

Frequently-Asked-Questions:

OSHA's Vaccine Emergency Temporary Standard (ETS)

What is the status of the ETS? (updated 12/21)

The day after the ETS became effective, a federal appeals court issued an order blocking it from taking effect. Less than a week later, the Judicial Panel of Multidistrict Litigation announced that the conservative Sixth Circuit Court of Appeals would decide the outcome of the ETS. On December 17, a three-judge panel from that Circuit shocked the nation by lifting the stay order and reviving the ETS with *immediate effect*. The Sixth Circuit's decision to dissolve the stay has already led to several petitions for review to the U.S. Supreme Court. The Supreme Court might elect not to review the merits of the Sixth Circuit's decision and could allow the dissolution of the stay to stand and implementation and enforcement of the ETS to proceed.

The most straightforward summary of the status of the ETS is that it's back in effect, with extended timelines, and covered employers must now take steps to ensure that they understand what is required of them and communicate effectively with their employees.

What are the key deadlines? (updated 12/21)

Although the ETS takes effect immediately, OSHA is giving employers a grace period. Enforcement for all portions of the ETS (other than testing and vaccination compliance) will begin January 10, 2022. Testing and vaccination compliance enforcement will start February 9, 2022. However, these deadlines come with an important caveat: the agency will refrain from such action before these dates "so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard."

However, since Hawaii is regulated by HIOSH (not OSHA), Hawaii employers would need to wait for HIOSH to officially announce its adoption of OSHA's ETS and its key deadlines. Historically, HIOSH compliance deadlines have followed a 30 day delay from OSHA dates. For example: If OSHA's testing/vaccination compliance deadline is February 9, HIOSH's compliance deadline may likely be March 9 (as an example).

The Basics of OSHA's Vaccine ETS:

What is an "ETS"?

OSHA permits the agency to issue an Emergency Temporary Standard (ETS) it can enforce immediately if it arrives at the conclusion that a "grave danger" to worker safety exists. For this reason, the rule did not go through the typical notice-and-comment period that federal regulations usually follow.

In general, what does the ETS require?

OSHA's Emergency Temporary Standards (ETS) requires all covered employers with 100 or more employees to either mandate their workforce receive the vaccination against COVID-19 or test them weekly to ensure they are not infected.

As part of OSHA's ETS, employers must also: 1) Establish, implement, and enforce a written policy on vaccines, testing, and face covering, 2) Provide certain information to employees on vaccines and the requirements of the ETS, 3) Provide paid time off (up to 4 hours) to employees to obtain the vaccine and reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination series dose to each employee for each dose, 4) Obtain and maintain records and roster of employee vaccination status, and 5) Comply with certain notice requirements when there is a positive COVID-19 case and reporting to OSHA when there is an employee work-related COVID-19 fatality or hospitalization. *See sections below for more details*

What does this mean for Hawaii?

In Hawaii, workplace safety is regulated by HIOSH (Hawaii Occupational Safety & Health) as opposed to OSHA. HIOSH, like other State Plan states, have up to 30 days to adopt the federal ETS or alternative regulations or standards. If changes are made, changes aren't allowed to create rules that are less strict than OSHA (only stricter).

What are the ramifications of non-compliance?

In light of these new rules, OSHA is relying on companies to self-enforce the rule. Employers who are not compliant could face fines of up to \$13,653 per violation for serious violations and 10 times that for willful or repeated violations. Lastly, OSHA inspectors will most likely be driven by employee complaints, on top of regular inspections.

How long will ETS be in place?

The ETS can only remain in place for six months. After that time, it must be replaced by a permanent OSHA standard, which must undergo a formal rulemaking process involving a typical notice-and-comment period during that six-month period.

About Eligibility:

Who is covered by OSHA's ETS?

OSHA's ETS requires private employers with more than 100 employees to comply with all aspects of the rules. While this appears straightforward, we know each business has unique circumstances.

ProService PEO clients: PEO status does not affect WSE count or OSHA's explanation of who is included in the 100 employee threshold. If a ProService PEO client has less than 100 employees, they are not affected by OSHA's ETS.

Multiple locations: In determining the number of employees, employers must include all employees across all of their U.S. locations, regardless of employees' vaccination status or where they perform their work.

Part-time vs Full-time employees vs Independent contractors: Part-time and full-time employees count towards the company total, but independent contractors don't.

Single corporate entity: Covered. For a single corporate entity with multiple locations, all employees at all locations are counted for purposes of the 100-employee threshold for coverage under this ETS.

Franchises: In a traditional franchisor-franchisee relationship in which each franchise location is independently owned and operated, the franchisor and franchisees would be separate entities for coverage purposes, such that the franchisor would only count "corporate" employees, and each franchisee would only count employees of that individual franchise.

Related entities: In other situations, two or more related entities may be regarded as a single employer for OSHA purposes if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted.

Why? OSHA has not found that the standard is feasible for firms with fewer than 100 employees, because it needs additional time to assess the impact of the standard on these employers, particularly as many smaller firms lack separate human resources departments and may face additional challenges when carrying out human resources functions. In contrast, OSHA has determined that the standard is feasible for firms with 100 or more employees, regardless of where those employees report to work. These firms generally have greater administrative capacities, and including all such employers in the scope of this ETS ensures that OSHA can cover two-thirds of all workers in the private sector as quickly as possible.

Staffing agencies: The ETS states that "in scenarios in which employees of a staffing agency are placed at a host employer location, only the staffing agency would count these jointly employed workers for purposes of the 100-employee threshold for coverage under this ETS." This is the case even if the staffing agency and host employer would normally share responsibility for the workers under the OSH Act for other purposes. The ETS refers to OSHA's existing guidance for temporary workers. While the ETS uses the phrase "staffing agency," we expect that this analysis may also be applied to similar business models even if they do not use buzzwords like "staffing agency" or "host employer."

Why did OSHA pick 100 or more employees as the threshold?

OSHA says that there are at least four reasons supporting the 100-employee threshold: 1) The ETS is feasible for employers of that size to enact promptly and without undue disruption; 2) To enable the ETS to cover two-thirds of all private sector workers in the nation, 3) Because of the risk of spread in large workplaces where the deadliest outbreaks can occur, 4) And because the threshold is comparable to decisions in analogous contexts with similar size requirements.

What about a change in the number of employees above or below 100?

Once an employer falls within the scope of the ETS, the standard continues to apply for the remainder of the time the standard is in effect. For example: If you have fewer than 100 employees on the effective date, subsequently hire more workers and hit the 100-employee threshold for coverage, however, then you would then be expected to come into compliance.

Are there any exceptions?

Yes. There are two main exceptions for employers covered by other related legal requirements: 1) Workplaces covered under the Federal Contractor Vaccine Mandate are not required to comply with the OSHA ETS, and 2) Settings where any employee provides healthcare services or healthcare support services when subject to the requirements of 29 CFR 1910.502 (Healthcare ETS)

Additionally, some employees may also be excluded from the requirements of the ETS (see next two questions on remote employees and employees who work outside).

Does ETS apply to remote employees?

The ETS requirements (such as showing proof of vaccination or weekly testing) do not apply to employees who never work in an office and never meet with co-workers or customers. However, you must still include those employees in your count to determine if you meet the 100-employee threshold.

Does the ETS apply to employees who work outside?

The ETS requirements (such as showing proof of vaccination or weekly testing) do not apply to employees who work exclusively outdoors. It is critical that employees have no work time indoors, even if brief. An example provided by OSHA was for construction workers who have a brief indoor meeting as part of the work day and spend the rest of the day outdoors. Those employees would still need to meet the ETS requirements. You may make slight adjustments to your current work practices to ensure that your employees qualify for the outdoor exemption, such as by holding tool box talks outdoors instead of in a traditional indoor location. Again, these workers do not have to comply with the ETS requirements, but will still be included in the count to determine if you meet the 100-employee threshold.

About Certification & Recordkeeping:

Will we be required to collect proof of vaccination?

Yes. Employers must require employees to provide an acceptable proof of vaccination status, including whether they are fully or partially vaccinated. If no proof of vaccination is provided, you must treat such employees as unvaccinated. Acceptable proof of vaccination status is: 1) the record of immunization from a health care provider or pharmacy; 2) a copy of the COVID-19 Vaccination Record Card; 3) a copy of medical records documenting the vaccination; 4) a copy of immunization records from a public health, state, or tribal immunization information system; or 5) a copy of any other official

documentation that contains the type of vaccine administered, date(s) of administration, and the name of the healthcare professional(s) or clinic site(s) administering the vaccine(s).

A signed and dated employee attestation is acceptable in instances when an employee is unable to produce proof of vaccination. The attestation must state their vaccination status and that they have lost and are otherwise unable to produce proof. In such cases, you must require that employees declare that the statement of their vaccination status is true and that they understand providing false information may subject them to criminal penalties.

What recordkeeping obligations coincide with collecting vaccination certification?

The ETS requires employers to maintain a record and a roster of each employee's vaccination status. You must also maintain a record of each test result provided by each employee. These records must be maintained as confidential medical records and must not be disclosed except as required or authorized by this ETS or other federal law. The roster must list all employees and clearly indicate for each one whether they are fully vaccinated, partially (not fully) vaccinated, not fully vaccinated because of a medical or religious accommodation, or not fully vaccinated because they have not provided acceptable proof of their vaccination status. Although unvaccinated employees will not have proof of vaccination status, the standard requires the employer to include all employees, regardless of vaccination status, on the roster.

What best practices are recommended for proving vaccination status?

When collecting vaccination status, be careful about delving into an employee's other health information. Simply tracking if an employee was vaccinated or having employees produce a copy of the vaccination card would not dig too deep – but asking an employee why they were or were not vaccinated could be a disability-related inquiry, triggering additional obligations. Lastly, you should maintain the records as you would any other confidential medical-related documentation (e.g., in a separate file, accessible to only those who need to know)

About Medical & Religious Accommodations:

Do we have to provide exceptions for any employees?

Yes, federal law requires that you would still need to consider and possibly accommodate valid medical and religious accommodation requests if an employee requests to be exempted from the vaccination requirement. You should ensure that your vaccination policies explain how employees can request exemptions in the form of accommodations on the basis of medical or religious reasons.

What should we do if someone presents us with a medical accommodation request?

Under the ADA, you must evaluate requests to determine whether a "reasonable accommodation" would enable the employee to perform all essential functions of their job without posing a "direct threat" to the safety of themselves or others, which cannot be eliminated or reduced through reasonable accommodation. The ADA direct threat requirement is a high standard, requiring you to use

objective information to show that the individual poses a “significant risk of substantial harm” in the workplace. You should interactively confer with the employee seeking accommodation but are not required to grant an accommodation that would impose an undue hardship on your business.

What should we do if someone presents us with a religious accommodation request?

As a best practice, you should confirm whether the employee’s accommodation request is indeed based upon a sincerely held religious belief or practice (as opposed to a more secular or non-spiritual reason for not wanting to get vaccinated); how receiving the vaccine would violate the employee’s beliefs; and what accommodation the employee is requesting. You must confer with the employee interactively to determine what, if any, reasonable accommodation options exist. However, you are not required to grant a request that would constitute an undue hardship.

What are examples of “reasonable accommodations”?

Accommodations can take various forms, depending on the circumstances, but may include remote work, other schedule changes, following additional safety precautions (including masking, distancing and frequent testing), changes in the working environment or possibly even unpaid leave, etc.

What is an “undue hardship”?

An undue hardship would be characterized by a significant difficulty or expense. “Undue hardship” can also be a very challenging standard for employers to meet. You must therefore consistently evaluate accommodation requests in an interactive, individualized manner and document your communications and rationale for arriving at conclusions.

If an employee is exempt from the vaccine due to a reasonable accommodation related to a disability or sincerely held religious belief, do they still need to be tested weekly?

Yes. The ETS requires weekly COVID-19 testing of all unvaccinated employees, including those exempt from the vaccine due to a reasonable accommodation. However, if testing for COVID-19 conflicts with an employee’s sincerely held religious belief, the worker may be entitled to a reasonable accommodation.

About Testing:

Who needs to be tested weekly for COVID-19?

Weekly testing applies to employees that are not vaccinated who report to the workplace at least once every seven days. Employees must provide documentation of the most recent COVID-19 test result no later than the seventh day following the date the employee last provided a COVID-19 test result.

If an employee reports to the Workplace less than once every seven days, the employer must ensure that the employee is tested for COVID-19 within seven days of returning to the workplace and the

employee must provide documentation of that test to its employer. Employees who work exclusively outdoors are not subject to the ETS.

Who pays for the tests?

Though the OSHA rule doesn't require employers to pay for regular COVID-19 testing, it acknowledges employers may be required to pay for testing to comply with other laws, regulations, or other agreements. For example, if an employee was exempted from a COVID-19 vaccine requirement due to a disability or medical contraindication to the vaccine, you would be required to pay for testing as an accommodation under the ADA. In addition, nothing prohibits employers from voluntarily assuming the costs associated with testing. In fact, ProService is recommending that employers cover testing costs to show goodwill to employees who are already navigating a tricky situation.

What if an employee says they need a medical or religious accommodation preventing them from being tested weekly?

OSHA directs employers to the [EEOC's guidance relating to COVID-19](#). If vaccination and/or weekly testing and/or wearing a face covering conflicts with an employee's sincerely held religious belief or practice, the employee may be entitled to reasonable accommodation under Title VII, so long as such accommodation does not cause an undue hardship for the employer. If the accommodation presents an undue hardship, the employer can place the employee on indefinite unpaid leave (until they get vaccinated), or choose to separate from the employee.

What if an unvaccinated employee has had a prior COVID-19 infection?

Employees who have tested positive for COVID-19 within the immediately preceding 90 days do not have to comply with a testing requirement. Testing positive means the employee received a positive COVID-19 test or has been diagnosed with COVID-19 by a licensed healthcare provider. However, unvaccinated employees (regardless of whether they have previously been infected with COVID-19), must still wear a face covering in the workplace.

What about remote workers?

Workers who are completely remote do not need to be tested provided that the employee does not report to a workplace where other individuals such as coworkers and customers are present. In other words, if you have an employee who comes into work once a month, the employee is not required to be tested every seven days when not appearing to work. Employers, however, must ensure that the employee is tested within seven days prior to returning to the workplace and provide documentation of that test result to the employer.

What kinds of tests will suffice?

Under the ETS, a "COVID-19 test" must be a test for SARS-CoV-2 that is: 1) Cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the U.S. Food and Drug Administration (FDA) to detect current infection with the SARS-CoV-2 virus (e.g., a viral test); 2)

Administered in accordance with the authorized instructions; and 3) Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor

Are employees allowed to use self-administered tests?

Employees are not allowed to self-administer and self-read unless observed by employer or an authorized telehealth provider. Antibody tests do not meet the definition of a COVID-19 test for purposes of the ETS.