



# January 21 Update - U.S. Supreme Court Blocks Federal COVID Vaccine and Testing Mandate

Insights

January 21, 2022

**Update:** *The U.S. Supreme Court recently blocked a key part of the Federal COVID vaccine Emergency Temporary Standard (ETS) from taking effect. This means that employers with over 100 workers need not scramble to meet OSHA's compliance deadlines of January 10, 2022 and February 9, 2022. While some employers welcome this turn of events, others fear complacency and are pressing forward with self-imposed vaccine and testing mandates.*

## ***The Court's Ruling In a Nutshell***

*On January 13, 2022, the U.S. Supreme Court found that the Federal OSHA's COVID vaccine ETS, targeting nearly all large U.S. employers and imposing significant penalties on noncompliant employees and employers, is a "broad public health measure" outside of OSHA's purview: "Imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic [that threatens everyone everywhere] is simply not part of what [OSHA] was built for."*

## ***Is the Federal OSHA ETS "Dead"?***

*Not necessarily. The U.S. Court of Appeals for the Sixth Circuit could rule in favor of OSHA and remove the stay. Additionally, OSHA may decide to let the ETS expire, and instead issue a permanent OSHA standard regarding COVID vaccinations and policies.*

## ***What should Employers do next?***

*Employers should closely monitor COVID's impact on the workplace, and comply with*

federal, state, and local standards. Depending on your industry and workforce, practical next steps could include:

- *Preparing for the possible return of the Federal OSHA ETS (or a similar OSHA standard) by (1) creating a vaccination roster of fully-vaccinated employees; and (2) creating vaccination or testing/masking policies that are appropriate for your workplace.*
- *Implementing policies and procedures for dealing with employees who test positive for COVID, including mechanisms for reporting test results and procedures for removing positive employees from the workplace.*
- *Providing paid time off for employees to get vaccinated and tested, and/or offering employees incentives to get vaccinated.*
- *Requiring employees to wear masks whenever working in close quarters, regardless of vaccination status.*
- *Determining whether a vaccine mandate or mandatory testing of unvaccinated employees is right for your company/workplace.*
- *Imposing insurance-related charges on non-vaccinated employees.*

*Please reach out to your Gunderson attorney with any questions.*

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**Update:** On December 17, 2021, the U.S. Court of Appeals for the Sixth Circuit lifted the stay of OSHA's COVID-19 Emergency Temporary Standard (ETS). This means that the ETS is in effect **now** for any Federal OSHA states (including New York, Massachusetts, and Texas). The original compliance deadlines of December 5, 2021 and January 4, 2022 are no longer feasible, however, OSHA has posted updated compliance deadlines of **January 10, 2022 and February 9, 2022.**

*“To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before **January 10** and will not issue citations for noncompliance with the standard’s testing requirements before **February 9**, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance.”*

States with approved OSHA plans (including California and Michigan) were originally given up to 30 days to adopt the federal ETS or standards that are at least as effective as the ETS. As of the date of this publication, this deadline has not been modified by OSHA. We expect to hear from these states soon regarding their intentions.

Immediately following the Sixth Circuit's decision, a flood of petitions were filed with the U.S. Supreme Court, requesting reinstatement of the stay. On December 22, 2021, the Supreme Court announced it would hold a special session for oral arguments on January 7, 2022. As the final outcome is still unknown, employers should continue to prepare to comply with the ETS by **January 10, 2022**.

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**UPDATE:** On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit issued an order staying enforcement and implementation of OSHA's COVID-19 "vaccine or test" emergency temporary standard (ETS).

**What does this mean for employers?** Because OSHA is barred from enforcing the ETS and from taking any steps to implement it, the initial deadlines discussed below are most likely no longer in effect pending further action from the court. However, depending on what happens in court, it's possible employers will only have a very short amount of time to implement the rule, assuming it survives. The most conservative approach would be to continue to prepare as if the ETS was going to take effect, with the understanding that the final outcome is not yet determined. At a minimum, employers should consider whether your company would require employees to be vaccinated or if you would offer the option of weekly testing, accompanied by face coverings.

**What will happen next?** There will be a lottery on November 16 to decide which federal appellate court will ultimately consolidate and decide the pending lawsuits against OSHA.

Our Labor & Employment team will continue to monitor these developments and provide updates as soon as they are available.

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This is an update to our October 1, 2021 [Preparing for a Return to the Workplace, Employers Are Making Big Decisions \(UPDATED\)](#) article.

The Occupational Safety and Health Administration (OSHA) has just issued an [Emergency Temporary Standard](#) ("ETS" or "standard") that goes into effect immediately establishing new COVID-19 vaccination and testing requirements for

employers with 100 or more employees. This standard will impact over 80 million private-sector workers.

The ETS requires all covered employees to be vaccinated or begin weekly testing by **January 4, 2022**. The current deadline to comply with all of the other provisions under the ETS is **December 5, 2021**.

A number of states have challenged, or stated they intend to challenge, this new mandate. On November 6, 2021, the United States Court of Appeals for the Fifth Circuit granted a stay of the ETS. This stay order is not a final ruling on the validity of the ETS and the future of the ETS remains uncertain due to the pending legal challenges. However, regardless of any of these challenges, employers should continue to prepare for the logistical challenges imposed under the ETS as if it is going to take effect as the final outcome has not yet been decided.

Currently 22 states (including California) have their own OSHA-approved plans that regulate private sector employers. These states have 30 days to adopt the federal standard or implement a regulation that is at least as effective as the ETS.

## SCOPE OF COVERAGE

The ETS requires employers with 100 or more employees to ensure all employees are fully vaccinated, with paid time off to get the vaccine, unless they choose to allow employees to undergo weekly COVID-19 testing and wear a face covering.

Employers covered by the federal contractor vaccine mandate or OSHA's prior healthcare employer standard are excluded. The ETS also does not apply to employees who do not report to a workplace where other individuals such as co-workers or customers are present, employees while they are exclusively working from home, or employees who work exclusively outdoors.

## New Requirements With Which Employers Must Comply by December 5, 2021

The new standard establishes several new requirements for employers that meet the 100-employee threshold. We have highlighted the most relevant and critical requirements below. Please visit [COVID-19 Vaccination and Testing ETS](#) for a comprehensive summary of the steps needed to comply with the standards.

**1. Employers must develop, implement, and enforce a mandatory COVID-19 vaccination policy.**

A mandatory vaccination policy is a policy requiring each covered employee to be fully vaccinated. This policy must require vaccination of all covered employees, other than those employees who fall into one of three categories:

- (1) those for whom a vaccine is medically contraindicated;
- (2) those for whom medical necessity requires a delay in vaccination; or
- (3) those 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.

However, the standard allows for an exception for employers that instead establish, implement, and enforce a policy allowing covered employees to elect to undergo regular COVID-19 testing and wear a face covering at work instead of vaccination. See [U.S. DOL, OSHA, COVID-19 Vaccination and Testing ETS FAQs](#) for additional guidance regarding the policies and [COVID-19 Vaccination and Testing ETS](#) for sample policy templates.

**2. Employers must determine the vaccination status of all employees, obtain acceptable proof, and maintain records and a roster of each employee's vaccination status.**

**3. Employers must provide employees reasonable time off to get vaccinated and paid time off to recover from any side effects.**

The ETS requires employers to support vaccination by providing employees reasonable time, 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.

**4. Employers have new requirements regarding how to handle positive COVID-19 cases in the workplace.**

The ETS requires employers to: (1) require employees to promptly provide notice if they test positive for COVID-19 or if they are diagnosed with COVID-19; (2) 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 (3) keep removed employees out of the workplace until they meet criteria for returning to work.

**5. Employers must provide specific information to their employees regarding the ETS and COVID-19 vaccines.**



The ETS requires employers to provide employees the following:

- (1) information about the requirements of the ETS and workplace policies and procedures established to implement the ETS;
- (2) the CDC document “Key Things to Know About COVID-19 Vaccines”;
- (3) information about protections against retaliation and discrimination; and
- (4) information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.

## **6. Employers must make employee COVID-19 vaccination documentation and any results available for examination and copying.**

The ETS requires employers to make available for examination and copying an employee’s COVID-19 vaccine documentation and any COVID-19 test results to that employee and to anyone having written authorized consent of that employee. Employers are also required to make available to an employee the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

Please visit [COVID-19 Vaccination and Testing ETS](#) for more information regarding the ETS requirements and comprehensive list of FAQs. We’ve highlighted a few FAQs that may be particularly helpful to you below.

## **New Requirements With Which Employers Must Comply by January 4, 2022**

### **1. Employers must ensure that any covered employee who is not fully vaccinated be tested for COVID-19 at least weekly and wear face coverings.**

Employers must ensure that each covered 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). Employers must make sure that any employee who is not fully vaccinated wears a face covering indoors or when occupying a vehicle with others for work purposes, with limited exceptions.

Note that the ETS does not require employers to pay for any costs associated with testing. However, employers may be required to pay for testing by other laws, regulations, or agreements. Additionally, nothing prohibits employers from voluntarily assuming the costs associated with testing.

## Next Steps

Please reach out to your Gunderson attorney to determine how to best comply with the new requirements.

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## FAQs

### What does 100 employees mean?

For purposes of the 100-employee threshold, the following rules apply to calculate the total number of employees:

- Employers should include all employees across all U.S. workspaces, regardless of vaccination status or where they perform their work.
  - i.e., OSHA has stated if an employer has 150 employees and 100 of them perform maintenance work in customers' homes, primarily working from their company vehicles (i.e., mobile workplaces), and rarely or never report to the main office, that employer would fall within the scope of the standard. See [U.S. DOL, OSHA, COVID-19 Vaccination and Testing ETS FAQs](#).
- The count should be done at the employer level (firm or corporate-wide) and not at the individual location level. A company with multiple locations should include all employees at all locations in their total count. This determination should initially be made as of the effective date of the standard (November 5, 2021).
  - If the employer has 100 or more employees on the effective date, this ETS applies for the duration of the standard.
  - If the employer has fewer than 100 employees on the effective date of the standard, the standard would not apply to that employer as of the effective date. However, if that same employer subsequently hires more workers and hits the 100-employee threshold for coverage, the employer would then be expected to come into compliance with the standard's requirements.
- Employers should include part-time employees in the 100-employee threshold.
- Employers do **not** need to include independent contractors in the 100-employee threshold.
- Employers should **not** consider vaccination status when counting employees. For example, if an employer has 200 employees, all of whom are vaccinated, that employer would be covered.

- See [U.S. DOL, OSHA, COVID-19 Vaccination and Testing ETS FAQs](#) for additional guidance regarding employees working exclusively outdoors, temporary and seasonal workers, employees from a staffing agency, and more.

### **What about our remote and distributed employees? How does this apply to them?**

Employers should include employees who are working from home in the 100-employee threshold. However, note that the standard's requirements would only apply to the employees who work in the office at least part time, and not to the employees that work *exclusively* from their homes. If employees come into an office intermittently or on an as-needed basis, they must be in compliance with the ETS requirements.

### **What is “acceptable proof” of employee vaccination status?**

The ETS requires employers to obtain proof of vaccination, by any of the following:

- record of immunization from a health care provider or pharmacy;
- a copy of the 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).

A signed and dated employee attestation is acceptable in instances when an employee is unable to produce proof of vaccination. This statement must (1) attest to their vaccination status; (2) that they have lost or are otherwise unable to produce proof required by the standard; and (3) include [specific language](#) acknowledging that providing false information subjects them to criminal penalties.

### **Are employers required to collect or maintain information for booster shots and additional doses of the vaccine?**

No. Employers are required to determine the vaccination status of each employee, including whether the employee is fully vaccinated. Booster shots and additional doses are not included in the definition of fully vaccinated under the ETS. Therefore,



the employer is not required to obtain vaccination-related information beyond what is considered necessary to demonstrate that the employee is fully vaccinated as defined by the ETS.

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