

ALERT

Employment Law

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THE OSHA SHOT-OR-TEST RULE: TO DO LIST WHILE WAITING ON THE COURTS

Over the past few months, we have watched the federal government engage in a flurry of activity regarding COVID-19. Much of this activity involves strongly encouraging or requiring employees in various industries and workplaces to become fully vaccinated against COVID-19. The most recent action of the federal government is the [Emergency Temporary Standard on COVID-19 Vaccination and Testing](#) (the “ETS”) published by the Occupational Safety and Health Administration (“OSHA”) on November 5, 2021.

In general, the ETS requires employers with 100 or more employees to have their employees fully vaccinated no later than *January 4, 2022*, or begin weekly testing of unvaccinated employees on that date. The ETS also requires those same employers to take certain concrete steps to comply with the ETS no later than *December 5, 2021*.

Digesting the ETS (which itself is over 150 pages) and accompanying guidance from OSHA would have been hard enough for most employers (not to mention employment attorneys across the nation), but on the very day the ETS was published, a temporary hold was placed on the ETS by the Fifth Circuit Court of Appeals. Furthermore, other lawsuits have been filed against the ETS in various other federal courts.

December 5 will be here before we know it. While we are waiting on the courts to make their decision on the legality of the ETS, the clock is ticking. Employers that do not prepare for the December 5 deadline, hoping that the courts will strike down the ETS before then, will be in a world of hurt if the courts do *not* strike down the ETS.

We have prepared this Alert so that you know what to begin doing right now to meet the December 5 deadline. If the ETS is struck down, you will have lost some time, effort, and compliance dollars. But if the ETS is *not* struck down, you will be glad you started to prepare

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right now. Failure to comply with the ETS could subject you to OSHA citations and penalties of up to \$13,653 per violation (and possibly more).

Steps covered employers should take now to meet the December 5 deadline

1. Select one or more of your administrators to be responsible for ETS compliance.
2. Determine the vaccination status of each of your employees. The ETS requires you to:
 - a. Provide information to your employees about the criminal penalties associated with submitting false statements and records, which is accomplished by distributing an OSHA fact sheet (click [here](#) for the fact sheet);
 - b. Obtain acceptable proof of vaccination from vaccinated employees;
 - c. Maintain confidential records of each employee's vaccination status; and
 - d. Maintain a confidential roster of each employee's vaccination status.

If you have questions about what documentation is acceptable, please let us know. For tracking of vaccination status, click [here](#) for templates developed by the CDC for use in the healthcare industry.

3. Decide whether you will require all employees to be fully vaccinated or if you will give employees the choice of being tested weekly for COVID-19 (which would also require them to wear masks most of the time).
 - a. You may want to wait until you have a good idea how many employees are already fully vaccinated, so that you know how many employees might need to be tested weekly.
 - b. Investigate the financial costs and consider the logistics of weekly testing.
4. If you are going to permit weekly testing of unvaccinated employees, determine who will bear the cost of that testing. The ETS permits you to require your employees to pay for the testing, or you could pay for it yourself.
5. Prepare a COVID-19 vaccination policy that complies with the ETS and that reflects the decisions you made in #3 and #4, above. OSHA has published model policies for this purpose. See the links below. If you would like our assistance in drafting or reviewing your policy, please let us know.

6. Work with your payroll provider to set up a payroll code for “ETS Leave” (or something similar).
 - a. The ETS requires employers to provide up to 4 hours of paid leave, including travel time, for employees to be vaccinated.
 - b. The ETS also requires employers to provide reasonable time and paid sick leave to recover from side effects of a COVID-19 vaccination.
7. Establish and distribute a policy or policies for considering requests for disability accommodation under the Americans with Disabilities Act (the “ADA”) and for religious accommodations under Title VII of the Civil Rights Act of 1964 (“Title VII”). (If you already have these policies, make sure that they are in good shape and that you are set up to handle an influx of accommodation requests.)
 - a. The ETS permits employers to grant accommodations for disabilities under the ADA and for sincerely held religious beliefs under Title VII.
 - b. Accommodations from the ETS’s vaccination, testing, and face covering requirements are possible.
 - c. If you need assistance developing such a policy or have questions about handling accommodation requests, please let us know.
8. Consider letting your employees know what to expect if the ETS is in effect on December 5. Based on discussions with numerous clients, there are a lot of employees who are very concerned about the ETS and its impact on their jobs.

Please note that this is not a complete list of what you need to do if the December 5 deadline remains in place. For instance, if the ETS is in effect on December 5, you will be required to provide your employees with your COVID-19 policy as well as certain information about the COVID-19 vaccine, to begin reporting all COVID-19 fatalities and hospitalizations to OSHA, and to begin providing ETS Leave to employees (see #6, above).

Click below for links to OSHA Guidance on the ETS

- [Main OSHA webpage on the ETS](#)
- [FAQs](#)
- [Summary #1](#)
- [Summary #2](#)
- [Webinar](#)
- [Model Mandatory Vaccination Policy](#)
- [Model Vaccination or Testing and Face Covering Policy](#)
- [OSHA Criminal Penalties Fact Sheet for Employees](#)

If you are wondering whether you are a covered employer under the ETS or have other questions about the ETS, please do not hesitate to contact us. We would be glad to help you.

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