

OSHA EMERGENCY TEMPORARY STANDARD

What you need to know about OSHA'S new vaccine rule for large employers

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Information is educational and should not be taken as legal advice

TODAY'S PRESENTERS



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INTRO TO OSHA'S ETS

- Emergency Temporary Standard (“ETS”)
- Effective on Friday, November 5, 2021
- In effect *at least* six months
- Two key deadlines for compliance:
 - December 6, 2021 (all requirements)
 - January 4, 2022 (testing option only)

COVERED EMPLOYER

≥100 employees across all U.S. workplaces, including:

- Remote employees
- Employees who work away from workplace
- Part-time employees
- Union employees
- Temporary employees
- Seasonal employees
- Employees who work exclusively outdoors
- Minors

X Independent contractors *do not* count

COVERED EMPLOYER

What about...

- Franchises and franchisors?
- Staffing agencies?
- Multi-employer worksites?
- Federal contractors and subcontractors?
- Medicare/Medicaid Healthcare Employers?

COVERED EMPLOYEES

- All employees of covered employers, **except:**
 - Those “[w]ho do not report to a workplace where other individuals such as coworkers or customers are present”;
 - Employees who **work from home**, while they work from home;
 - Employees who work **exclusively outdoors**
- Oregon and local government employees
- United States Postal Service employees

EMPLOYER POLICY: TWO OPTIONS

1. Vaccination mandate for **all** employees, subject to potential accommodations for medical and religious reasons;
2. Employees can choose to either:
 - a. be fully vaccinated, **or**
 - b. submit regular COVID-19 testing *and* wear face coverings

***Partial mandatory
vaccination policy
OK!***

“FULLY VACCINATED”

- In a nutshell, two weeks *after* final dose (if two-dose vaccine) or single dose
- Must be an approved vaccine!
 - Approved or authorized for emergency use by the FDA;
 - Listed for emergency use by the World Health Organization (WHO); or
 - U.S. clinical trial, if employee gets actual vaccination (not placebo) with some additional requirements

“REGULAR” TESTING

- **Required for all employees who are not vaccinated by January 4**
 - Employees who have completed the entire primary vaccination by January 4 do not have to be tested, even if they have not yet completed the 2-week waiting period
- “Regular” depends on the employee’s attendance at the workplace: weekly *or* seven days prior to entering workplace
- ETS does ***not*** require employers to pay for costs of testing
- It is unsettled how this will play out in Oregon (stay tuned for Oregon OSHA rule.)
- If an employee does not provide the result of a COVID-19 test, the employer must keep the employee removed from the workplace until the employee provides a test result

WHAT COUNTS AS A TEST?

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

Antibody tests do not meet this definition

FACE COVERINGS

A covering that ***completely covers the nose and mouth*** of the wearer, ***excluding face shields***, which is made with two or more layers of a breathable fabric that is tightly woven, is secured to the wearer's head with ties, ear loops, or elastic bands that go behind the head, and is a solid piece of material without slits, exhalation valves, visible holes, or other openings in the material

FACE COVERINGS

- Unvaccinated employees must wear them in the workplace with minor exceptions (alone in a room with floor to ceilings windows and a closed door, eating and drinking, identification purposes in compliance with safety and security requirements.)
- ETS does not require face coverings for fully vaccinated employees
- But Oregon law currently does! Reminder:
 - As of August 13, 2021, face coverings are required indoors statewide
 - As of August 27, 2021, most public outdoor settings, including large outdoor events, where physical distancing is not possible. These mask mandates are in effect regardless of vaccination status

PAID TIME OFF

Under any policy:

- **Up to 4 hours of paid time** for *each* primary vaccination series dose
 - Includes travel time
 - Cannot be offset by any other leave that the employee has accrued, such as sick leave or vacation leave
 - Only if during work hours
- **“Reasonable” amount of paid sick leave to recover from any side effects** experienced (during scheduled work hours) following each primary vaccination series dose
 - Can require employee to use that paid sick leave when recovering from side effects experienced following a primary vaccination dose. If none available, must provide
 - Generally, can cap at 2 days for each dose

EMPLOYEE NOTIFICATION OF POSITIVE TEST AND REMOVAL

- Require employees to promptly notify of positive COVID-19 test or diagnosis
- Immediately remove infected employee from workplace
- To return to work, employee must:
 - Provide negative COVID-19 test,
 - Satisfy CDC's "Isolation Guidance," *or*
 - Receive a recommendation to return to work from a licensed healthcare provider

EMPLOYEE NOTIFICATION OF POSITIVE TEST AND REMOVAL

- **Exemption from testing:** No regular testing required for unvaccinated employees for 90 days after positive COVID-19 test or positive diagnosis by a licensed healthcare provider
 - Note: When the employee returns to work they must continue to wear a face covering
- The ETS does **not require paid time off** for removal period
- But Oregon law may! Check your policies

NOTICE TO EMPLOYEES

- Requirements of the OSHA rule and employer policies
- “Key Things to Know About COVID-19 Vaccines,” available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
- Anti-retaliation and anti-discrimination provisions of the OSH Act
- Criminal penalties for knowingly supply false statements or documentation under 18 USC 1001 and Section 17(g) of the OSH Act

RECORDKEEPING: COLLECTING AND CREATING DOCUMENTS



- **Policy:** should be distributed to employees; no need to give it to OSHA unless requested
- **Vaccination Records:** Employer must retain a digital or physical copy of acceptable documentation from each employee
- **Roster:** Maintain a roster of vaccinated/unvaccinated employees

WRITTEN POLICY CONTENTS

PART 1

All of the applicable requirements of the rule:

1. requirements for COVID-19 vaccination;
2. applicable exclusions from the written policy (e.g., medical contraindications, medical necessity requiring delay in vaccination, or reasonable accommodations for workers with disabilities and sincerely held religious beliefs) and procedure for notifying employer of an exclusion;
3. information on determining vaccination status and how this information will be collected;
4. paid time and sick leave for vaccination purposes;
5. notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace;
6. information to be provided to employees – e.g., how the employer is making that information available to employees;
7. and disciplinary action for employees who do not abide by the policy.

WRITTEN POLICY CONTENTS

PART 2

Other relevant information

- policy's effective date,
- who the policy applies to,
- deadlines (e.g., for submitting vaccination information, for getting vaccinated),
- and procedures for compliance and enforcement

WHAT COUNTS FOR A VACCINATION RECORD?



Oregonlive.com

- Immunization record from health care provider or pharmacy
- CDC vaccine card
- Medical records documenting vaccination
- Immunization records from public health, state, or tribal information system
- Any other official documentation

WHAT IF MY EMPLOYEE HAS LOST THEIR VACCINE CARD?

Employee attestation is a last resort

- attest to their vaccination status (fully vaccinated or partially vaccinated);
- attest that they have lost or are otherwise unable to produce proof required by the standard; and
- include the following language: “I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.”

RECORD KEEPING AND RETENTION

What records am I required to retain, and where do I keep them?

- Treat vaccination records and employee roster as employee medical records and store them in the confidential medical file
- Retain for as long as the rule is in effect

CONFIDENTIALITY: DISCLOSING RECORDS TO EMPLOYEES

What am I required or allowed to disclose to employees? Upon request, an employer must provide:

- Employee's own vaccination documentation and test results to employee or other authorized individuals;
- Information regarding the aggregate number of fully vaccinated employees and total number of employees at that workplace

CONFIDENTIALITY: DISCLOSING RECORDS TO OSHA

What records am I required to give to OSHA?

Within 4 hours:

- Written policy
- Aggregate numbers of fully vaccinated and total number of employees

By the end of the next business day:

- All other records required to be maintained

REPORTING FATALITIES AND HOSPITALIZATIONS

OSHA fact-sheet for reporting fatalities and hospitalizations:

<https://www.osha.gov/sites/default/files/publications/OSHA4129.pdf>

- Work-related COVID-19 hospitalizations must be reported within 24 hours
- Work-related COVID-19 fatalities must be reported within 8 hours

EXCLUSIONS

- Medical contraindication for vaccination
- Medical necessity requires a delay in vaccination
- Those entitled to a reasonable accommodation under civil rights laws

- Federal contractors and subcontractors are subject to Executive Order 14042 and exempt from the ETS
- Medicare and Medicaid-certified employers are subject to the Centers for Medicare & Medicaid Services Rule

ACCOMMODATIONS: DISABILITY



3playmedia.com

Americans with Disabilities Act

- Duty to engage in the interactive process
- May ask for medical verification
- Undue hardship: significant difficulty and expense
- Direct threat

ACCOMMODATIONS: RELIGIOUS BELIEF

Title VII of the 1964 Civil Rights Act

- May seek additional information if you have an *objective basis* for doubting sincerity or religious nature of the belief, practice, or observance
- Undue hardship



[Wikipedia.com](https://en.wikipedia.org/wiki/Religion)

EFFECT OF STATE PLANS

- 21 states + Puerto Rico have their own OSHA programs, including Oregon, Washington, and California
- States have 30 days to complete their own rules
- Must be “at least as effective” as the OSHA standard, but may be more protective of employees

ENFORCEMENT

- In states that have their own plans, the state OSHA will enforce
- Federal OSHA will enforce everywhere else
- Fines are possible, with willful violations seeing fines up to \$136,532

LEGAL CHALLENGES

What to expect in the courts

LAWSUITS AGAINST OSHA

- Lawsuits filed in the 5th, 6th, 7th, 8th, 11th, and D.C. Circuits
- Plaintiffs include 26 states, the Republican National Committee, and a variety of businesses
- Temporary stay issued in the 5th Circuit
- The cases will be consolidated in a single Circuit, chosen at random
- May be heading to the U.S. Supreme Court

OREGON DECISIONS

Fraternal Order of Police v. Brown, Jefferson County Circuit Court

- Challenge to vaccine mandate for Oregon executive branch employees.

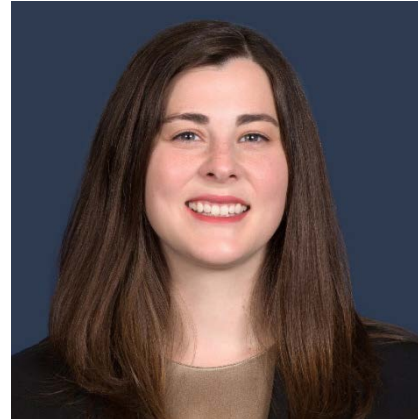
Johnson v. Brown, District of Oregon

- Challenge to vaccine mandate for health care and education employees

THANK YOU!



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