



DISCLAIMER:

This Guide is intended to provide general information about the OSHA mandate for COVID-19 vaccination and testing. It should not be relied upon as legal advice. Please consult an attorney if you have legal questions or concerns. UCON will make every effort to update this information as quickly as possible when changes occur.

Background

Federal OSHA filed a notice with the Federal Register on November 4, 2021, announcing a new Emergency Temporary Standard (ETS) to protect more than 84 million workers from the spread of coronavirus on the job. Under the standard, covered employers must develop, implement and enforce a mandatory COVID-19 vaccination policy unless they adopt a policy requiring employees to choose to either be vaccinated or undergo regular COVID-19 testing and wear a face covering at work. The Notice was published Friday, November 5, 2021.

California employers should note that Federal OSHA’s vaccine ETS does NOT apply to all 100+ employee companies in California, unless such contractors are working on (1) an exclusively federally funded project and/or (2) the federal agency overseeing the federal project applies that mandate. ***A mandatory vaccine ETS will only take effect statewide once Cal/OSHA adopts the current or an amended version of the Federal OSHA ETS.***

Coverage

The ETS covers employers with 100 or more employees – firm or company-wide – and provides options for compliance. The ETS also requires employers to provide paid time to workers to get vaccinated and to allow for paid leave to recover from any side effects.

There is a provision in the ETS that states **that employees who work exclusively outdoors are NOT covered.** The [Frequently Asked Questions](#) page on this issue states:

- Employees must work outdoors on all days (workers who work indoors on some days and outdoors on other days would not be exempt from the ETS).
- The employee must not routinely occupy vehicles with other employees as part of work duties (i.e., do not drive to worksites together in a company vehicle)
- The employee works outdoors for the duration of every workday except for *de minimis* use of indoor space where other individuals may be present – such as a multi-stall bathroom or an administrative office – as long as the time spent indoors is brief or occurs exclusively in the employee’s home (e.g., a lunch break)
- The employee’s work must truly occur “outdoors,” which does not include buildings under construction where substantial portions of the structure are in place, such as walls and ceiling elements that would impede the natural flow of fresh air at the worksite.

ETS Requirements

The ETS requires that employers:

- Determine the vaccination status of each employee, obtain acceptable proof of vaccination status from vaccinated employees and maintain records and a roster of each employee's vaccination status.
- 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 the required criteria.
- Ensure each worker that 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.

Payment for Testing and Face Coverings

The ETS does not require employers to pay for testing. However, employers may be required to pay for testing to comply with other laws (such as California employment law), regulations, collective bargaining agreements, or other collectively negotiated agreements. Employers are also not required to pay for face coverings.

ETS Effective Date

The ETS is effective immediately upon its publication in the Federal Register. Employers must comply with most requirements within 30 days of publication and with testing requirements within 60 days of publication (on/about January 4, 2022).

ETS as Basis for Final Standard

The ETS also serves as a proposal for normal rulemaking for a final standard. OSHA is seeking comment on all aspects of the ETS and whether the agency should adopt it as a final standard.

What about Legal Challenges?

The U.S. Court of Appeals for the Fifth Circuit has issued a stay on implementation of the ETS. Since lawsuits have been filed in multiple districts, a lottery will be held to determine where the case will be heard. Whether the stay is upheld or overturned is still uncertain. Employers will need to evaluate their risk level for proceeding or waiting. This stay does not impact the Federal Contractor vaccine mandate, and Cal/OSHA could decide on additional rules regardless. [Read this article](#) for more analysis.

What about California Employers?

On November 5, 2021, inquiries were made with the Deputy Chief Cal/OSHA and the Executive Officer of the Cal/OSHA Standards Board as to what action the state will take and the timeline for such action. The Cal/OSHA Standards Board must adopt the ETS or "at least as effective as" measures within 15-30 days (30 days would be on or about December 5, 2021). The Board is scheduled to meet on November 18 to determine how to effectively align the OSHA ETS with the current Cal/OSHA ETS.

Advocacy Points to be Made Before the Cal/OSHA Standards Board

- Maintain the exclusion from the requirements of the ETS for employees who work exclusively outdoors.
- Keep the employer coverage at 100 or more employees.
- Keep the testing option.
- Mirror the federal position on providing employees reasonable time, including up to four hours of paid time, to receive each primary vaccination dose, and reasonable sick leave to recover from any side effects experienced following each primary vaccination dose.

Resources for Employers

The federal ETS and related materials can be accessed at www.osha.gov.

Of particular interest are:

- [OSHA National News Release](#)
- [COVID-19 Vaccination and Testing ETS Fact Sheet](#)
- [COVID-19 Vaccination and Testing ETS Summary](#)
- [Federal ETS Webinar](#)
- [Frequently Asked Questions](#)

The full Federal Register Notice can be reviewed [here](#).

UCON held a webinar on November 11 – materials are available here, and another webinar will be held once Cal/OSHA rules are issued.

- [Webinar Slides](#)
- [Webinar Recording](#)