



**PHILLIPS LYTLE LLP CLIENT ALERT**  
**FOR BNHRA MEMBERS**  
**LABOR & EMPLOYMENT**



**NOVEMBER 2021**

## *Roll Up Your Sleeve or Get Tested — OSHA Issues COVID-19 Vaccination and Testing Emergency Temporary Standard*

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued its long-anticipated [emergency temporary standard \(ETS\)](#) requiring most employers with 100 or more employees to require that their employees be vaccinated against COVID-19 or undergo weekly testing and wear a face covering at work. The ETS can last for six months, after which it must be replaced by a permanent regulation.

### **Which employers are covered by the ETS?**

- Private employers with 100 or more employees firm- or corporate-wide are covered. All part-time employees count toward the 100-employee threshold. Independent contractors are not included in the threshold.
- In states with OSHA-approved “State Plans,” state and local government employers, as well as private employers with 100 or more employees, will be covered by state occupational safety and health requirements.

### **Which workplaces are not covered by the ETS?**

- Workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors. (The deadline for federal contractors to meet their vaccination mandate has been pushed back to January 4, 2022.)
- Settings where any employee provides health care services or health care support services when subject to the requirements of OSHA’s Healthcare ETS.
- Workplaces of employers who have fewer than 100 employees in total.
- Public employers in states without OSHA-approved “State Plans.”

### **If an employer is covered by the ETS, does that mean all of its employees must follow the provisions of this ETS?**

- No. The requirements of the ETS do not apply to:
  - Employees who do not report to a workplace where other individuals are present.
  - Employees while working from home.
  - Employees who work exclusively outdoors.

### **What does the ETS require employers to do?**

- Develop, implement and enforce a mandatory COVID-19 vaccination policy or instead establish, implement and enforce a policy allowing employees to elect either to get vaccinated or to undergo weekly COVID-19 testing and wear a face covering at the workplace. (OSHA has issued template mandatory vaccination and vaccination or testing policies that employees can use to develop their policy, which are available at the [OSHA COVID-19 Vaccination and Testing ETS website](#).)
- Determine the vaccination status of each employee, obtain acceptable proof of vaccination from vaccinated employees, maintain records of each employee’s vaccination status, and maintain a roster of each employee’s vaccination status. (Acceptable proof of vaccination includes: (i) a record of immunization from a health care provider or pharmacy; (ii) a copy of a COVID-19 Vaccination Record Card; (iii) a copy of medical records documenting the vaccination; and (iv) a copy of any other official immunization record. If an employee is unable to provide proof of vaccination, a signed and dated statement containing the following language is acceptable: “I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false



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information regarding my vaccination status on this form may subject me to criminal penalties.” If an employer has ascertained and retained records of an employee’s vaccination status through another form of attestation or proof before the effective date of the ETS, the employer does not have to recertify the employee’s vaccination status.)

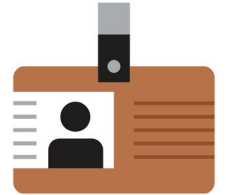
- Support vaccination by providing employees reasonable time, including up to four hours of paid time, to receive each primary vaccination dose, and reasonable time and paid sick leave to recover from any side effects experienced following each primary vaccination dose. This time cannot be offset by any other leave that the employee has accrued. **(New York State employers should remember that New York State law also requires employers to provide employees with up to four hours of paid leave to receive each dose of a COVID-19 vaccination, including booster shots, through December 31, 2022.)**
- Ensure that each employee who is not fully vaccinated is tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer). **(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. Employers may voluntarily pay the costs associated with testing. A test cannot be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.)
- Require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19.
- Immediately remove from the workplace any employee, regardless of vaccination status, who received a positive COVID-19 test or is diagnosed with COVID-19 by a licensed health care provider, and keep the employee out of the workplace until return-to-work criteria are met.
- Ensure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances. Employers cannot prevent an employee, regardless of vaccination status, from voluntarily wearing a face covering unless it creates a serious workplace hazard.
- Provide each employee with (i) information, in a language and at a literacy level the employee understands, about vaccine efficacy, safety and the benefits of being vaccinated (by providing the CDC document [“Key Things to Know About COVID-19 Vaccines”](#)); (ii) the requirements of the ETS and workplace policies and procedures established to implement the ETS (OSHA has issued a fact sheet entitled [“Workers’ Rights under the COVID-19 Vaccination and Testing ETS”](#) which employers can use for this purpose); (iii) protections against retaliation and discrimination; and (iv) laws that provide for criminal penalties for knowingly supplying false statements or documentation. (OSHA has issued a fact sheet entitled [“Information for Employees on Penalties for False Statements and Records”](#) which employers can use for this purpose.)
- Report work-related COVID-19 fatalities to OSHA within 8 hours of learning about them and work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization.
- Upon request, make available for examination and copying to an employee (and anyone having the employee’s written authorization) the employee’s COVID-19 vaccine documentation and any COVID-19 test results; make available to an employee or an employee representative the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace; and provide the employer’s policy and other documents required to be maintained under the ETS to OSHA.



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#### Are employees entitled to reasonable accommodations under a mandatory vaccination policy for medical and religious reasons?

- Yes. Employers who adopt a policy mandating vaccination must provide reasonable accommodations to employees who have a medical condition or sincerely held religious beliefs, practices or observances that conflict with a vaccination requirement, as long as the accommodation does not impose an undue burden on the employer.

#### When does the ETS take effect?

- The first compliance deadline for employers — providing time off for employees to get vaccinated and ensuring unvaccinated employees are wearing masks — is December 5, 2021. Employees must be fully vaccinated by January 4, 2022, or submit to testing.

#### What are the penalties for non-compliance?

- Employers that do not follow the ETS could be cited for a violation by OSHA and face a fine of up to \$13,653 for each serious violation. A willful violation, essentially deliberate disregard of the ETS, could result in a fine as high as \$136,532.

#### Where can employers get more information if they have questions about the ETS?

- OSHA has issued a [webinar](#), [fact sheet](#) and [frequently asked questions](#) that provide information about the ETS.

#### Additional Assistance

*For further assistance, please contact any of the attorneys on our [Labor & Employment Practice Team](#) or the [Phillips Lytle attorney](#) with whom you have a relationship. ■*



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