OSHA ETS Announcement on COVID Vaccination Mandate
Frequently Asked Questions

When is the ETS effective?

The OSHA ETS is effective on the date of publication in the Federal Register, which will be November 5, 2021. Most of the requirements must be implemented within 30 days of publication, the remaining requirements must be implemented by January 4, 2022.

Can we provide comment on the ETS?

Yes, OSHA is soliciting comments on the ETS in general but are also seeking comments on certain aspects. Some of the other things OSHA is seeking comment on are:

• If employers with less than 100 employees can administratively handle the burden of the ETS.
• Whether COVID-19 is a serious risk in the workplace or not?
• Whether prior infection with COVID-19 should be an exemption from the vaccine or testing requirements?
• Should OSHA require testing more frequently than on a weekly basis?
• Should vaccination be mandatory with no opting to test weekly instead?
• Should there be additional workplace controls, such as barriers, social distancing, ventilation, and sanitation?

Are any workplaces exempt?

Yes, the ETS does not apply to workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety or in settings where employees provide healthcare services or healthcare support services when subject to the requirements of the Healthcare ETS (29 CFR 1910.502). It also does not apply to employees who do not report to a workplace where other individuals such as coworkers or customers are present, employees while they are working from home, or employees who work exclusively outdoors.

How do we count the 100 employees?

If at any time your business has 100 employees, at any U.S. location or worksite (i.e., employees working from home), while the ETS is in effect, you are covered by the ETS. So, if you have 10 employees during the month of November but hire 90 in the month of...
December and the ETS is still in effect you are covered by the ETS for the remainder of the time the ETS is in effect.

**Are temporary and seasonal workers counted?**

Yes, for the purposes of the ETS any employee is counted towards the 100. However, if you have staffing agency employees or contractors working for another employer, they are not counted toward your employee count.

**What is required under the ETS?**

The ETS requires all covered employers to ascertain the vaccination status of each employee, regardless of whether the employer chooses to not mandate vaccination and allow testing. This must include whether the worker is fully vaccinated, meaning two weeks after the full required vaccine course is completed.

**What if I am in a state that does not allow vaccination mandates by employers or asking for employees’ vaccination status?**

The ETS is seeking to preempt state law. So, any state law that is contrary to the ETS is preempted by the ETS.

**How does an employer determine vaccination status?**

Each employee must provide acceptable proof of vaccination status. Acceptable proof of vaccination status is:

- The 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).

**What if an employee lost or is otherwise unable to provide proof of vaccination status?**

In instances where an employee is unable to produce acceptable proof of vaccination, a signed and dated statement by the employee, subject to criminal penalties for knowingly providing false information:

- Attesting to their vaccination status (fully vaccinated or partially vaccinated); and
- Attesting that they have lost and are otherwise unable to produce proof required by the ETS.
What if I have already collected vaccination status of my employees prior to the ETS?

You do not have to collect the information for employees that you already have proof of vaccination status meeting the guidelines of the ETS again. The ETS will require you to ascertain the vaccination status of employees that you hire after the effective date or that you have not already ascertained their vaccination status.

What does it mean to be fully vaccinated?

To be fully vaccinated a person must have received an approved COVID-19 vaccine and waited two weeks after the last administered dose.

What is an approved COVID-19 vaccine?

As with other guidance, an approved COVID-19 vaccine is one of the following:
- Janssen/J&J
- Pfizer-BioNTech
- Moderna
- AstraZeneca
- Covishield
- BIBP/Sinopharm
- Sinovac

Must I require all workers get vaccinated?

No, the ETS gives employers the option to adopt a mandatory vaccination policy or to allow unvaccinated employees to test every 7 days and wear face coverings.

What is a mandatory vaccination policy?

A mandatory vaccination policy is a written employer policy requiring each employee to be fully vaccinated. The policy must require vaccination of all employees, other than those employees who:
- The vaccine is medically contraindicated
- Medical necessity requires a delay in vaccination
- Are legally entitled to a reasonable accommodation under federal civil rights laws due to disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.

Additionally, the policy must require all new employees to be vaccinated as soon as practicable.
What if I chose not to adopt a mandatory vaccination policy?

Employers choosing not to adopt a mandatory vaccination policy must institute a written policy allowing any employee not subject to a mandatory vaccination policy to choose either to:
• Be fully vaccinated against COVID-19
• Provide proof of regular testing for COVID-19 every 7 days and wear a face covering when not alone at a worksite other than their home.

You must still offer support for vaccination through paid leave for getting the vaccine or any recovery from vaccine side-effects. You may also not discourage or prevent employees from getting vaccinated.

Can I have different policies for different groups of employees?

OSHA has indicated it is acceptable to have different policies for different groups of employees, for instance, you could mandate vaccines for employees who work in close quarters with other employees or the public and not mandate vaccines and allow testing for employees who frequently work from home or at locations where they are alone. However, caution should be used here to not cause an disparate treatment of any workers under Federal Employment Discrimination Laws as indicated by the EEOC.

Which COVID-19 tests can be used under the ETS?

Tests that are cleared, approved, or authorized, including in an Emergency Use Authorization, by the Food and Drug Administration to detect current infection satisfy the ETS. However, self-administered, and self-read test must be conducted in front of a proctor, which can be the employer or other healthcare provider.

Am I required to pay for employee testing?

No, the ETS requires employers to ensure that each employee who is not fully vaccinated is tested for COVID-19 at least weekly or within 7 days before returning to work. The ETS does not require employers to pay for any costs associated with testing. However, employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements. In addition, nothing prohibits employers from voluntarily assuming the costs associated with testing. Further guidance will be forthcoming from the Department of Labor Wage and Hour Division regarding other federal laws that might require employers to pay for testing.
Do I have to maintain records of vaccination status or testing results?

Yes, the ETS requires employers to maintain a record of each employee’s vaccination status and each test result provided by each employee. These records are confidential medical records and must not be disclosed except as required or authorized by the ETS or other federal law.

I am in a state with an OSHA approved State plan, does the ETS cover me?

States that have an OSHA approved state plan are required to adopt at least the standards outlined in the ETS within 30 days and if they do not employers in state plan states will be covered by the ETS. If the state plan state adopts a more stringent rule and it is approved by OSHA, the employer in a state plan state will be required to follow the state plan.

For additional information please visit the OSHA website on the ETS for FAQs, webinars, sample vaccine policies, sample vaccination or testing policies, and other helpful information:

https://www.osha.gov/coronavirus/ets2

Information provided to AmericanHort, by JPH Law. Questions? Contact AmericanHort at telephone: 614-487-1117, or via email at hello@AmericanHort.org.