

White House Releases OSHA Emergency Standard on COVID Vaccination & Testing Requirements

A COVID-19 Communication from Questco - November 4, 2021

On Thursday, November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard (ETS) to minimize the risk of COVID-19 transmission in the workplace. The ETS establishes binding requirements to protect unvaccinated employees of large private employers (100 or more employees) from the risk of contracting COVID-19 in the workplace.

In summary, the ETS requires that covered employers:

- ***Get their employees fully vaccinated by January 4, 2022***
- ***Require unvaccinated employees to produce a negative test on a weekly basis***

After January 4, 2022, any employees who have not received the necessary vaccines will be required to produce a verified negative test to their employer on at least a weekly basis. Furthermore, unvaccinated employees are required to wear a face covering in the workplace.

What Does this Mean?

How to determine if you are a covered employer:

First, to determine whether you meet the 100-employee minimum requirement, employers must include all employees across all of their U.S. worksite locations regardless of where they perform their work, including any employees that are working from home. However, with respect to vaccination / weekly testing, the ETS requirements outlined only apply to those employees who work in the office at least part of the time around other individuals, and not to those employees who work exclusively from home.

It should be noted that the employee size test is based on the actual number of total employees at the individual employer level, including any franchises under common ownership. This also includes any independent contractors or temporary staff paid directly by the employer. Although you are part of a PEO that co-employs thousands of employees across our client base, only those employees directly controlled by the individual employer should be considered in determining whether you meet the 100-employee minimum requirement.

Covered Employer Requirements

- The employer must establish, implement, and enforce a written mandatory vaccination policy that includes:

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- The requirements of the vaccine;
 - The exemptions
 - How vaccine status should be collected;
 - Paid leave policy for getting the vaccine and recovering from any vaccination-related reactions
 - The COVID response plan for a positive case
 - Discipline for failing to follow the written vaccination policy
- The employer must require each vaccinated employee to provide acceptable proof of vaccination status, including whether they are fully or partially vaccinated. This proof must be maintained by the employer. The following list includes the acceptable documentation for proof of vaccination:
 - the record of immunization from a health care provider or pharmacy;
 - a copy of the U.S. COVID-19 Vaccination Record Card;
 - a copy of medical records documenting the vaccination;
 - a copy of immunization records from a public health, state, or tribal immunization information system; or
 - a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).
 - Require employees to provide prompt notice when they test positive for COVID-19 or receive a COVID-19 diagnosis. Employers must then remove the employee from the workplace, regardless of vaccination status; employers must not allow them to return to work until they meet required criteria.
 - Ensure each worker who is not fully vaccinated is tested for COVID-19 at least weekly (if the worker is in the workplace at least once a week) or within 7 days before returning to work (if the worker is away from the workplace for a week or longer).
 - Ensure that, in most circumstances, each employee who has not been fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes.

Employers are required to provide reasonable time to each employee during work hours for each of their primary vaccination dose(s), including up to four hours of paid time, at the employee's regular rate of pay. However, the employer is not required to provide paid leave to any employee due to absences related to a COVID-19 diagnosis or positive COVID-19 test result other than leave provisions included in the company's regular paid time off policy.

For employers who elect to provide the testing option, an employer must maintain a record of each test result and the records must be maintained in accordance with 29 CFR 1910.1020 as employee medical records. Importantly, the ETS does **NOT** require the employer to pay for the weekly testing except under certain state specific regulations nor does the employer have to pay the employee for the time required to have the testing performed.

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States with OSHA State Plans / local vaccination policies

Certain states enforce their own OSHA requirements. For those States with state-level requirements, they can develop their own standards within 30 days from the date this ETS was approved as long as they are equal to or more effective than the Federal OSHA standards. The ETS preempts and invalidates any State or local requirements that ban or limit an employer's authority to require vaccination, face covering, or testing. If a State wants to go beyond what the Federal law requires, it may do so. However, no State or local requirement may undercut the requirements of the ETS.

What's Next?

While we anticipate that there will be questions as to the legality of the large employer vaccine mandate and we will see various challenges filed across multiple states and jurisdictions, we recommend that our clients proceed with the expectation that they will need to meet the requirements of this ETS. This means that covered employers must comply with requirements within 30 days of publication (December 5, 2021) and must comply with vaccination/testing requirements within 60 days of publication (January 4, 2022). With respect to this timing, covered employers need to have their mandatory vaccination policy in place by December 5, 2021.

As you can imagine, this OSHA vaccination standard is very new and the specific details around implementation and compliance/regulation is still under development. Questco remains committed to ensuring that our clients are in compliance with all government mandated COVID-19 workplace requirements.

Given the importance of this recent development, **Questco will be hosting a client webinar that addresses the latest developments around the OSHA ETS on Vaccinations in the Workplace on Thursday, November 11, 2021.** A separate meeting invitation will be sent out early next week for this event. In the meantime, please reach out to your Client Success Manager with any immediate questions.

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