



OSHA Emergency Temporary Standard

Issued November 4, 2021

Information in this guide is not considered legal advice. We encourage you to consult legal counsel for any legal questions you may have. The guidance from state and federal agencies are subject to change. Please consult with your HR Business Partner for the latest developments and use the Helpful Links found in this guide for the most current guidance.



**OSHA EMERGENCY TEMPORARY STANDARD (ETS)
Issued Thursday, November 4, 2021**

eESI EMPLOYER GUIDE

NOTE: As of 11/7/21 a temporary stay has been issued by the 5th Circuit Court, as well as other challenges, however, the employment law community recommends that employers continue to prepare for the ETS as written.

ENTITIES COVERED

1. Employers with 100 or more employees company-wide, not by worksite location
2. Professional Employer Organization (PEO) relationships are not specifically addressed in the ETS, however the multi-employer worksite analysis can probably be applied to this vaccine ETS, which means that historically, worksite employers could use their own employee count instead of the combined PEO employee count – we will provide an update if/when this is clarified

ETS MAIN REQUIREMENT – EMPLOYER’S CHOICE:

1. All employees must be vaccinated against COVID-19, or
2. Unvaccinated employees must wear a mask and be tested once every 7 days

PENALTIES

1. Each violation of the ETS could result in a fine up to \$13,653
2. Repeat or willful violations go up to \$136,532
3. Penalties could be assessed for each facility, area within a facility, or each employee
4. Potential exposure for whistleblower, retaliation, and negligence claims asserted by employees

FIRST DEADLINE: December 5, 2021

1. Determine if your company is covered, and if so:
2. Create an ETS policy
3. Inform and train employees
4. Complete company-wide vaccination status roster
5. Unvaccinated employees must start wearing masks/face-coverings
6. Establish processes for recordkeeping, addressing non-compliant employees, and handling reasonable accommodations for religious or medical reasons

SECOND DEADLINE: January 4, 2022

1. COVID-19 testing requirements for those not fully vaccinated come into effect.
2. Employees who are not vaccinated or are not following the testing/masking requirements must be removed from the workplace.

NOT COVERED UNDER THE ETS

1. Worksites covered under the Federal Contractor Mandate
2. Settings where an employee provides healthcare services covered under the Healthcare ETS



HOW EMPLOYEES ARE COUNTED

(NOTE: PEO relationships are not specifically addressed in the ETS, however the multi-employer worksite analysis can probably be applied to this vaccine ETS, which means that historically, worksite employers could use their own employee count instead of the combined PEO employee count – we will provide an update if/when this is clarified)

1. Count all employees including full-time, part-time, temporary, etc.
2. A single corporate entity with multiple locations must count all employees at all U.S. locations
3. Two or more related entities may be regarded as a single employer if:
 - a. Common ownership/affiliation
 - b. Same direction and control, including safety matters
4. Do not count independent contractors
5. Do not count international employees
6. There are special rules for franchisees and corporate franchises
7. Employees from staffing agencies are counted with the staffing agency, not the worksite employer

EMPLOYEES EXCLUDED

(Must be counted to determine coverage but are not required to follow the mandates)

1. Employees who do not report to a workplace (no coworkers or customers present)
 2. Employees who work from home full time
 3. Employees who work exclusively outdoors
- *Excluded employees must still report their vaccine status for tracking purposes only

VACCINATION STATUS TRACKING

1. Employer must keep a confidential roster of employee vaccination status
2. Employer must keep a copy of each employee's proof of vaccination
3. Maintain confidential roster of employee vaccination status separate from the employee personnel file and present to OSHA as requested

PAID TIME OFF REQUIRED

1. Up to 4 hours to be vaccinated (if over 4 hours, pay is not required but the leave is protected)
 - a. May NOT be from an existing paid time off plan
2. Up to 2 days paid to recover from side effects of vaccination
 - a. May be required to use existing PTO/sick leave, but not existing vacation
3. Paid time off for testing is not specifically required by the ETS, but it may qualify as compensable time under the FLSA. Awaiting guidance from the DOL.

PAY FOR TESTING

1. Employer is not required to pay for testing under the ETS, but may choose to do so
2. Pay for testing would be required if it is for a reasonable accommodation under the ADA

HELPFUL LINKS

[OSHA ETS FAQ's](#)

[OSHA COVID-19 Vaccination and Testing ETS Summary](#)

[OSHA COVID-19 Vaccination and Testing ETS Fact Sheet](#)