

## COVID-19 Vaccination Mandates FAQs

September 2021

*On September 9<sup>th</sup> President Biden announced new broad efforts to further combat the COVID-19 Pandemic. The announcements are part of the administration's six-pronged national strategy ([Link](#)). The most notable tactic in the announcement is the forthcoming Emergency Temporary Standard (ETS) that OSHA has been instructed to promulgate, which mandates vaccination or weekly testing for employers with 100 or more employees. In addition to the ETS, other means of mandating vaccines or testing for government employees and contractors have been announced along with mandates for healthcare providers which participate in Medicare and Medicaid programs. The new mandates through executive order and OSHA regulatory action build on the efforts many of the nations largest employers have undertaken to increase vaccination rates within the workforce.*

### **What authority does OSHA have to mandate vaccines?**

*OSHA has broad authority to develop and implement workplace safety and health requirements for all private workplaces. Part of OSHA's authority includes the provisions for developing Emergency Temporary Standards (ETS) which do not have the same development and adoption timelines or processes as other OSHA standards. An ETS can be instituted if there is a "grave danger" to employees and no other OSHA standard addresses the specific danger posed to employees. An ETS is immediately enforceable by OSHA and violations can lead to citations and financial penalties of up to \$14,000 per violation.*

### **What businesses are impacted by the ETS?**

*All businesses that are covered by the OSH Act will need to comply with the ETS. The ETS text will provide further detail regarding which industries and employers must comply with the regulation and the extent of compliance activities required. Businesses that do not typically interact with OSHA (office-based employers) will need to comply with the ETS.*

### **What is the deadline for complying with the ETS?**

*The final version of the ETS will be issued in the next several weeks. Once the ETS is issued, compliance will be compulsory. The ETS may provide guidance on compliance implementation timelines, but employers should act now so that they can achieve compliance as soon as feasible. It is likely that the ETS will be effective mid-October or early November; an implementation date in January 2022 is a possibility but given the nature of the announcement this may be unrealistic. The ETS will remain in effect for six months.*

### **What are employers in states with State OSH programs required to do?**

*Employers with operations that in whole or in part are typically regulated by a state sponsored OSH plan will need to comply with the federal ETS. State OSHA plans can create their own ETS provided it is at least as stringent as the federal ETS within 30 days. Several state plans have already implemented COVID-19 related standards, however, if those standards do not require vaccination and/or testing, they will have to be updated.*

# HENDERSON BROTHERS UPDATE

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**How will OSHA require employers to count employees, when determining employer size.**

*OSHA has not yet released details on this topic. It is expected however, that OSHA will likely require employers to count total employees regardless of employee location. Prudent business managers should plan on a worst-case scenario and count all employees on payroll regardless of location or position within a joint employer relationship.*

**What type of recordkeeping activity is required?**

*The exact recordkeeping details for the ETS are currently unknown. Records will likely mirror the requirements of similar health related standards such as Bloodborne Pathogens. Many health-related records must be kept on file during active employment and then for an additional 30 years post-employment. Human Resource departments and heads should plan on developing a COVID-19 and ETS specific filing system. The employee and company compliance records in these files should be maintained in accordance with best practices for confidential recordkeeping. Develop a plan for OSHA compliance auditing of these records.*

**Which Vaccines, and doses will be considered as part of the ETS?**

*As of now there are no specifics on which vaccines or the number of doses or boosters that will be required for compliance with the ETS. The FDA fully authorized Pfizer-BioNTech vaccine will certainly be acceptable as part of the ETS and most likely the Moderna and Johnson & Johnson vaccines under emergency use authorization will be similarly acceptable. Full compliance with the ETS will likely require the full dosage/course of any accepted vaccination and will likely also include required boosters at the appropriate time interval. Booster vaccination timing may exceed the six-month limit on the ETS. Vaccines not authorized for use in the United States such as the AstraZeneca vaccine may be unacceptable and could create compliance challenges for employers with workers that have been vaccinated in other nations.*

**What type of testing will be required?**

*A specific testing protocol has not yet been released. Testing will likely rely on professionally administered tests rather than “at-home” testing kits. Employers utilizing any form of testing for compliance should be aware of the possible delays in receiving test results and the implications of these delays on workplace admittance and compliance. OSHA regulations typically require employers to pay for all health and safety related expenses directly or through reimbursement. Health insurance is unlikely to pay for weekly ETS compliance testing. Employees will likely have to be paid for their time during any testing procedure as the testing arises out of workplace and the use of PTO for testing may be acceptable to OSHA.*

**Will the ETS face legal challenges?**

*The short answer is, yes, it will likely face legal challenges as opponents of the ETS have already indicated their intention to file lawsuits seeking to invalidate the standard. OSHA will need to establish the existence of a “grave danger” to workers in order to successfully defend the ETS. We do not currently know if courts will block enforcement of the emergency rule while the arguments are considered or if the ETS will be permitted to remain in effect during the challenges. However, even with the expected challenges, employers are advised to create a plan for compliance as it is unlikely that all aspects of the ETS will be invalidated via the courts.*

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