

OSHA Issues Emergency Temporary Standard for Private Employers with 100-Plus Employees – New Deadline: January 4, 2022

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Today, November 4, 2021, the Department of Labor's Occupational Safety and Health Administration ("OSHA") issued several rules related to vaccine mandates. Critical to private employers with 100 or more employees, the OSHA rule or "ETS" requires, in general, the vaccination of employees or weekly testing of unvaccinated workers, beginning by **January 4, 2022** (a new deadline; the previously announced deadline was December 8, 2021).

This blog provides a short outline of issues with OSHA's new ETS, as they apply to private (not federal contracting) employers with 100-plus employees. Please join this writer for a lunchtime (complimentary) KRCL webinar on these issues on **November 17, 2021**, "**Navigating Federal and Texas COVID Mandate Rules in the Workplace.**" The topics will include this OSHA mandate, the federal contractor mandate, Texas rules, and religious accommodations. Speakers include Andrea ("AJ") Johnson, Douglas Bracken, Dennis Duffy, and Darren Harrington. **Click here to register.**

While this new ETS has been in the making for a few weeks, the Biden Administration first announced the then-coming rule in September 2021. The full rule is here. And the summary of the rule is here.

In quick outline, what this means for private employers with 100 or more employees is the following:

1. Employees must either be fully vaccinated by January 4, 2022, or produce, on at least a weekly basis, testing that shows the employee to be COVID-free.
2. This mandate applies to workers who come to a workplace where other workers are present. Employees who work at home or work *exclusively* (practically speaking) outdoors, for example, are not covered by the mandate, and affected employers may excuse them from the OSHA requirements (see below).
3. Employers must determine the vaccination status of employees and obtain and retain (in a confidential manner) proof of vaccinations and of testing results.
4. Employers must remove COVID-positive employees from the workplace. Employees must provide prompt notice to their employers of any positive testing or diagnosis.
5. Employers must compensate employees for time spent obtaining a *vaccination*. However, the ETS does not require compensation for *testing* by unvaccinated workers, though state law, company policy, or other agreements (such as collective bargaining agreements) may require as much.
6. Employers must make sure that unvaccinated employees wear masks at work. This requirement takes effect as of December 5th.
7. Employers have reporting and record-keeping requirements for ensuring compliance.
8. Employers are required to have a policy that tracks the ETS requirements and is available for employee review (e.g., posted with other company requirements).

Note that there is a separate OSHA vaccine-mandate ETS for health care workers. That health care ETS and the similar mandate as to federal contractors are now all pegged, with this 100-plus employee rule, to the **January 4, 2022**, deadline.

OSHA's FAQs about this new ETS for private employers with 100-plus employees are here. The FAQs for the healthcare industry are here.

A few initial interesting points for consideration:

What about state rules that differ?

The federal government (and the ETS states as much) has taken the position that the rules will pre-empt any contradictory state rules, such as those here in Texas. Note that, there are a number of lawsuits brought by 19 states, including Texas, which challenge these federal rules, as an alleged “overreach” and beyond the federal government’s (President Biden’s) constitutional power. See 19 states sue Biden administration over COVID vaccine rule. Hard to know if these lawsuits will have any impact, as the deadline is not that far off, we know that the courts can rule in a slow manner, and the argument of federal pre-emption is a firmly held legal principle (though some have questioned also the “true” emergency nature of the rule, given the changing deadlines). If you are interested, here are the Texas papers.

A description of the arguments pro and con can be found also in the blog, “Expected Challenges Facing OSHA’s COVID-19 Vaccine Mandate for Large Employers.”

Does an employer count employees when they work in different work sites?

Yes. All employees, no matter where they are located, are counted. That rule includes employees working in remote areas or even at home. Part-time and seasonal employees are a part of the count. Whether an employee is already vaccinated is not critical to the count – in other words, everyone, vaccinated already or not, is part of the headcount. Contractors, however, are not counted.

What about employers who use staffing companies?

Only the staffing agency counts its employees, and the “host” employer counts its own separate employees. OSHA provides an example where a host company has 80 employees, but uses staffed employees who number 30, and, in that situation, the host company is not required to count the staffed workers (and the host is then considered not subject to the ETS, as it has employees numbering below the 100-employee minimum). Nevertheless, the host entity can place requirements on the staffing agency for vaccination, testing, and/or the wearing of facemasks.

Can an employer have a policy permitting some options about vaccination?

Yes. In other words, an employer does not have to mandate vaccination of, for example, workers who work at home, or an employer may perceive differences for employees working at “headquarters” versus those working with the public (such as in a retail setting), but the other requirements of the ETS will apply.

Can the employer require an employee to use PTO or sick time for the vaccination process?

No. Employers are supposed to provide reasonable time for vaccinations during the working hours, up to four hours of paid time.

What about employees who have side effects from the vaccination process?

Employers are supposed to allow paid time off for recovery from the vaccination if needed. Employers may cap this time, and OSHA says it presumes two days to be a reasonable cap.

Does the mandate apply to those working at home or “outside”?

Not necessarily. Workers who work solely at home and workers that work solely (almost) outside are not necessarily subject to the vaccination mandate (employers need not require them to do so). However, if, for example, an unvaccinated home worker comes to the office setting, that person must have a test within 7 days of arrival at the office that reflects a negative COVID test.

Outdoor workers would be a very limited subset of individuals, and only if they do not regularly work around others. OSHA has stated the following criteria must be met:

- The employee must work outdoors *all* the time, though a “*de minimus*” amount of indoor space use (such as bathrooms) is permitted.

- The employee must not regularly drive or be a passenger in vehicles with other employees, when performing company work.

The restrictions on this kind of “outdoor” work may limit this exclusion to only the solitary landscaper, for example, who is almost never in contact with his colleagues.

Can safety in the workplace rules (e.g., social distancing, masks, etc.) replace the vaccine and testing mandate of the ETS?

No. The safety requirements that an employer has already in place (even if proven effective) do not take the place of the ETS, which still requires mandatory vaccination and testing for employees interacting together in a single workplace.

OSHA has invited public comment about the rules for the next thirty days. OSHA’s Vaccination and Testing ETS: How You Can Participate. KRCL’s employment team is here to answer your questions as you make your way through these new rules in the workplace.

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