



## OSHA Issues COVID-19 Workplace Vaccine-or-Testing Mandate

OSHA issued its Emergency Temporary Standard for COVID-19 vaccinations today. Under the Emergency Temporary Standard, all employers with 100 or more employees must mandate that employees get vaccinated against the coronavirus by January 4, 2022, or test for COVID-19 on a weekly basis at minimum. In determining how to count employees, for purposes of accessing the applicability of this standard, all part-time employees and employees who work from home must be counted.

**Unvaccinated people must wear masks:** Unvaccinated workers must wear face coverings while on the job beginning December 5, 2021. The Emergency Temporary Standard requires that employers ensure that any face covering required to be worn by unvaccinated employees is: (i) worn by the employee to fully cover the employee's nose and mouth; and (ii) replaced when wet, soiled, or damaged (e.g., is ripped, has holes, or has broken ear loops).

**Employer Vaccination Status Requirements:** Covered employers must determine the vaccination status of each employee. The employer must require each vaccinated employee to provide acceptable proof of vaccination status, including whether they are fully or partially vaccinated. Any employee who does not provide one of the acceptable forms of proof of vaccination status must be treated as not fully vaccinated for the purpose of the Emergency Temporary Standard.

Covered employers must maintain a roster of each employee's vaccination status. These records and the roster must be maintained by employers in a confidential manner and must be available for inspection by the end of the next business day after a request for such record is made.

**Non-vaccinated employees:** Employees who are not fully vaccinated, including those who are unable to receive vaccinations, and are entitled to reasonable accommodations, must provide COVID-19 testing results every 7 days and wear face coverings. OSHA acknowledges that there has been recent evidence of fraud associated with people providing fake vaccination records. While employers may not invite or facilitate fraud, the Emergency Temporary Standard does not require employers to monitor for or detect fraud.

Beginning January 4, 2022, every unvaccinated employee, who reports at least once every 7 days to a workplace where other individuals, such as coworkers or customers, are present:

- Must be tested for COVID-19 at least once every 7 days; and
- Must provide test results no later than seven (7) days after the employee's last test.

An employee who does not report during a period of 7 or more days to a workplace where other individuals, such as coworkers or customers, are present (e.g., teleworking for two weeks prior to reporting to a workplace with others):

- Must be tested for COVID-19 within 7 days prior to returning to the workplace; and
- Must provide documentation of that test result to the employer upon return to the workplace.

**Testing required:** The testing conducted on unvaccinated employees may be molecular tests or rapid antigen tests. OSHA expects that most screening testing will be antigen testing that is conducted at point-of-care locations due to the reduced cost and faster processing time.

To be a valid, a COVID-19 test under this standard may not be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

**Employers don't need to pay for testing:** In a move that appears designed to push workers to choose vaccinations over testing, the rule does not require employers to pay for or provide testing to workers who decline the vaccine.

**Positive COVID-19 Tests:** The Emergency Temporary Standard provides that when an employee has received a positive COVID-19 test or has been diagnosed with COVID-19 by a licensed healthcare provider, the employer must not require that employee to undergo COVID-19 testing for 90 days following the date of their positive test or diagnosis.

**Paid time off for vaccination and vaccination side effects:** The Emergency Temporary Standard requires covered employers to provide workers with paid time off to get vaccinated and to recover from any negative side effects.

The employer must provide four (4) hours of paid time off for each primary vaccination dose. This paid time off cannot be offset by any other leave that the employee has accrued, such as sick leave or vacation leave.

Covered employers must also provide paid sick leave for employees to recover from side effects experienced following any primary vaccination series dose. If an employee already has accrued paid sick leave, an employer may require the employee to use that paid sick leave when recovering from side effects experienced following a primary vaccination dose.

If an employer provides employees with multiple types of leave, such as sick leave and vacation leave, the employer can only require employees to use the sick leave when recovering from vaccination side effects. Employers cannot require employees to use advanced sick leave to cover reasonable time needed to recover from vaccination side effects.

The Emergency Temporary Standard does not require employers to provide paid time off to any employee for absences due to a positive COVID-19 test or diagnosis of COVID-19; however paid time off may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements.

**Penalties:** The penalty for violating this standard is \$14,000 per citation. OSHA, however, may issue multiple citations per inspection depending on the number of instances of the violation. The Emergency Temporary Standard contains a long discussion of egregious violations by employers who willfully disregard the standard's requirements. Thus, willful violations of this standard are definitely on the table.

**Does not apply to Federal Contractors:** This Emergency Temporary Standard does not apply to workplaces subject to the Federal Contractors Executive Order. OSHA will treat federal agencies' compliance with EO14043, the deadline of which was also extended to January 4, 2022, as sufficient to meet their obligations under OSHA.

**Healthcare workers don't have testing option under separate rule:** A second rule issued by the Centers for Medicare & Medicaid Services requires some 17 million healthcare workers to be vaccinated by the same deadline, January 4th, but with no option for weekly testing in lieu of vaccination. The rule covers all employees — clinical

and non-clinical — at about 76,000 health care facilities that receive federal funding from Medicare or Medicaid.

**Does not apply to outdoor employees or those working remotely on a permanent basis:** OSHA has excluded employees who work exclusively from home or outdoors from the scope of this Emergency Temporary Standard.

**OSHA Reporting:** Employers must report each work-related COVID-19 fatality to OSHA within 8 hours of the employer learning about the fatality. Usually, a fatality must occur within 30 days of a work-related incident to be reportable. OSHA, however, has chosen not to apply the 30-day limitation period to COVID-19 infections. Therefore, the requirement to report these work-related COVID-19 fatalities to OSHA is not limited by the length of time between workplace exposure and death.

Employers must also report all in-patient hospitalization resulting from a work-related COVID-19 infection. The Emergency Temporary Standard does not limit the COVID-19 reporting requirement to only those hospitalizations that occur within 24 hours of a workplace exposure. Thus, all subsequent work-related COVID-19 hospitalizations are now reportable.

Companies who anticipated this new OSHA rule have already filed court challenges, just hours after the announcement.

**For more information, please contact [Tony Stergio](#).**