

# How to Prepare for OSHA's COVID-19 Vaccination Emergency Temporary Standard

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While the Occupational Safety and Health Administration (OSHA) has not yet released the emergency temporary standard (ETS) requiring private employers with 100 or more employees to mandate vaccination or weekly testing for their unvaccinated employees, covered employers should start preparations to comply now. Legal challenges to the ETS have been and will be made, but these requirements are not legislation, and President Joe Biden has the authority to direct OSHA to release and enforce an ETS. Any changes or delays to the ETS would likely come after the requirements go into effect and could take some time. By preparing now, employers can avoid possible penalties due to lack of planning.

These steps will help an employer be prepared to comply with the new requirements, which may become effective immediately upon release. Statements made by OSHA officials regarding anticipated requirements are included below but are subject to change under the ETS.

## **STEP 1. DETERMINE EMPLOYER COVERAGE.**

All private employers with 100 or more employees will be subject to the federal ETS or a state standard that meets or exceeds the requirements of the standard. OSHA officials have stated that the 100-employee threshold will be based upon a companywide headcount rather than the number of employees at a particular worksite.

Employers should count all employees individually, whether they are full time, part time or working on a temporary basis. Independent contractors and leased employees (where the client employer is not the employer of record) are not counted. Further joint-employment stipulations may be addressed in the ETS.

If an employer's total headcount fluctuates above and below 100, the ETS will most likely apply if the total has reached 100 at any time during the year. The ETS should provide specific details on this when released.

## **STEP 2. SURVEY CURRENT EMPLOYEES ON VACCINATION STATUS.**

Understanding how many unvaccinated workers an employer has will help inform the best compliance approach for the organization. For example, an employer with only 10 unvaccinated workers might allow those employees to choose either vaccination or weekly testing, whereas a company with 100 unvaccinated workers may find the logistics of collecting weekly testing documentation too difficult, and therefore decide not to offer the testing option. See [Employee Survey: COVID-19 Vaccine \(www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/employee-survey-covid-19-vaccine.aspx\)](https://www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/employee-survey-covid-19-vaccine.aspx) for a sample survey.

Surveying employee sentiment around required vaccination will also help an employer prepare for its communications around the policy they decide upon. Should unvaccinated employees disclose they will quit instead of getting a vaccine, this information can also be used to prepare for workplace staffing needs and associated costs.

### STEP 3. RESEARCH TESTING.

Whether an employer will offer the option of weekly testing to unvaccinated workers—or only use testing as a religious or disability accommodation—understanding the logistics of testing should be reviewed before determining the employer's compliance approach.

#### Accessibility

Questions to consider:

- Are there testing locations near the workplace? What are their hours and procedures for testing? How long does it take to get testing results there? Contact these locations to determine which vaccines they offer and what their capacity is for handling your employee testing.
- Is onsite testing a more convenient option? For employers with large numbers of unvaccinated workers, a vendor-run testing program at the workplace might be a good approach.
- What day(s) of the week will the employer require testing? Will local testing locations be open and available to test all impacted workers? For example, if an employer requires a negative test result each Monday, will all employees be able to get a test near the worksite the week before, or will employees need to be tested on their off days? If testing during the workday is the only available option, how will employee late arrivals or early departures for testing affect productivity?
- Which test will the employer accept? The ETS should offer some details on which tests will be acceptable but understanding the different options ahead of time is helpful.
  - The rapid test (an antigen test) yields results in about 15 minutes but can give inaccurate results. It appears to be most effective when someone is experiencing symptoms of COVID-19.
  - The PCR test (polymerase chain reaction) is the gold standard test. Results are usually available in two to four days. This is the most accurate test, for both symptomatic and asymptomatic individuals, which makes it more reliable for routine testing.

Home testing kits are widely available at pharmacies and online, some with mail-in options for results (PCR), while others give results in about 15 minutes (rapid antigen test). The Biden administration supports the use of home testing and has secured commitments from Walmart, Amazon and Kroger to sell the kits at cost. The Food and Drug Administration has currently authorized (<https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/in-vitro-diagnostics-euas-antigen-diagnostic-tests-sars-cov-2>) several brands for home use. Employers could obtain these and make them available for use at the workplace, or employees could use these at home. The latter, however, would require a great sense of trust in those employees.

It is possible that employers may be able to place the onus of testing completely on the employees, and just accept their documentation, but this might be confusing and stressful for employees and lead to disruption in the workplace and lower productivity.

#### Cost

While the Families First Coronavirus Response Act, as amended by the Coronavirus Aid, Relief, and Economic Security Act, provides for free COVID-19 testing of insured and uninsured individuals when determined medically necessary by a health care professional, the law does not currently require free testing for general employment purposes (see Q5 (<https://www.cms.gov/files/document/FFCRA-Part-43-FAQs.pdf>)). The ETS will hopefully address this issue as to whether employers or employees must bear the cost of testing, but OSHA cannot legislate insurance companies to do so. Therefore, understanding the cost implications of testing before implementing a policy is advised.

Cost questions to consider:

- Are there current state laws that would require employers to pay for employment-related costs? For example, California requires the reimbursement to employees for necessary business expenses, which would apply here. Check all applicable states as employees are governed by the laws of the state in which they perform work, which may not be where company headquarters is located.
- What are the projected costs for both the employee and employer for testing? Contact local suppliers to compare pricing, including organizations providing onsite testing services. The IRS has stated that in-home tests would be reimbursable (<https://www.irs.gov/newsroom/irs-cost-of-home-testing-for-covid-19-is-eligible-medical-expense-reimbursable-under-fsas-hsas>) under flexible benefits plans such as flexible spending accounts and health savings accounts, which may help employees manage costs.
- Will the cost of testing, if paid for by the employee, bring the employee's weekly pay below minimum wage? Both the Fair Labor Standards Act and some state laws would not allow this.
- Will an employer's budget allow for employer-paid testing for as long as the ETS is in place (which would be six months to start, then it could be extended for another six months or made a permanent standard)? Or is mandatory vaccination, which is free, the better option?

#### **STEP 4. CONSIDER PAID-TIME-OFF REQUIREMENTS.**

President Biden's plan calls for paid time off (PTO) to be given for an employee to receive the vaccine and to recover from any side effects. While the ETS will provide details on this requirement, an OSHA official has stated that employers will likely be able to require the use of the PTO the employer currently offers to its employees, rather than require additional paid leave. Nothing, however, would stop an employer from creating a new type of paid leave just for this purpose.

Hopefully the regulations will address the proper actions to take if an employee who has already exhausted their paid leave needs time off to receive the vaccine or recover from it. Until then, employers may wish to consider whether offering a new bank of leave or advancing PTO to these employees might work better for their organization.

Additionally, state COVID-19-related laws might also require additional paid leave for time to get or recover from the vaccine.

For employers who include a testing option for unvaccinated workers, the time spent obtaining a COVID-19 test may be considered hours worked depending on the circumstances, such as directing employees to use a specific provider at specific times. Hopefully, the ETS will provide further guidance for employers.

While less likely, employers may also be able to require the use of PTO for workers who are unable to get tested outside of work hours. This would not be a popular option from a worker's perspective but could potentially induce them to choose vaccination over weekly testing.

#### **STEP 5. ADDRESS REMOTE-WORKER REQUIREMENTS.**

While the executive order requiring vaccination for federal workers also requires most employees working from home to be vaccinated, the ETS may not. If an employer has remote workers who will never come into the office, employers may be able to use remote work as an option for unvaccinated workers.

If allowed by the ETS, an employer may choose to consider a full-time remote-work option, determine how many employees this would apply to, what the employee-eligibility requirements would be, what the associated costs with long-term telecommuting might be and any other data meaningful to the company.

**STEP 6. DETERMINE A COMPLIANCE APPROACH AND CREATE A WRITTEN POLICY.**

After examining the data in the steps above, employers should determine if they will:

- Allow unvaccinated workers the option of weekly testing in lieu of vaccination.
- Require vaccination for all employees without the option for weekly testing, except when allowed as an accommodation.
- Help employees find testing locations and provide cost information if applicable.
- Pay for testing, if not required by the ETS.
- Increase leave banks, if not required by the ETS
- Allow full-time remote-worker positions to be excluded from the requirements, if allowed under the ETS.

A clearly written policy ([www.shrm.org/ResourcesAndTools/tools-and-samples/policies/Pages/Large-Employer-COVID-19-Vaccination-Policy.aspx](http://www.shrm.org/ResourcesAndTools/tools-and-samples/policies/Pages/Large-Employer-COVID-19-Vaccination-Policy.aspx)) should detail the requirements the employer has decided upon and the consequences for noncompliance.

Procedural requirements might include:

- Required documentation, both for proof of vaccination and for weekly testing. The ETS will hopefully detail employer options.
- A process for employees to submit required documentation and procedures on storage and retention of the information.
- Time frames for current and new hires to comply.
- A system for religious and disability accommodation requests ([www.shrm.org/ResourcesAndTools/tools-and-samples/how-to-guides/pages/how-to-handle-an-employees-request-for-an-accommodation-to-a-vaccine-requirement-covid19-coronavirus.aspx](http://www.shrm.org/ResourcesAndTools/tools-and-samples/how-to-guides/pages/how-to-handle-an-employees-request-for-an-accommodation-to-a-vaccine-requirement-covid19-coronavirus.aspx)).
- The steps to be taken if an employee fails to comply, up to and including termination.

**STEP 7. DEVELOP EMPLOYEE COMMUNICATIONS.**

Start developing employee communications now. A memo ([www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/memo-covid-19-vaccine-osh-ets.aspx](http://www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/memo-covid-19-vaccine-osh-ets.aspx)) to employees about the upcoming ETS that explains the employer will be in full compliance with details to follow will help to set expectations. If an employer has already determined some compliance aspects it wishes to share, or if company policy is already in line with the forthcoming requirements, communicating that as early as possible would be advisable to build trust.

Communicate ahead of time where employees can go to get vaccines near the workplace, or how to find a location near their homes, and keep this information easily accessible. Detail whether or not employees must seek testing outside of work hours.

Some employees will most likely choose to leave the company rather than be vaccinated, and early communications may give them a head start, leaving employers with worker shortages. Knowing the percentage of unvaccinated workers and their sentiments as surveyed in step 2 above can help an employer prepare for this. However, any employer with 100 or more workers will be held to the same vaccination requirements, so a mass exit may not come to pass. If warranted, employers may want to communicate that a discharge for violating a company policy (such as mandatory vaccination or testing) generally makes an individual ineligible for unemployment insurance.

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