OSHA EMERGENCY TEMPORARY STANDARD SURVIVAL GUIDE

(An Analysis of What We Know, What We Think, and What We Don't Know about OSHA's Emergency Temporary Standard for Private Employers)

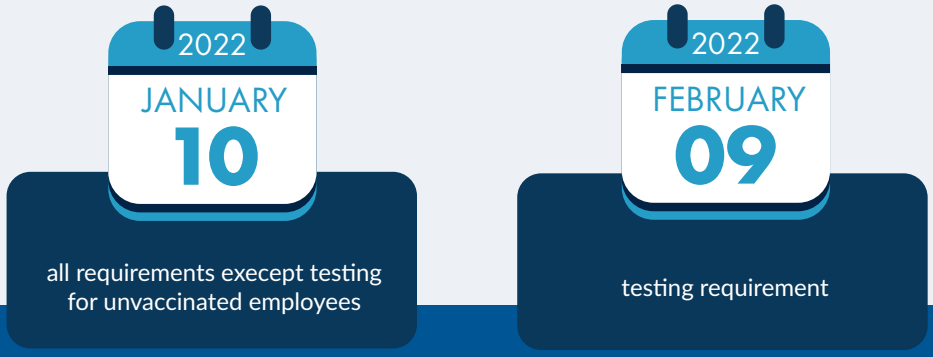
SheppardMullin

What Happened? I Thought This Was Gone!

On Friday, December 17, the United States Court of Appeals for the Sixth Circuit lifted the nationwide Stay that had been previously put in place by the United States Court of Appeals for the Fifth Circuit. In lifting the Stay, the Sixth Circuit has allowed the enforcement of the Emergency Temporary Standard (ETS) to move forward. This was an unexpected turn of events, but one that was very much welcomed by OSHA and the Biden Administration.

Now, that the Stay has been lifted, Federal OSHA has taken the view that the original deadlines are effective (i.e., December 6, 2021, for all requirements except testing for unvaccinated employees, which would begin on January 4, 2022). But, in recognition of the delay, OSHA issued a press release stating that it will use "enforcement discretion" "so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard". This means that no citations will be issued for violations and OSHA will not begin enforcement until **January 10, 2022**, for all requirements except testing for unvaccinated employees, and **February 9, 2022**, for the testing requirement.

OSHA ENFORCEMENT WILL NOT BEGIN UNTIL:



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Is the ETS Here to Stay?

The Sixth Circuit's decision only covered the Stay, so the court still has yet to rule on the merits on whether the ETS exceeded OSHA's statutory authority and can remain in effect. There have been appeals to the Supreme Court to stay enforcement, but the ETS and its enforcement will continue according to the timelines originally set forth by OSHA unless and until the Supreme Court rules otherwise. If the Supreme Court refuses to hear the appeals of the stay decision or to issue a stay, OSHA can proceed with its enforcement of the ETS while the Sixth Circuit determines the merits of the various legal challenges to the ETS.

What Does the ETS Require?

The ETS, which applies to private employers with a total of 100 or more employees, has two main requirements:

1. Employees must be fully vaccinated against COVID-19; ***or***
2. Employees must provide proof of weekly testing for COVID-19 ***and*** wear a face covering.

Of course, there are further specifics as to each of these requirements. This Survival Guide covers many of the looming questions related to the ETS and we will continually update the Guide as the application of the ETS moves forward and/or it faces more challenges.

Applicability of the ETS

Does the New ETS Apply to Me?

The federal ETS applies to all private employers with a total of 100 or more employees at any time the ETS is in effect. Union or non, and regardless of industry, the ETS casts a wide net in its attempt to increase vaccination rates nationwide.

There are some exceptions, however. If your workplace is covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors ***or*** if your employees work in healthcare or healthcare support settings covered by the federal Healthcare Emergency Temporary Standards, then those standards will apply instead (to the extent they are reinstated).

What happens if only portions of the worksite, or portions of the workforce are covered by those other standards, and others are covered by this ETS? Make sure to apply the applicable order to the applicable group. For example, are you a hospital system with employees in hospitals and in administrative offices? The Healthcare ETS would apply to those employees in your healthcare settings, and this ETS would apply to those in your offices.

Does the New ETS Apply to All of My Employees?

The ETS will apply broadly to all employees of a covered employer ***except***:

1. Employees who do not report to a workplace where others (i.e., coworkers or customers) are present (in other words, they work entirely alone);
2. Employees who work from home; or
3. Employees who work exclusively outdoors.

To be considered working "exclusively outdoors," the employee must work outdoors on ***all*** days of work, not just some, and must work outdoors for the duration of the entire workday with the exception of minor indoor use for brief periods of time such as restrooms or stopping into an administrative office. The employee cannot routinely share vehicles with others as part of their work duties.

What About Employees Who Work at Client Sites or Travel?

Employees spending any time on location working with others (whether coworkers, clients, customers, or the public) are covered by the new ETS, even if they do not work exclusively (or even at all) at the employer's worksite.

How Do I Know Whether I Have 100 Employees?

Businesses must review their employee counts ***company-wide***, not at each facility or location. The count includes full-time and part-time employees, onsite and traveling employees, and temporary and seasonal workers (that are working at the time the ETS is in effect).

Even though they may not be subject to the ETS's requirements, businesses must also include employees working exclusively outdoors, employees working from home, and employees otherwise excluded from coverage under the new ETS. These employees still count for purposes of determining whether the company has met the 100-person threshold!

Will Staffing Agency Employees Count Towards My 100 Number?

Only the staffing agency will be considered the employer of these jointly-employed workers for purposes of the ETS. For example, if I have 100 workers, and 50 of them are from a staffing agency, my business would not be covered by the new ETS.

Are Employers With Union-Represented Employees Covered Under the ETS?

Yes, the ETS applies to employers with 100 or more employees whether these or any part of them are represented by a union.

Will Employers With Union-Represented Employees Be Required to Bargain Over the ETS Requirements Before Implementation?

As a general rule, the National Labor Relations Act requires employers with union-represented employees to bargain over terms and conditions of employment and although the National Labor Relations Board has not addressed whether COVID-19 vaccinations are a mandatory subject of bargaining, the Board has required employers with union-represented employees to bargain over similar policies. However, since a collective bargaining agreement cannot displace federal law or regulation, the requirements under the ETS will control and while compliance with the ETS will not be subject to bargaining there are certain aspects of the ETS that will necessitate bargaining.

The ETS provides covered employers the option of establishing a mandatory vaccination rule or a "vaccine or test and mask" rule. Accordingly, while compliance itself will not be subject to bargaining, an employer will most likely be required to bargain over the decision to adopt a vaccine only or vaccine or test and mask policy. In addition, an employer will also be required to engage in "effects bargaining" – bargaining related to the effects its decision has on bargaining unit members. Included in this would be bargaining over who pays for the vaccine and/or testing (if that is an option); what, if any, Personal Protection Equipment will be provided by the employer; will employees receive paid time off to allow them to be vaccinated and/or tested; what are the procedures for potential accommodations; and the protocols related to record-keeping as it relates to proof of vaccination status and/or test results.

I Am a Federal Contractor and Subject to EO 14042. Do I Need to Worry About the OSHA ETS?

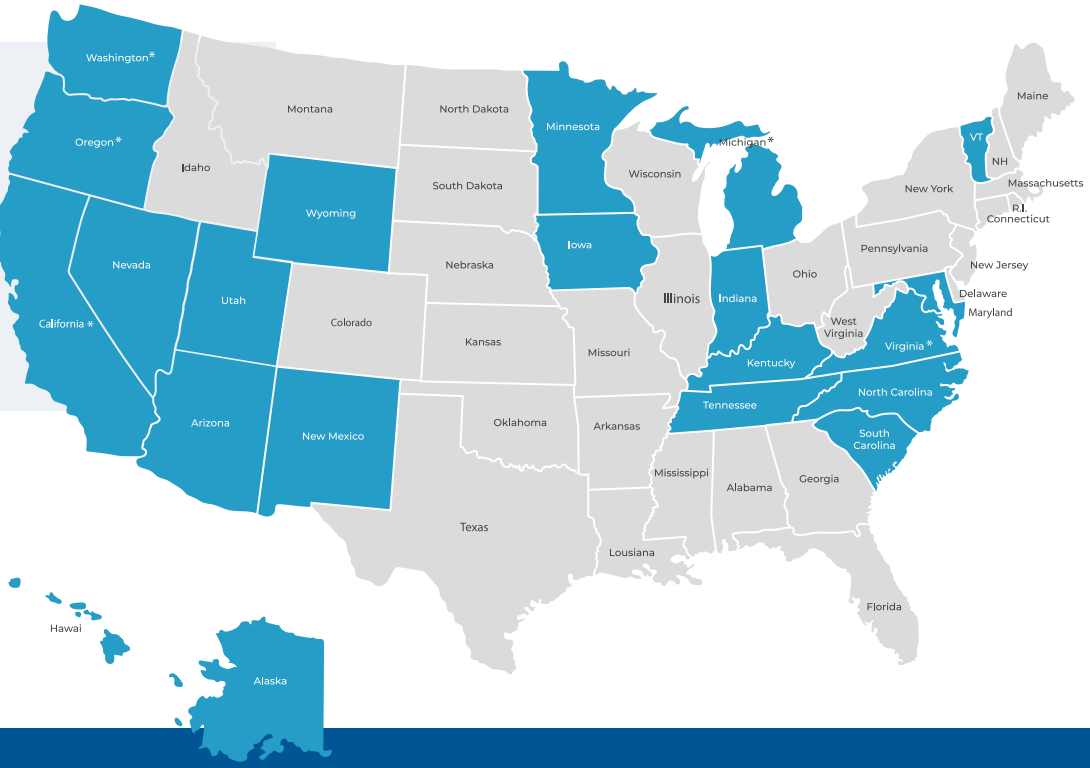
Yes. In a world where both EO 14042 and the OSHA ETS are being enforced, EO 14042 takes precedence over the OSHA ETS, and therefore the EO applies to all covered employees and covered workplaces – not the OSHA ETS. If you have more than 100 employees, and some of those employees are NOT covered by EO 14042, then the OSHA ETS applies to those employees.

As of December 22, 2021, only the OSHA ETS is legally enforceable (EO 14042 currently is subject to a nationwide injunction). Therefore, Federal contractors must comply with the OSHA ETS like any other company in the United States.

What if I Am in a State With an OSHA-Approved State Plan?

The ETS is not automatically effective in the 21 states (plus Puerto Rico) with an OSHA-approved State Plan. Instead, employees in states with a State Plan are governed by the State Plan's occupational safety and health standards and regulations. However, State Plans are required to adopt and enforce standards that are "at least as effective" as federal OSHA's requirements. State Plans originally had 15 days (until November 20, 2021) to notify federal OSHA whether they would adopt the federal ETS or amend any COVID-19 emergency temporary standards currently in place to be identical or at least as effective as the requirements in the federal ETS. Additionally, the State Plan's standard was required to be published within 30 days of publication of the ETS (December 5, 2021) and to remain in effect for the duration of the federal ETS. But, no State Plans initially adopted the ETS because it was stayed immediately. Now that the Stay has been lifted, it is unclear at this time whether the Stay tolled the 15-day notice and 30-day publication deadlines and whether the State Plans must adopt the ETS now or can wait to see if the Supreme Court considers appeals of the Stay decision.

The following states have an OSHA-approved State Plan that governs private employers (states marked with an asterisk also have their own COVID-19 emergency temporary standard):



Employers with employees in states with State Plans should continue to monitor developments at the state level for further updates and consider drafting a written policy that complies with the ETS requirements in the meantime.

What if I Have Employees in California?

California has an OSHA-approved State Plan, known as "Cal/OSHA," and has already had a COVID-19 emergency temporary standard in place since November 2020, which was just recently updated at Cal/OSHA's December 16, 2021, Standards Board meeting. These updates will go into effect in California on January 14, 2022, and will remain in effect through at least April 14, 2022. Therefore, any new requirements under the ETS must either be included as revisions to the current Cal/OSHA ETS or as a new ETS. Cal/OSHA has yet to announce whether it will adopt the new ETS now that the Stay has been lifted or if it will wait to see how the Supreme Court responds. Previously, Cal/OSHA indicated that it planned to adopt the ETS as a new ETS that presumably would supersede any less restrictive requirements under the current Cal/OSHA ETS. Additionally, Cal/OSHA's revisions could impose more stringent requirements than those in the federal ETS, such as requiring employers to pay for the weekly testing required by the ETS. We will update this Guide once Cal/OSHA announces its plans.

The Vaccination Requirement

What Does It Mean to Be "Fully Vaccinated"?

"Fully vaccinated" means that the employee is two weeks past his, her, or their vaccination with at least the minimum interval between doses required (if applicable). The vaccine received by the employee must be approved or authorized for use by the FDA, listed for emergency use by the WHO, or administered as part of a U.S. clinical trial (subject to certain conditions). Per the ETS, an employee may also be considered "fully vaccinated" two weeks after the employee received the second dose of a combination of vaccines, depending on certain factors.

As of this version of the ETS, boosters or third shots are not required in order to be considered "fully vaccinated." Notably, the ETS refers to the employees' "primary vaccination," which infers that additional COVID-19 vaccination(s) may be contemplated in the future.

Do I Need to Provide My Employees Paid Time Off to Get Vaccinated?

Yes – employers must provide each employee "reasonable" paid time (up to four hours), at the employee's regular rate of pay, for the time spent obtaining each required vaccination dose during work hours. If an employee chooses to get vaccinated in the evening or over the weekend, employers are under no obligation to pay for this time.

And no, employers may not require employees to use accrued paid sick leave, vacation, or PTO first.

OSHA clarified that this requirement is not retroactive!

Do I Need to Provide My Employees Paid Time Off to Recover From Vaccine-Related Side Effects?

Yes, but you can require use of available paid sick leave or PTO for the time an employee spends recovering from any vaccination-related side effects. You may not require use of accrued vacation.

However, employees cannot be required to "go negative" in paid sick leave if the employee does not have sufficient paid sick leave available to apply to this recovery period.

OSHA clarified that this requirement is not retroactive!

Do I Need to Require That All of My Employees Get Vaccinated, or May I Allow Non-Fully Vaccinated Employees to Test Instead?

Companies can choose whether they would like to institute a mandatory vaccination policy (subject to exemptions available under applicable law) or whether they would like to allow their employees the option to choose between vaccination or weekly testing.

The Testing Requirement

How Often Must Non-Fully Vaccinated Employees Test?

Non-fully vaccinated employees must test at least once every seven days.

What if the employee reports to work less than once per week? Then the employee must obtain a test at least seven days prior to reporting to the workplace, and present their test results upon return.

Do you have a non-fully vaccinated employee who has recently tested positive for or been diagnosed with COVID-19? That employee must not be tested for 90 days following the date of their positive test or diagnosis, given the high likelihood of a false positive result.

What Type of Tests Are Acceptable Under the New ETS?

Any test that is cleared, approved, or authorized (including in an Emergency Use Authorization) by the FDA, so long as the test is administered in accordance with test instructions, and the test is **not *both*** self-administered and self-read unless under observation by the employer or authorized telehealth proctor. Antibody tests ***do not qualify***.

Employers can use a variety of tests ranging from laboratory- or clinic-provided NAAT tests to self-administer over-the-counter rapid antigen tests. Employers should be certain to work with their legal team to ensure that any testing program complies with applicable medical privacy and healthcare laws and regulations.

What Happens if I Am Unable to Secure Sufficient Numbers of Tests for All of My Employees?

OSHA has acknowledged that, in times like these with high demand and supply chain stressors, adequate testing kits and supplies may not be immediately available for all employers. OSHA has indicated that it will review all efforts the employer made to comply, and consider good faith as part of its enforcement analysis.

Who Is Required to Pay for These Weekly Tests?

The employee! Please be aware that states with laws requiring expense reimbursement may ultimately decide that this is the employer's cost to bear. Be sure to review applicable state laws (and any language in applicable collective bargaining agreements or other employee agreements or policies) to determine whether these testing costs must be paid instead by the employer.

What Happens if an Employee Refuses to Get Tested/Provide Test Results?

That employee must be barred from the workplace until he/she/they can provide a negative test result.

Face Covering Requirements for Non-Vaccinated

What Are the ETS Rules on Face Coverings?

Face coverings are required for non-fully vaccinated employees if the employee is working indoors, or is sharing a vehicle with another person for work purposes. Note that employers should always check applicable state and local health orders to determine if universal masking may be required in their location.

There are certain exceptions to the ETS's mandatory face covering requirements:

1. When the employee is alone in an enclosed room (floor-to-ceiling walls and a closed door);
2. For the limited time when an employee is eating or drinking, or is removing the face covering for safety or security requirements;
3. If the employee is wearing a respirator or surgical facemask; or
4. If the employer can show that wearing a face covering is infeasible or creates a greater hazard than the potential COVID exposure.

At all times when a face covering is required, the face covering must cover the employee's nose and mouth, and may not be not wet, soiled, or damaged (it should be replaced in those circumstances).

Any fully vaccinated employee may wear a face covering, facemask, or respirator if desired, so long as its use does not create a hazard of serious injury or death.

Under the ETS, businesses may not prohibit customers or visitors from wearing face coverings.

What Counts as an Acceptable Face Covering?

Employees can wear any face covering so long as it:

1. Completely covers the nose and mouth; and
2. Is made of two or more layers of a tightly-woven breathable fabric; and
3. Is secured to the face or head (gaiters are permissible if they are double-layered); and
4. Fits snugly over the nose, mouth, and chin, with no large gaps on the side of the face; and
5. Is a solid material with no slits, valves, holes, punctures, or other openings.

Employees may also wear surgical or medical face masks or respirators such as N95s.

Requests for Accommodations

Are There Any Exemptions to the ETS?

Yes, certain employees can be exempt if they seek a medical or religious accommodation. The request for a medical accommodation is guided by the Americans with Disabilities Act while the process for reviewing a religious accommodation is guided by Title VII of the Civil Rights Act of 1964. Both requests require an interactive process that is individualized to the employee's particular situation.

Do I Have to Provide the Same Accommodation to All Employees Seeking One?

No. The EEOC guidance is clear on this point – there is no "one accommodation fits all" solution. Each employee's request must be assessed on an individual basis through an interactive process. If one particular employee can be accommodated through weekly testing and masking, it does not mean another employee can be accommodated in the same way or even that any reasonable accommodation exists for that other employee.

Further, when considering an individual accommodation request, the EEOC encourages employers to consider "whether exempting an employee from getting a vaccination would impair workplace safety." In assessing accommodations as well as workplace safety, the EEOC has instructed employers to consider the following factors: the type of workplace, the nature of the employee's duties, the number of employees who are fully vaccinated, and how many employees and nonemployees physically enter the workplace.

Can an Employee Choose What Accommodation They Want?

No. An employee does not get to decide what accommodation they can have and/or want. According to the EEOC, the employer chooses which accommodation to offer. If there is more than one accommodation that would be effective in eliminating the employee's religious conflict and/or medical issues, the employer can consider the employee's preference, but is *not* obligated to provide the reasonable accommodation preferred by the employee. For example, if an employee requests to telework as an accommodation due to their sincerely held religious belief against the vaccine, an employer should take such request into consideration, BUT need not honor the request. Instead, the employer could determine that, based on all the facts, the appropriate reasonable accommodation for the employee is weekly testing and masking at the office.

After Some Time Passes, Can I Follow-Up With the Employee to See if They Still Need an Accommodation?

Absolutely. A request for an accommodation is not one that is frozen in time – and, similarly, a granted accommodation is not a "forever accommodation." The obligation to accommodate employees is a continuing one that takes into account changing circumstances. As the EEOC notes, "an employer has the right to discontinue a previously granted accommodation if it is no longer utilized for religious purposes, or if a provided accommodation subsequently poses an undue hardship on the employer's operations due to changed circumstances." Given this, we would recommend that communications to employees granting any type of accommodation should clearly state that the accommodation is subject to continued review by the Company – and, specifically, that the accommodation may be changed or revoked should circumstances change.

My Employee's Religious Accommodation Request Does Not Seem Religious at All – It's More Personal, Can I Ask Follow-Up Questions?

The short answer is: Yes. Recently, the EEOC provided further guidance as to the types of questions an employer may ask to determine if an employee's religious beliefs are "sincerely held." According to the EEOC, the sincerity of a religious belief is "largely a matter of individual credibility" and, as a result, an employer may consider the following factors:

- Whether the employee has acted in a manner inconsistent with the professed belief (although employees need not be scrupulous in their observance);
- Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for nonreligious reasons;
- Whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and
- Whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

To weigh these factors, the EEOC explicitly has stated that an employer may ask for an explanation of how the employee's religious belief conflicts with the employer's COVID-19 vaccination requirement.

Importantly, under the EEOC guidance, simply stating "I won't let the government tell me what to do" is not enough to qualify for a religious accommodation under Title VII. The EEOC made clear that *objections to COVID-19 vaccination that are based on social, political, or personal preferences, or on nonreligious concerns about the possible effects of the vaccine, do not qualify as "religious beliefs" under Title VII.*

At What Point Can We Claim an "Undue Hardship" Such That We Cannot Provide an Accommodation for an Employee?

We receive this question almost daily – especially from employers that have a low vaccination rate among employees. In order to prove an undue hardship, an employer must show that the cost of an accommodation is more than minimal. However, the definition of "cost" is *not just monetary.* The EEOC allows an employer also to consider the burden on the employer's business as well as the risk of the spread of COVID-19 to other employees or the public. Importantly, the undue hardship analysis, like the accommodation process, is not a "one size fits all" test. Employers should consider the particular facts of each situation and, if challenged, will need to demonstrate how much cost or disruption the employee's proposed accommodation would involve. The EEOC has suggested that the following considerations are relevant for an employer's undue hardship analysis when an employee is seeking an accommodation related to a COVID-19 requirements:

- Works outdoors or indoors,
- Works in a solitary or group work setting, or
- Has close contact with other employees or members of the public (especially medically vulnerable individuals).

Ultimately, this will lead to a similar conclusion as the accommodation process – some employees may pose an undue hardship by virtue of their accommodation request; however, employees in similar positions may not pose any such hardship.

COVID-Positive Response Requirements

What Should I Do if an Employee Tests Positive for COVID-19?

Any employee, regardless of vaccination status, who tests positive for COVID-19, or who is diagnosed with COVID-19 by a licensed healthcare provider, must immediately be removed from the workplace.

COVID cases must remain isolated at home until:

1. The employee receives a negative test result via a NAAT test if the first positive test was an antigen test; or
2. The employee meets CDC's return-to-work-criteria; or
3. The employee receives a recommendation to return to work from a licensed healthcare provider.

Do I Need to Pay for Employees' Time Off if They Test Positive for COVID-19?

No, however, state or local laws may apply that could require paid time off for these purposes.

Do I Need to Exclude a Non-Fully Vaccinated Employee From Work Who Is a Close Contact of a Positive COVID-19 Case?

Under the new ETS, no. Employees may remain at work even if they have been a "close contact" of a positive COVID case. Again, this may differ depending on applicable state or local public health requirements, so be sure to analyze all available guidance when presented with a close contact situation.

Am I Obligated to Conduct Contact Tracing?

No, but again, state or local public health orders or laws may require that employers conduct contact tracing and provide notification to close contacts or others at the same worksite as the positive COVID case.

Do I Need to Report an Employee's COVID-19 In-Patient Hospitalization or Death?

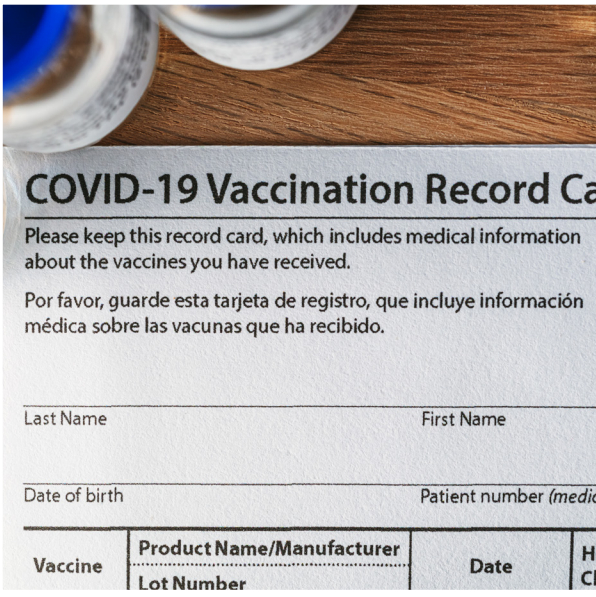
Yes, but only if the employee's illness was work-related. Under OSHA's regulations, an employee's COVID-19 illness is work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing illness. The determination on work-relatedness is different for employers in California, and Cal/OSHA guidance instructs that if employers are uncertain whether an employee's exposure was work-related, they should err on the side of reporting.

Employers must report each work-related COVID-19 death to OSHA or their State Plan within eight hours of the employer learning of the employee's death and must report each work-related COVID-19 in-patient hospitalization to OSHA or their State Plan within 24 hours of learning about the hospitalization. To assist employers with the reporting process, OSHA has prepared a fact sheet that contains contact information and identifies the information that must be reported.

Recordkeeping Requirements

What Records Do I Need to Maintain?

The ETS contains two main recordkeeping requirements:



1. **Proof of Vaccination Status Records**: Employers must maintain proof of each employee's vaccination status, which can take the form of: (1) immunization record; (2) a copy of the COVID-19 Vaccination Record Card; (3) a copy of medical records documenting vaccination; (4) any other official documentation that reflects the vaccine administered, the date of administration, and the name of the healthcare professional/site that administered the vaccine; or (5) a signed attestation from the employee which may be subject to criminal penalties (under Section 17(g) of the OSH Act for knowingly supplying false statements or documentation). Employers also must maintain a roster of each employee's vaccination status.

2. **Test Result Records**: Employers must maintain a record of each test result provided by each employee.

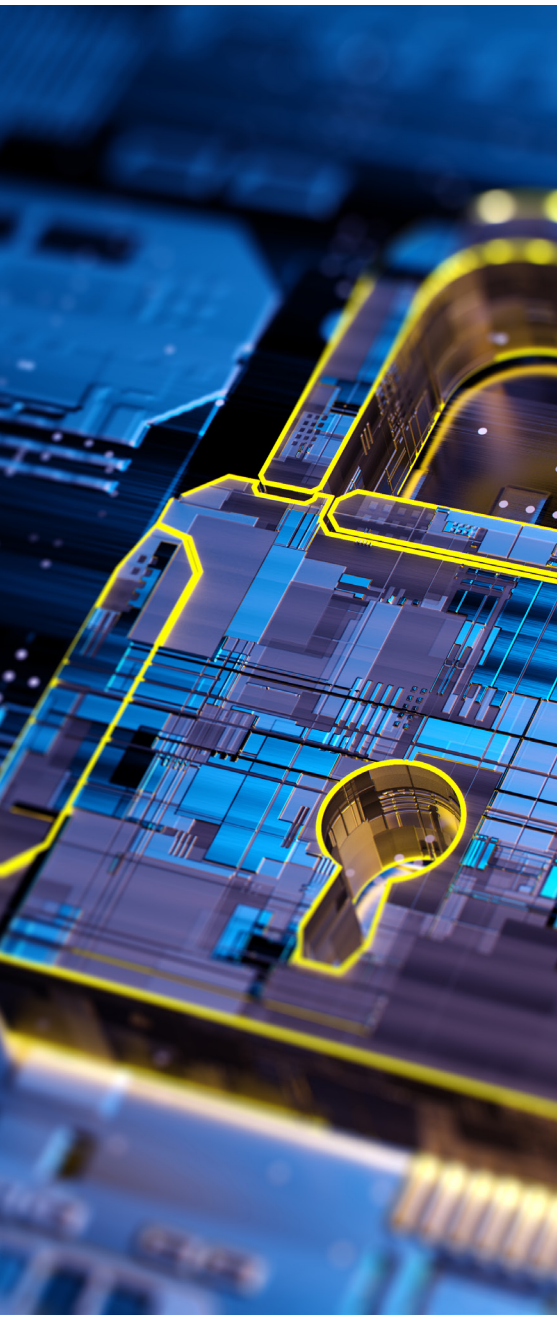
The records and the roster must be maintained as confidential medical records and must not be disclosed except as required or authorized by the ETS or other federal or state law. The records and roster must be kept for as long as the ETS is in effect. Fortunately, they are not subject to OSHA's standard medical record retention requirements, which require retention for the duration of employment plus 30 years.

How Should I Store/Maintain Records of My Employees' Test Results?

There are two considerations here: (1) the Americans with Disabilities Act; and (2) other applicable privacy and data security rules.

Under the Americans with Disabilities Act (ADA), employee test results and vaccination status must be kept separate and apart from the employee's regularly kept personnel file. The ADA does not allow for the co-mingling of health information and personnel files.

Privacy and data security laws and regulations also impose various obligations on employees to protect the security and confidentiality of the vaccine records and roster. To meet these obligations, at minimum, employers should implement appropriate technical, administrative and organizational safeguards to protect the information, including:



- **Limit Access.** Employers should ensure that the vaccination documentation and roster are kept strictly confidential. Access to them is provided to other employees solely on a "need to know" basis. Employees with access must be advised that further disclosure or discussion of the information (to other employees or anyone else) is not permitted.
- **Protect the Information.** Employers must implement and maintain reasonable physical and technical safeguards designed to protect the vaccine records and roster, whether they are stored digitally or in hard-copy. Hard-copy physical records must be securely stored. For example, employees should not leave roster copies in unlocked file cabinets or on desks. Likewise, digitally maintained information and records should be stored in secure locations with at least the same level of security as other medical or personnel records.
- **Satisfy State-Specific Security Requirements.** Some states, such as Massachusetts and New York, have specific technical, administrative, and organizational controls which must be in place to protect employee health information. Similarly, California's Confidentiality of Medical Information Act imposes requirements on certain organizations that restrict their ability to share or disclose health information. Employers should ensure that their practices also comply with any related state-specific obligations.
- **Provide Accurate Notice.** Employers must ensure that any disclosures regarding their practices or policies for employee data are updated to reflect the collection and storage of COVID vaccine and testing records and the creation of the roster. Many employers have a separate employee privacy policy or explain their practices in an employee handbook. Further, employers in California who are subject to the California Consumer Privacy Act (CCPA) must also ensure they are meeting their notice obligations. The CCPA requires that, either before or at the time of the collection of any personal information, the employer must provide a written "notice of collection" specifying the categories of information that will be collected and the purposes for which the information will be used. Before collecting the individual COVID-19 vaccine documentation and any COVID-19 test results required by the ETS for a particular employee, employers subject to the CCPA must review and, if necessary, update their notice of the collection to ensure it discloses the collection and use of the data and the purposes for which it will be used.

Do I Need to Provide Employees With Access to Vaccination/Test Result Records?

Yes. Employers must make available, for examination and copying, the individual COVID-19 vaccine documentation and any COVID-19 test results required by the ETS for a particular employee to that employee and to anyone with written authorized consent from the employee. Additionally, an employee/employee representative may request the total number of fully vaccinated employees at a workplace and the total number of employees at that workplace. In both instances, employers must comply with the request by the end of the next business day after the request.

Notice and Information Requirements

What Information Must I Provide to My Employees Under This New ETS?

Each employee must receive, in their own language and at their literacy level:

1. Any policies and procedures the employer will be implementing pursuant to the ETS, including:

    - The employer's mandatory vaccination and/or testing policy;
    - The process that will be used for tracking vaccination status;
    - Time and pay/leave available for vaccinations and related side effects;
    - Procedures relating to notification of a positive COVID-19 test or diagnoses;
    - Policies and procedures used for requesting vaccination records; and
    - Policies and procedures relating to non-fully vaccinated employees' obligations to test and wear face coverings.

2. A copy of the document "Key things to Know About COVID-19 Vaccines", which is available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html

3. A statement that the employer will not discharge or in any way discriminate against an employee for reporting a work-related illness or injury, or for exercising rights under or required by the ETS.

4. A statement that criminal penalties are associated with knowingly supplying false statements or documentation.

Enforcement of the ETS

What Happens if I Do Not Follow Any of the ETS Requirements?

Federal OSHA and State Plans in certain states handle enforcement of the ETS. Random or programmed inspections are possible. However, many, perhaps most, investigations occur in response to a complaint and/or the reporting of a serious illness or death. In such instances, OSHA will conduct an on-site workplace inspection to make sure employers have complied with all requirements under the ETS and may ask for supporting documentation. OSHA and State Plan personnel have already been stretched thin due to COVID-19, and it is unclear whether they will be able to promptly handle and enforce the new requirements brought on by the ETS.

Citations for alleged violations implicating a serious safety risk may be issued for noncompliance, and the penalties for each such "serious violation" can range from $13,653 to $136,532 (if a violation is willful or repeated). Employers also can incur multiple violations. Although the ETS does not create a private right of action for employees to sue their employer, employers in California can be sued by employees under California's Private Attorneys General Act ("PAGA") for a claim based on violations of Cal/OSHA regulations if Cal/OSHA does not issue a citation or fails to timely investigate the alleged violation.

The ETS and Executive Order 14042

Are the OSHA ETS and EO 14042 Different? How?

Yes. Most importantly – EO 14042 is a true vaccination mandate; employees do not have the option to provide weekly negative tests like they do under the OSHA ETS. Additionally, unlike the OSHA ETS, EO 14042 applies even to covered remote workers. Finally, while the EO encourages employers to provide paid time off to receive and recover from the vaccine, paid time off is not a requirement. The remaining requirements are similar, including verifying proof of vaccination, recordkeeping, and the deadlines for compliance.

Does the 6th Circuit Dissolution of the Stay of the OSHA ETS Injunction Stay the Injunction of EO 14042?

No. The OSHA ETS and EO 14042 are being challenged separately in Federal court. While the Sixth Circuit Court of Appeals dissolved the injunction preventing enforcement of the OSHA ETS, EO 14042 remains enjoined nationwide (as of December 20, 2021, at least).

Intersection With State Laws Banning Mandates

Generally Speaking, When Does OSHA Preempt an Existing State Law?

If a state has a rule or regulation that is not federally approved that 'directly and substantially' impacts worker safety it is likely preempted.

At a high level, when Congress determines that Federal law should control on any given issue, State law is "preempted" and must give way. Accordingly, Congressional intent ultimately governs the determination whether federal law preempts state law.

The preemptive scope of the Occupational Health and Safety Act ("OSH Act" codified at 29 U.S.C. § 667) and accompanying OSHA rules and regulations was largely settled in 1992. In *Gade v. National Solid Wastes Management Association*, the Supreme Court interpreted the OSH Act as generally preempting any State law that directly and substantially regulates worker safety or health on an issue covered by OSHA regulations, where no preempting State plan had been submitted to the Secretary of Labor for approval. More particularly, Justice O'Connor held that "non-approved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly preempted as in conflict with the full purposes and objectives of the OSH Act." 505 U.S. at 98–99.

Consequently, under existing Supreme Court precedent, a State's regulation that directly and substantially regulates worker safety and health is preempted if there is an OSHA regulation addressing the same issue; ***unless*** the State has submitted and obtained approval for an overlapping regulation from the Department of Labor.

What, if Anything, Does the ETS Say About Conflicting State Laws?

Quite a bit, actually.

The ETS makes explicitly clear that it "preempts States, and political subdivisions of States, from adopting and enforcing workplace requirements" that would conflict with its mandate. Specifically, the ETS notes that State or municipal workplace regulations governing any of the following categories are preempted:

a. Vaccination;

b. Wearing face coverings; or

c. Testing for COVID-19.

Thus, the DOL's position is that, absent an existing, Federally-approved plan regarding the foregoing issues, the ETS preempts any conflicting State or municipal laws or regulations.

Notably, the Rule also calls out States that have implemented regulations prohibiting employer-mandated vaccines. In an accompanying summary and FAQ document on OSHA's website, the Administration—citing the *Gade* case—states that it intends for the ETS "***to preempt and invalidate any State or local requirements that ban or limit an employer's authority to require vaccination***, face covering, or testing."

Does the ETS Preempt State or Local COVID Requirements for Public Spaces; Such as Requiring Face Coverings Indoors, Proof of Vaccines for Restaurant/Bar Entry, Etc.?

No. OSHA has explicitly stated that the ETS "does not preempt…applicable requirements meant to protect public health by helping to prevent the spread of COVID-19 in public spaces." Accordingly, existing State or municipal regulations that require individuals to wear face coverings, provide proof of vaccination, or display a recent negative COVID-19 test are not preempted. The Administration states it does not intend for the ETS to preempt non-conflicting requirements that generally apply to "workers and nonworkers alike" and that apply members of the public.

For more information, contact:

Denise Giraudo
dgiraudo@sheppardmullin.com
202.747.1906

David Chidlaw
dchidlaw@sheppardmullin.com
619.338.6614

Wynter Deagle
wdeagle@sheppardmullin.com
858.720.8947

Jim Hays
jhays@sheppardmullin.com
212.634.3025

Ryan Roberts
reroberts@sheppardmullin.com
202.747.2187

Jonathan Clark
jclark@sheppardmullin.com
469.391.7420

Brian Fong
bfong@sheppardmullin.com
415.774.2977

Robert Foster
rfoster@sheppardmullin.com
858.876.3523

Ashley Hirano
ahirano@sheppardmullin.com
619.338.6547

SheppardMullin

OSHA Emergency Temporary Standard Survival Guide

(An Analysis of What We Know, What We Think, and What We Don't Know about OSHA's Emergency Temporary Standard for Private Employers)