

# CRISIS MANAGEMENT FOR COVID 19

## Phase 47: OSHA ETS – What Now?

*Presented by:  
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# INTRODUCTIONS



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# WHAT WE'LL COVER

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OSHA ETS –  
What Now? Who does this  
impact? How? When? What  
do we do? Why? Muddy  
Guidance ....



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# Legal and Regulatory Impact of OSHA ETS



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## OSHA ETS

### *The OSHA ETS has finally arrived! Here is what you need to know*

- On November 4, 2021, OSHA issued its long-awaited emergency temporary standard (ETS) that requires employers with 100 or more employees to ensure that their employees are either fully vaccinated or subject to COVID-19 testing at least once per week. It is a “floor” not a “ceiling” requirement....
- ETS goes into effect immediately, and must be implemented on **December 5, 2021**, affecting 84 million!
- Requires employers to implement a written mandatory vaccination policy.
- Employers are exempted from this requirement only if they implement and enforce a written policy requiring all employees to be fully vaccinated or to undergo testing at least weekly and to wear face coverings.
- Employees must be fully vaccinated on or before January 4, 2022. If employers decide to permit testing for unvaccinated workers, the requirement to test begins on that same day.
- The ETS will remain in effect for six months, or until May 5, 2022.
- Pursuant to OSHA regulations, the ETS becomes the proposal for a permanent standard.
- Purpose is to establish “minimum” vaccination, testing, and face covering requirements to “address the grave danger of COVID-19 in the workplace,” and to “preempt inconsistent state and local requirements relating to these issues, including requirements that ban or limit authority to require vaccination, face covering, or testing, regardless of the number of employees.”

- OSHA states that the ETS is a floor, not a ceiling, and establishes minimum requirements. “Nothing in this section prevents employers from agreeing with workers and their representatives to additional measures,” and “does not supplant collective bargaining agreements”
- Which employers are required to comply?
  - The ETS applies to employers with 100 or more employees with three important exceptions:
    - Workplaces or settings where compliance with OSHA’s healthcare ETS is required;
    - Federal contractors covered by the Safer Federal Workforce Task Force’s COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors;
    - Employees who would otherwise be covered, but “do not report to a workplace where ... coworkers or customers are present,” at-home, or who “work exclusively outdoors”;
- The ETS applies to employers with a total of 100 or more employees at any time the ETS is in effect.
- ETS suggests additional implications being studied for employees of less than 100
- ETS will have drastic impact, but in implementation, as well as in supply chain, factory, Emergency Response, and numerous other facets of every day life yet to be fully fleshed out!



- Covered employers must maintain a record of each employee's vaccination status as well as a roster of each employee's status.
- These records are "medical records" covered by OSHA's access to employee exposure and medical records regulation, 29 C.F.R. 1910.1020 and "must not be disclosed except or required or authorized by this section or other federal law."
- Employers are typically required to maintain medical records for the duration of employment plus 30 years.
- This provision does not apply to vaccine records but employers must retain the records while the ETS is in effect.
- The ETS is not final – it is fluid and OSHA can update/revise at will, without notice or public comment, and in essence constitutes a mask mandate without being a mandate.
- Anticipated updates include less than 100 employees
- Attempts to restrict state and local laws and ordinances from being enforced that contradict OSHA ETS
- Creates enforcement issues, compliance issues, and other concerns nationwide

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## OSHA ETS

*The Fifth Circuit has Stayed Enforcement, already, of the OSHA ETS, pending final ruling*

- On November 6, 2021, the Fifth Circuit granted a stay of the OSHA ETS.
  - This is not a final ruling, but is a temporary injunction, pending the ruling, in one of the multiple lawsuits filed throughout the United States'
  - The Fifth Circuit Court of Appeals wrote that the pending lawsuit raised "cause to believe that there are grave statutory and constitutional issues" surrounding the ETS.
  - The Court stayed the ETS until further notice by the Court and ordered the parties to submit, this week, further briefing about the validity of the ETS.
- The future of the ETS remains uncertain due to pending legal challenges. While the final result is unknown, it will take weeks of planning for employers to comply with the ETS's deadlines.
- ***26 states have filed suit*** challenging the ETS, the enforcement of the ETS, the effective "mask mandate," etc. Kentucky joined Tennessee and Ohio in filing another suit. Substantial additional guidance in the next several days/weeks
- ***However, until the litigation is concluded, employers must continue preparing for the ETS as if it is going to take effect while litigation continues.***



## What qualifies as “Proof” of vaccination?

- Employers are **required** to determine the vaccination status of each employee
  - Acceptable proof of vaccination status includes a vaccine card, records from a pharmacy or health care provider, or “any other official document” that includes the dates and type of vaccination and the place the employee received the vaccine
  - If an employee is unable to produce this type of record, an attestation in which the employee acknowledges the following is acceptable: vaccination status (e.g., full or partial); if possible, information regarding the type of vaccine, dates of administrations and who provided the vaccine; and a statement that the proof of vaccination is lost or cannot be produced
  - The attestation must include the following language: ***“I declare 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.”***
  - Employers are responsible for assurance of compliance
  - Compliance starts **on December 5, 2021, not January 4, 2022!**

- When is testing required and who pays for it?
  - The ETS divides unvaccinated employees into two groups for purposes of testing.
    1. Employees who report to a workplace at least once every 7 days must be tested at least once every 7 days
    2. Employees who are working remotely and occasionally report to a workplace must be tested within every 7 days of reporting to the workplace.
  - In each case, documentation of the test must be provided to the employer
    - If an employee does not produce a test or tests positive, ***the employee is not permitted in the workplace***
- The ETS allows employers to require the employee to pay for the cost of testing but notes that employers may be required to pay for tests pursuant to state law or a collective bargaining agreement
  - Deductions cannot cause employees to make less than minimum wage
  - Certain states preclude such deductions, etc. (Indiana)
- Employers may voluntarily pay for testing and may require more frequent testing.

- The employer must keep a record of each test result. The test results are employee medical records covered by OSHA's Access to Medical Records standard but must be kept while the ETS is in effect.
- What records must be kept?
  - The employer must maintain and provide the following information upon request:
    - An employee or anyone with written authorized consent from the employee is entitled to his or her COVID-19 vaccination records and test results, which the employer must provide by the end of the next business day following the request.
    - Within four hours of a request from OSHA, the employer must provide a copy of the written COVID-19 policy requiring vaccination or requiring vaccination and testing and vaccination and testing records for each employee.
    - Any other written records required by the ETS must be produced to OSHA by the end of the next business day following the request.
  - The ETS impact upon OSHA technically requires retention of records for term of employment plus thirty years! ETS suggestion of vaccination information being only while the ETS is in place is somewhat confusing

- What kinds of tests are acceptable?
  - At home or over-the-counter tests are permitted, but the test may not be both self-administered and self-read. Compliant tests include “proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer.”
- Is the employer required to give paid time off for vaccination or testing? What about side-effects?
  - The employer must provide up to four hours of paid time off to receive each dose of the vaccine. “[R]easonable time and paid sick leave to recover from side effects” must also be provided. Employees may be required to use existing sick leave to recover from side effects.
  - Employer must also provide
- Are employees required to report positive tests?
  - In the written program, the employer must require employees to report positive test results regardless of vaccination status. Employees who test positive must be removed from the workplace. Employees are permitted to return to work only after receiving a negative test result, meeting the Centers for Disease Control and Prevention (CDC) return-to-work criteria, or receiving a recommendation from a health care provider allowing a return to the workplace.

- Is paid time off required when an employee tests positive?
  - Employers are not required under the ETS to provide paid time off to any employee who is removed from the workplace due to a positive test. The ETS notes that paid time off under these circumstances may be required by a collective bargaining agreement or other law.
- Covered employers must provide employees with the following information:
  - The requirements of the ETS and the policies the employer has implemented to comply with the ETS;
  - The CDC document entitled “Key Things to Know About COVID-19 Vaccines”;
  - The employee’s rights under the whistleblower provision of OSHA and §1904.35(b)(1)(iv) of the recordkeeping regulation, which prohibits retaliation when an employee reports a work-related illness;
  - The criminal provisions in the OSH Act and other federal laws; OSHA concludes that these provisions prohibit falsifying a vaccination, testing, or other required record.
- When must the employer report fatalities and hospitalizations due to COVID-19 to OSHA?
  - Any work-related COVID-19 fatality must be reported to OSHA within eight hours of the employer learning of the fatality. Each COVID-19 case that results in in-patient hospitalization must be reported within 24 hours of the employer learning of the hospitalization. The provision requiring the reports of hospitalization is a departure from previous OSHA requirements. Prior to the ETS, OSHA’s recordkeeping regulation required hospitalizations to be reported only if the employee was admitted to the hospital within 24 hours of exposure to the virus.

- When are face coverings required?
  - Each employee who is not fully vaccinated must wear a face covering while indoors or in a vehicle with a co-worker. “Face covering” is defined as consisting of two or more layers of fabric, secured to the head with straps or ties, covering the nose and mouth, and solid with no slits or holes. “Facemask” is defined separately, and means a surgical or medical mask. The term “respirator” is also defined and expressly excludes face coverings and facemasks.
  - Face coverings must be worn by unvaccinated unless: 1) the employee is alone in a room with floor to ceiling walls with the door closed; 2) for a “limited time” while eating or drinking; 3) when the employee is wearing a respirator or face mask; or 4) if the employer can show that wearing a face covering is infeasible or causes a greater hazard, such as situations when the work requires the employee’s mouth to be uncovered.
- Employers must permit employees to wear face coverings or face masks even if the ETS does not require it. The employer must also permit an employee to wear a respirator even if respirator use is not required. In those cases, the employer will have additional compliance obligations under OSHA’s Mini Respiratory Protection Program, 29 C.F.R. 1910.504.
- Who must pay for face coverings?
  - The ETS does not require employers to pay for face coverings but notes that payment may be required by other laws or collective bargaining agreements.



- What about State Laws?
  - OSHA states that the ETS preempts state and local laws prohibiting vaccine/testing mandates or face covering requirements. An employer can comply with both the ETS and state laws prohibiting vaccination mandates by allowing testing for unvaccinated workers. However, as OSHA explains in the rulemaking record, prohibiting vaccine mandates frustrates the overall regulatory scheme OSHA seeks to put in place by depriving employers of the ability to mandate vaccines for all or certain groups of employees.
  - States with state OSHA plans approved by federal OSHA may adopt standards that differ from the federal ETS, but those state standards must be “as effective as” the federal ETS. Federal OSHA may find that state OSHA regulations forbidding vaccine mandates are not “as effective as” the federal ETS, which may trigger the somewhat lengthy process of withdrawing approval of the state plan.
  - Must State Plan OSHA states adopt the ETS?
    - Yes. OSHA gives State Plan States 30 days to adopt the ETS. State plan states must notify federal OSHA within 15 days of the action they intend to take regarding the ETS. The OSHA ETS was entered to “minimize the risk of COVID-19 transmission in the workplace.”
  - It could have been effective immediately, but “OSHA expects that the [ETS] will result in approximately 23 million individuals becoming vaccinated.”

- We have mentioned a couple of different dates during the webinar today. These are the ones to remember:
  - The ETS is effective upon publication in the Federal Register. To be in compliance, an employer must ensure the following:
    - 30 days from publication (12/5/21) – All requirements other than testing for employees who have not completed their entire primary vaccination dose(s).
    - 60 days from publication (1-4-22) – testing for all employees who have not received all doses required for a primary vaccination.

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