

UPDATE: OSHA ETS VACCINE MANDATE

By *BRSi Compliance*

On November 5, 2021, the federal Occupational Safety and Health Administration (OSHA) issued their Emergency Temporary Standard (ETS) providing details of President Biden's proposed mandate requiring employers with 100+ employees to either (1) mandate vaccinations or (2) require vaccination or weekly testing and face coverings for those unvaccinated. Below is a brief summary of the ETS.

How to count the 100-employee threshold

- The employee count is based on an entire company, and not by individual location. We assume any controlled groups (by IRS definition) should be considered as one company.
- All employees including full-time, part-time, temporary, and seasonal must be included in the employer count.
- The count date is the effective date of the ETS (November 5, 2021). If an employer subsequently crosses the 100-employee threshold, they become covered by the ETS on that date. However, if a covered employer drops below the 100-employee count, they continue to be covered by the ETS while it remains in effect.
- Companies do not have to count independent contractors or contract employees, staffing agency employees, or employees of other employers at the same worksite.

Which employees are subject to the ETS requirements?

- Any employee working within the workplace where other employees or customers are present.
- Any employee who comes into the workplace at least once every seven days.

Which employees are not subject to the ETS requirements?

- Any employee who is 100% remote and never comes into the workplace.
- Any employee working exclusively outdoors.
- Any employee who reports to a workplace where no other employees or customers are present.

Vaccination Regulations Highlights

- Fully vaccinated means - two weeks after the second dose of an approved two-shot vaccine or two weeks after an approved single-shot vaccine.

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Vaccination Regulations Highlights (continued)

- Employers must have an acceptable proof of vaccination and maintain a copy of that record:
 - Record of immunization from health provider or pharmacy
 - Copy of US COVID-19 Vaccination Card
 - Copy of any medical record showing proof of vaccination
 - Copy of any other official health document (including date, and health care provider)
 - Attestation of vaccination if no other means to obtain proof (see details for guidance)
- Employers must keep all records confidential and must keep separate from an employee's personnel file. Access to those records should only be available to the employee(s) maintaining the policy.
- Employees that may be exempt from the vaccine requirement:
 - Employees who are medically contraindicated for a COVID-19 vaccine.
 - Employees with medical conditions that require a delay in the vaccination.
 - Employees legally entitled to reasonable accommodation under federal civil rights laws (i.e., disability, religious beliefs).
- Employers should have a written mandatory vaccination policy.
- Employers may take disciplinary action for non-compliant employees (including discharge of employment).
- Employers must provide reasonable time (up to four hours) and pay the employee for the time spent (during work hours) to get each dose of the vaccine. Employers cannot require employees to use existing paid leave for this purpose.
- Employers must provide paid time due to the adverse effects of the vaccines. Employers can require the employee to use existing and available sick leave, but if there is no existing paid leave available, the employer must provide up to two days paid leave (per dose).

Testing/Face Mask Requirements

- Unvaccinated employees must go through weekly testing starting January 4, 2022.
- Any employee who tests positive or is diagnosed for COVID-19 infection should not be tested within 90 days of their positive test or diagnosis. However, once that employee meets the "return to work" criteria, a face mask is required.
- Employers do not have to pay for the cost of the testing.
- If testing takes place during work hours, employers should compensate for the employee's time.
- If testing is not conducted during work hours, there is no clear guidance on employee compensation. If your employees are considered "front line", previous DOL guidance states employees should be compensated for their time. Please contact your legal advisor to see if other state or federal laws apply to your group.
- FDA approved viral tests are acceptable.
- Self-Administered tests are (only) acceptable if observed by the employer or a telehealth provider.
- Employers must keep copies of each employee's test result and must keep results confidential.
- Any unvaccinated employees must also wear face coverings indoors or while driving with another employee for a work-related matter.
- Employers are not required to pay for employee face coverings.
- Insurance is not required to cover the mandate testing. To our knowledge insurance carriers will not be covering the cost of testing unless it is related to COVID-19 symptoms or diagnosis. Self-Funded clients can choose to cover the cost of the testing, or not.

COVID-Positive Requirements

- Employees must notify their employer of a positive test result and should leave the workplace immediately.
- Employees testing positive cannot return to the workplace until they meet the CDC's published criteria or have approval to return to work by their health care provider.
- Employees who have contact with a COVID positive person are not required to leave the workplace premises.
- Contact tracing is not a requirement.

Additional Employer Requirements

- Employers must provide all employees with their ETS policy and procedures.
- Employers must provide a copy of the CDC document: [Key Things to Know About COVID-19 Vaccines \(cdc.gov\)](https://www.cdc.gov/media/releases/2020/s1105-covid-19-vaccines.html)
- Employers cannot discharge or retaliate against employees for reporting work-related injuries or illnesses.
- Employers must report any work-related COVID-19 fatalities to OSHA within 8 hours of learning of the death.
- Employers must report any work-related hospitalization to OSHA within 24 hours of learning of the hospitalization.

Penalties for Non-Compliance

- OSHA penalty for per violation is \$13,653.
- OSHA penalty for egregious and willful violations is up to \$136,532 per violation.

BRSi is not licensed to provide legal advice. The above OSHA ETS summary should not be construed as legal advice. You should consult with your legal advisor to review details of the ETS definitions, requirements and regulations to determine a plan of action that best meets the needs of your company. Further, your legal advisor can also review state and local laws that may impact your decisions. BRSi can only answer questions as it relates your company's health plan(s).

Note: Several states have already presented legal challenges to the OSHA ETS ruling. However, the Biden administration and DOJ have stated they will rigorously fight any legal challenge.

OSHA ETS Detail Links

[Occupational Safety and Health Administration ETS](#)

[Emergency Temporary Standard](#)

[US Department of Labor issues emergency temporary standard to protect workers from coronavirus | Occupational Safety and Health Administration \(osha.gov\)](#)

[COVID-19 Vaccination and Testing ETS - Frequently Asked Questions | Occupational Safety and Health Administration \(osha.gov\)](#)

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If you have any additional questions or concerns, please contact us at info@benefitreview.com

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