Kirsten M.
Eriksson**

Principal
keriksson@milesstockbridge.com
410 385-3583



**Stephanie K.
Baron**

Principal
sbaron@milesstockbridge.com
410 385-3463



**Veronica D.
Jackson**

Principal
vjackson@milesstockbridge.com
410 385-3499



**Paolo M.
Pasicolan**

Principal
ppasicolan@milesstockbridge.com
410 385-3713

Who does the ETS apply to?

All employers with 100 or more employees

- Includes full- and part-time employees; does not include contractors
- Includes temporary and seasonal employees
- Total employee count, regardless of location
- Includes remote employees and employees who work exclusively outdoors
 - But – these employees do not need to be vaccinated / tested / masked
- Staffing agency employees counted by their actual employer

Not addressed: Affiliated / Integrated employers

Who does the ETS NOT apply to?

- Workplaces covered by the Guidance for Federal Contractors and Subcontractors
 - BUT – some employers may have only some of their workplaces covered by the Federal Contractor Guidance. If they employ more than 100 employees, those workplaces not covered by that Guidance would be subject to the ETS.
- Workplaces covered by the healthcare services and healthcare support services ETS
- Contractors, visitors, vendors

Counting Employees

- Determination made as of the effective date of the ETS (November 5, 2021)
- Employer who later falls below 100 employees still required to comply for the duration of the ETS.
- Employer who later reaches 100 employees must come into compliance with the ETS.
- Once an employer becomes covered – they stay covered for the duration of the ETS.

What is Required?

- Choice Time: Mandatory Vaccination Policy versus “Vaccine or Test” Policy.
- OSHA has sample policies but they require customization.
- Exemptions:
 - Remote employees do not need to be vaccinated or tested weekly unless they come on-site.
 - Outdoor employees (but not in a vehicle).
 - Solo employees.

When is Compliance Required?

- Immediately
 - Implement a policy to meet deadlines below.
- December 6, 2021
 - Paid-time provisions
 - Collection of vaccination status
 - Mask mandate
- January 4, 2022
 - For in-person employees; indoors or in a vehicle.
 - Vaccination deadline (vax choice or mandatory vaccination employers).
 - Unvaccinated employees (in-person)
 - Weekly testing begins unless they have received second shot and are waiting for 2-week period.
 - **But** may be extended pending court challenges.

Testing and Masks for Unvaccinated Employees

- Employers must maintain accurate records regarding vaccination status of “each employee.”
 - This is required to comply with testing and mask requirements.
 - The record component does not contain an exemption for remote employees.
- Employers must obtain test results once every 7 days and before an unvaccinated employee comes on-site.
 - Accurate records must be maintained of each test result provided by employees.
 - Tests cannot be both self-administered and self-read.
 - Unvaccinated employees must wear a mask on-site.

Requests for Exemption or Accommodation

- Three categories of individuals who may receive exemption from mandatory vaccination policy:
 - Vaccine medically contraindicated
 - Medical necessity requires delay (employee recently had COVID)
 - Legally entitled to reasonable accommodation due to (1) disability; or (2) sincerely held religious belief

Requests for Exemption or Accommodation

- Establish process to review requests
- Use standard forms to obtain information from employees
 - Medical issues, allergy and/or disability – Request documentation from healthcare provider
 - Religious Accommodation – no third-party documentation necessary
- Consistency is key

What Does the Employer Need to Pay For?

Vaccination

- Up to four hours of duty time for each vaccination, which includes time spent traveling and time spent being vaccinated
 - OSHA assumes that employees will be vaccinated during work time; if an employee chooses to get vaccinated during non-working hours, the time need not be paid (per the ETS)
- A “reasonable” amount of sick time after vaccination due to side effects. Two days will likely be deemed “reasonable.” Employers can charge time off to sick time or PTO, but even if employees do not have available time, employers must provide paid time off
- Costs of vaccine itself should be covered by insurance or government – no cost to employee

What Does the Employer Need to Pay For?

Cost of Testing

Federal law

- ETS does not require employers to bear the cost of testing – the employee has made “an individual choice to pursue a less protective option”
 - What about the FLSA? Employers may not require employees bear the cost of “facilities” that are “primarily for the benefit of the employer” if it impacts minimum wage or overtime. Will OSHA language carry the day?

What Does the Employer Need to Pay For?

Cost of Testing

State law

- 10 states require employers to reimburse employees for necessary business expenses
 - ***How will “necessary” will be defined?***
- In addition, some states prohibit employers from requiring employees to pay for the cost of medical tests in connection with employment

What Does the Employer Need to Pay For?

Time Spent Getting Tested

Federal law

- ETS does not require employers to pay employees for the time spent obtaining a test
- BUT: Under FLSA, “hours worked” ordinarily includes all the time during which an employee is required to be on the employer’s premises, on duty, or at a prescribed workplace. See DOL’s Q&A re COVID-19 and the FLSA
- DOL announced it would update its guidance – wait and see!

State law

- Most state laws define “hours worked” similarly – how will various states interpret the law?

Reasonable Accommodations

- Employers must bear the cost of providing reasonable accommodations, so if employees do not “choose” to be tested, but need to be tested because they cannot be vaccinated due to a medical or religious restriction, the employer needs to pay for the time and the test



ERISA Considerations

Does ERISA apply to testing/vaccine programs?

- It depends on whether the employer pays for testing/vaccine:
 - Not paying for testing/vaccine
 - Offering an incentive for testing/vaccine
 - Paying for testing/vaccine for all employees

ERISA Considerations

If ERISA applies . . .

- Your testing/vaccine program is a standalone health plan.
 - Plan document and summary plan description (SPD)
 - Form 5500
 - Claims procedure
 - ACA compliance

ERISA Considerations

Complying with ERISA

- Easiest way to comply is to piggyback off an EAP:
 - No employee contributions or premiums
 - No cost sharing
 - No coordination of benefits with another health plan
- Consult the administrator of your health plan



Record Keeping Obligations

Vaccination Status

- What constitutes proof?
 - the record of immunization from a health care provider or pharmacy;
 - a copy of the U.S. COVID-19 Vaccination Record Card;
 - a copy of medical records documenting the vaccination;
 - a copy of immunization records from a public health, state, or tribal immunization information system; or
 - a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).
- How long? – as long as the ETS is in effect
- Where? – paper or electronically as long as its kept confidential
- Disclosure to who? – aggregate numbers to any employee who asks and to OSHA if it asks



COVID Test Results

- What is maintained? – each and every test result must be kept
- How long? – as long as the ETS is in effect
- Where? – paper or electronically as long as its kept confidential

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