

Vaccination & Testing Requirements

The Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS)

The ETS has arrived...!

OSHA'S EMERGENCY TEMPORARY STANDARD ON VACCINATION AND TESTING



Employers with 100+ employees will be required to **ensure all workers are fully vaccinated** unless the employer requires unvaccinated employees to undergo weekly testing and wear a face covering.

osha.gov/vaxETS

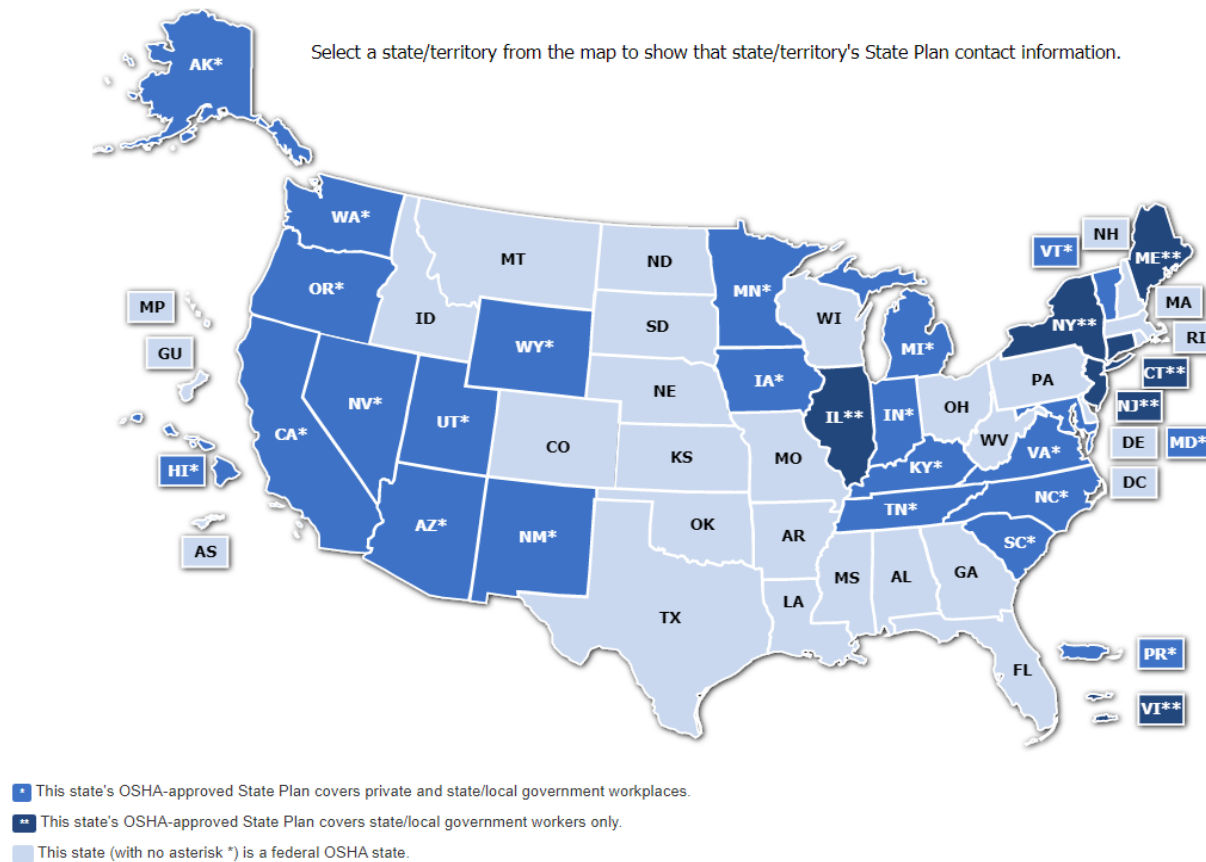
Legal Backdrop Preemption



Rule: States and state political subdivisions cannot adopt and enforce workplace requirements relating to the occupational safety and health issues of vaccination, wearing face coverings, and testing for COVID-19, except under the authority of a federally-approved OSHA state plan.

Purpose: This provision is intended to preempt and invalidate any state or local requirements that ban or limit an employer's authority to require vaccination, face covering, or testing.

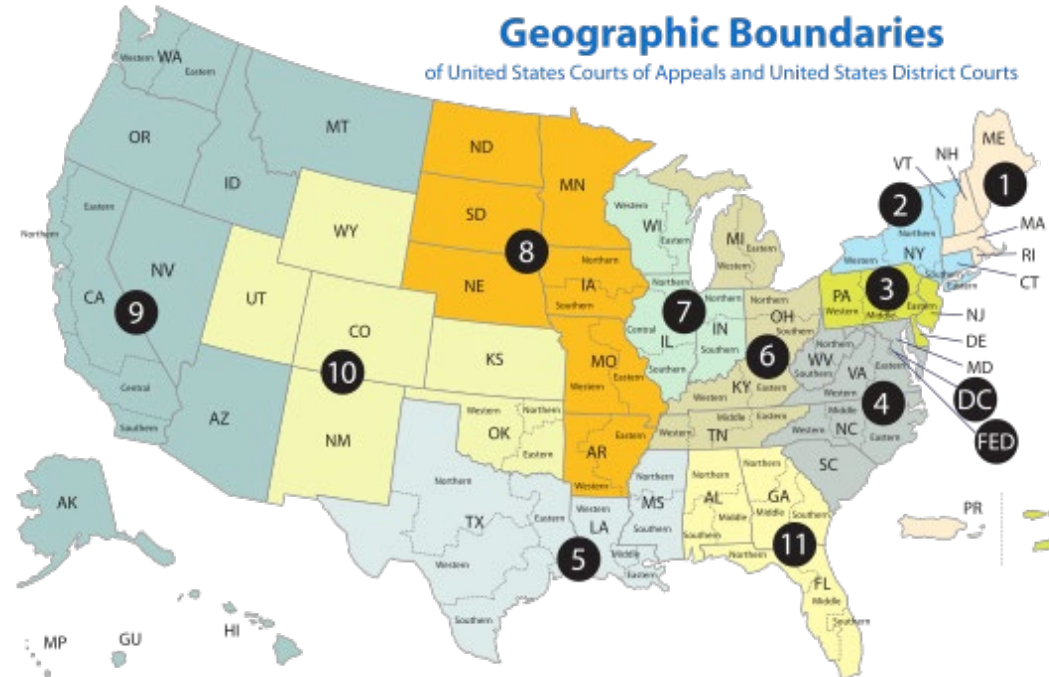
Preemption - OSHA-Approved Plan States



Legal Backdrop Federal Circuit Courts of Appeals & Challenges

Multi-Circuit Lottery,
currently between the
following circuits:

- Fifth
- Sixth
- Eighth
- Eleventh
- D.C. Circuit

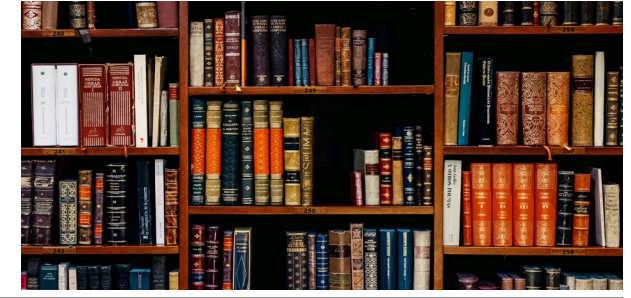


ETS Requirements

Scope - High Level

- 100 or more employees
- Dec. 5th:
 - PTO for EEs to get vaccinated
 - Require unvaccinated EEs to mask
- Jan. 4th:
 - Fully vaccinated or weekly testing
 - Unvaccinated workers must produce a negative test weekly

ETS Requirements Scope



Coverage

- 100 or more employees

How to count to 100

- As of November 5, 2020:
- Include:
 - Multiple worksites/locations
 - Seasonal employees
 - Part-time employees
 - Minor employees
 - Remote & outdoor employees
- Exclude:
 - Staffing agency workers
- Once covered, the employer remains covered for duration of ETS regardless of fluctuations in size.

ETS Requirements Scope - contd.



Exclusions

- Employers with fewer than 100 employees
- Federal employees & contractors
- Workers in Healthcare settings subject to the CMS emergency rule
- Employees working exclusively:
 - Remote
 - Outdoors
 - Reporting to a workplace with no customers/co-workers

ETS Requirements

Mandatory Vaccine or Vaccine & Test Policy

Covered employers MUST develop, implement and enforce a policy - two options:

Mandatory Vaccination Policy

- All employees must be fully vaccinated against COVID-19
- *Unless* exemption applies (*next slide)

OR

Vaccination *or* Test/Mask Policy

- Employees must be fully vaccinated **OR**
- Employees who do not submit proof of full vaccination may:
 - Submit to weekly testing and
 - Must mask at virtually all times in the workplace

ETS Requirements

Mandatory Vaccine Policy - contd.

Mandatory Vaccination Policy Exemptions

- Vaccine is medically contraindicated
- Medical necessity requires a delay in vaccination
- Legally entitled to a reasonable accommodation under federal civil rights laws because they have a:
 - disability *or*
 - sincerely held religious beliefs/practices/observances that conflict with vaccine

ETS Requirements

Mandatory Vaccine Policy - contd.

Testing/Masking Considerations

- *Testing*
 - At least weekly (if in workplace 1x/week) *or*
 - within 7 days before returning to work (if away longer than 7 days)
 - Does not have to be PCR test; rapid OTC acceptable
 - Self-administered or read, but EEs can't do both
 - Return after removal from workplace:
 - Negative PCR
 - Ok per CDC guidance
 - Healthcare provider greenlight
- *Masking*
 - Includes in work vehicles
 - Double layer
 - Employer doesn't need to pay

ETS Requirements

Vaccine or Test Policy - Face Coverings

Testing - After Jan. 4, 2022

- If not fully vaccinated, employees must:
 - *Test*
 - At least weekly (if in workplace 1x/week)
or
 - within 7 days before returning to work (if away longer than 7 days)
 - *Provide proof of negative test result*
- Employers are not required to or prohibited from paying any costs associated with testing.
 - *However*, employers may be required by other laws or CBAs to pay for testing



ETS Requirements

Vaccine or Test Policy - Face Coverings



Employers must ensure employees who are not fully vaccinated wear face coverings when indoors and in a vehicle with another person for work purposes.

Exceptions include:

- when alone in a fully enclosed room with the door closed,
- when eating or drinking,
- when wearing a face covering is infeasible or creates a greater hazard.

ETS Requirements

Paid Time and Sick Leave

Paid leave to obtain vaccination

- Up to 4 hours per primary dose, boosters excluded
- Cannot require employee to use existing paid leave time

Paid leave to recover from vaccination side effects

- “Reasonable Amount of Time” = 2 days per primary dose, boosters excluded
- Can require employee to use existing/already-accrued paid sick time, but cannot require employee to go negative.

OSHA doesn't require paid leave if COVID-19-positive

- *But* - check applicable state/local law and policies.

DOL Updates? We expect more

ETS Requirements Notice

Employers must provide each employee with information, in a language and at a literacy level the employee understands, about:

- ETS requirements and workplace policies and procedures established to implement the ETS;
- Vaccine efficacy, safety and the benefits of being vaccinated (provide the CDC document “Key Things to Know About COVID-19 Vaccines”);
- Protections against retaliation and discrimination; *and*
- Laws that provide for criminal penalties for the knowingly supplying false statements or documentation.

ETS Requirements Recordkeeping

Determine vaccination status of each employee

Preserve acceptable proof and roster of each employee's vaccination status.

- **Proof of vaccination status must be maintained as employee medical records.**
- Acceptable proof of vaccination include a vaccination card or a record of immunization from a health care provider or a vaccine registry and that an employer can accept a signed and **dated attestation** of vaccination only when an employee has lost or is otherwise unable to produce other acceptable proof.

Employers that have already asked employees about their vaccination status and retained records of employee responses prior to the effective date are exempt from the above; they may keep using what they already have.

As long as an employer does its due diligence to ensure the vaccination information provided is accurate, **OSHA will not hold the employer accountable if documentation is found to be fraudulent.**

Boosters - TBD



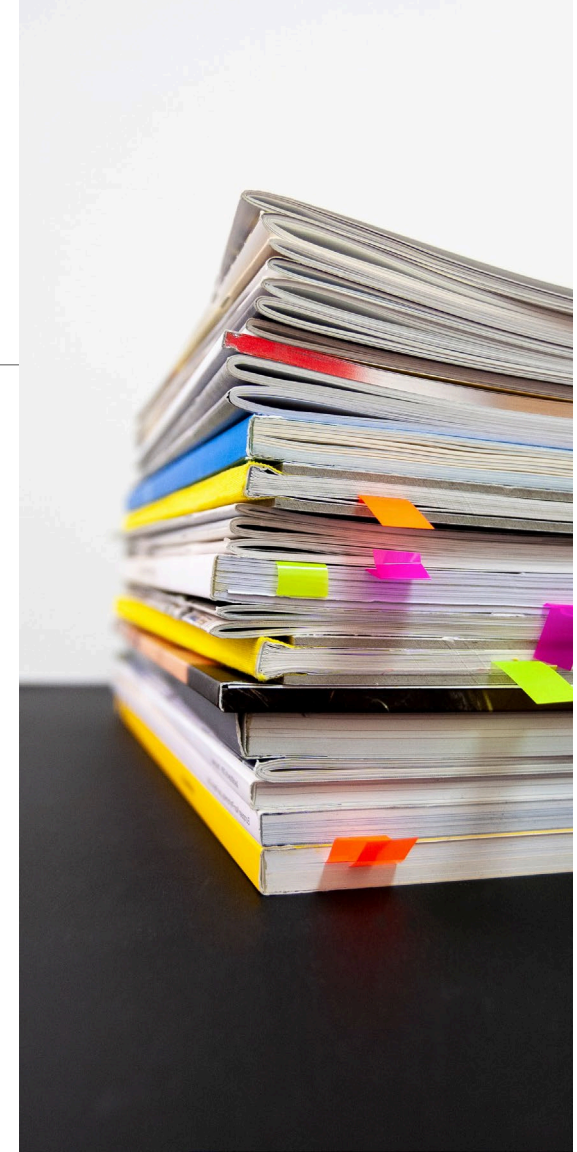
ETS Requirements Reporting

Employers are required to report the following with usual OSHA criteria for other illnesses:

- Work-related fatality within 8 hours of learning of it
- Work-related in-patient hospitalization within 24 hours of learning of the hospitalization.

Employers must provide to OSHA upon request:

- Individual vaccine information and test results to that employee by the end of the next business day after request;
- the aggregate number of fully vaccinated at a workplace to an employee by the end of the next businesses day after a request and to the Assistant Secretary of OSHA within 4 business hours of the request; *and*
- the employer's written vaccination policy to the Assistant Secretary within 4 business hours of the request.



Penalties

IF the rule becomes effective, the following penalties can be assessed by OSHA:

- ☐ Agency Citation
- ☐ Fine of up to \$13,653 for each serious violation
- ☐ Fine of up to \$136,532 for each “willful” violation
- ☐ Criminal penalties possible

Source: U.S. Department of Labor

KEY COMPLIANCE DATES

REQUIREMENT	30 DAYS AFTER PUBLICATION	60 DAYS AFTER PUBLICATION
Establish policy on vaccination	X	
Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status	X	
Provide support for employee vaccination	X	
Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis	X	
Remove any employee who received positive COVID-19 test or COVID-19 diagnosis	X	
Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes	X	
Provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation	X	
Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours	X	
Make certain records available	X	
Ensure employees who are not fully vaccinated are 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)		X

Open Questions

- Smaller employer coverage?
- Boosters
- Interplay with other laws - continued evolution
- And of course - the legal challenges.

Key Resources

- ETS Summary: <https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf>
- Workers' Rights Summary: [Workers' Rights under the COVID-19 Vaccination and Testing ETS \(osha.gov\)](#)
- FAQs re ETS: <https://www.osha.gov/coronavirus/ets2/faqs>
- Mandatory Vaccination Policy: <https://www.osha.gov/sites/default/files/covid-19-ets2-sample-mandatory-vaccination-policy.docx>
- Vaccine or Test Policy: <https://www.osha.gov/sites/default/files/covid-19-ets2-sample-employee-choice-vaccination-policy.docx>
- Social Media Resources: [COVID-19 Vaccination and Testing ETS - Social Media Toolkit | Occupational Safety and Health Administration \(osha.gov\)](#)
- ETS Website: [COVID-19 Vaccination and Testing ETS | Occupational Safety and Health Administration \(osha.gov\)](#)
- CDC Key Things to Know About COVID-19 Vaccines: [Key Things to Know About COVID-19 Vaccines \(cdc.gov\)](#)
- EEOC Guidance: [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission \(eeoc.gov\)](#)