January 6, 2022

Guidance on the COVID-19 Emergency Temporary Standard as Required by the Occupational Safety and Health Administration (OSHA)

Background:

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard (ETS) entitled “COVID-19 Vaccination and Testing; Emergency Temporary Standard” (hereinafter referred to as the ETS). The ETS requires employers with 100 or more employees to adopt a policy within 30 days of the regulation, requiring employees to be either fully vaccinated or to be subject to weekly COVID testing. The ETS also went into effect on November 5, 2021, upon its publication in the Federal Register.

On November 12, 2021, a Federal Court of Appeals issued a nationwide order enjoining OSHA from enforcing the ETS. On December 17, 2021, a second Federal Court of Appeals lifted the injunction, thus allowing OSHA to reinstitute its ETS.

OSHA has since issued guidance indicating compliance dates. This guidance addresses the applicability of this rule and ETS within the OCFS service systems. Please note that this guidance is based upon current information and is subject to change. Employers should conduct their own review of the OSHA ETS: https://www.osha.gov/coronavirus/ets2

A. Applicability to Employers:

The OSHA ETS is applicable to employers who have 100 employees or more throughout the organization, even if those employees report to different facilities or locations. Part-time employees, seasonal employees who are employed at the time the ETS goes into effect, and employees who fully telecommute are covered in the count of employees. Please see OSHA’s website for additional information about applicability.

B. Applicability to Staff of Covered Entities:

The ETS applies to staff at the covered entities, including unionized employees.

The ETS mandate itself does not apply to the following employees/staff (although these staff members should be included in the count of employees of the organization):

- Independent Contractors;
- Staff who work exclusively outside;
- Staff who telecommute full-time;
• Staff who do not report to a workplace where other co-workers or members of the public are present; and
• Those who had received a reasonable accommodation under applicable federal standards (e.g., ADA or Title VII).

C. Timing of Compliance:

By January 10, 2022 covered employers must either (a) develop, implement, and enforce a mandatory COVID-19 vaccination policy or (b) adopt a policy requiring employees to either be vaccinated or undergo regular COVID-19 testing and wear a face covering at work. Presently, all employees must wear a face covering at work, regardless of vaccination status. Employers may also develop a bifurcated policy requiring employees in some sectors to be vaccinated but requiring other employees to be vaccinated or undergo weekly testing.

This policy must require employees be fully vaccinated by February 9, 2022 or be subject to weekly COVID-19 testing.

D. Proof of Vaccination Status:

As part of their vaccination policy, covered employers must track employee vaccination status and keep such records confidential. Examples of acceptable forms of proof of vaccination include:

• CDC COVID-19 vaccination record card (or a legible photo of the card);
• Documentation of vaccination from a health care provider or electronic health record;
• State immunization information system record, including the Excelsior Pass; or
• Employee attestation confirming their fully vaccinated status, with all available documentation, under acknowledgment of criminal penalty for false statements.

Employers must provide non-exempt employees up to four (4) hours of paid time at the employee’s regular rate of pay to receive the vaccine during work hours. The employer is not required to provide paid time off if the employee receives the vaccine during non-work hours. Employers must also provide reasonable time off to allow an employee to recover from the effects of the vaccine and may require the employee to use accrued sick leave for this purpose. Note that booster shots are not required by this ETS.

Employers must have documentation of their employees’ vaccination status by January 10, 2022.

Under the ETS, employees who have only received the first dose of a COVID-19 vaccine in a two-dose series are not “fully vaccinated” and must be subject to the testing and face covering requirements described below.

E. Testing Option:

Employers may allow all or some employees to opt-out of mandatory vaccines by receiving weekly COVID-19 testing and wearing a permissible face covering while at work. Permissible tests include viral tests, commercially available PCR and “rapid” tests, both nucleic acid amplification tests and antigen tests. Antibody tests are not acceptable. All approved tests must be administered in accordance with the FDA-authorized instructions. Tests that are both self-administered and self-read by the employee are not permissible. Approved antigen tests can be self-administered but not self-read by the employee. Over the counter and approved self-administered tests can be used through the use of a proctored test that is supervised by an authorized telehealth provider or proctored by the employer. The ETS does not require the employer to purchase the tests.

Employees must report the results of their tests within 7 days. Employees that have not reported their results by the 7th day of taking the test must be removed from the worksite.
Employers must maintain copies of their employees' test results and these records must be kept confidential. Employees that work remotely must be tested within 7 days if the employee returns to the workplace and provide documentation of the result of the test before the employee returns. Employees who are subjected to weekly testing must wear appropriate face coverings while at work as set forth in the provider's policy. Employees that have a positive COVID-19 test or diagnosis must be immediately removed from the workplace and may not return until they:
  o Have a negative COVID-19 nucleic acid amplification test after receiving a positive result from a COVID-19 antigen test;
  o Have undergone the required quarantine period; or
  o Receive a recommendation from a licensed health care provider that they can return to work.

Employers’ policies must require employees to undergo weekly testing by **February 9, 2022**.

**F. Procedures:**

By **January 10, 2022**, employers must provide a copy of their vaccination policy to their employees. By the same date, employers must also provide the employees information about the efficacy of the COVID-19 vaccination; information about how to report a positive COVID-19 test; information about OSHA’s anti-retaliation requirements in 29 CFR 1904.35(b)(1)(iv); and prohibitions of 18 USC 1001 and Section 17(g) of the OSH Act which provides for criminal penalties for false information and any other information required by 29 CFR § 1910.501.

Employers must allow for reasonable accommodations under applicable Federal Law.

**G. Reporting Requirements:**

The ETS requires providers to report to OSHA any work related COVID-19 death within 8 hours and any work-related COVID-19 hospitalizations within 24 hours. Employers should use the criteria set forth in OSHA regulation 29 CFR § 1904.5 to determine whether a COVID-19 illness is work-related. See, [https://www.osha.gov/laws-regs/regulations/standardnumber/1904/1904.5](https://www.osha.gov/laws-regs/regulations/standardnumber/1904/1904.5).

**H. Enforcement:**

Employers who violate the ETS may be subject to OSHA fines and penalties.

For additional questions, please note that OSHA has also published a set of FAQs for the ETS here: [https://www.osha.gov/coronavirus/ets2/faqs](https://www.osha.gov/coronavirus/ets2/faqs).

A summary of the ETS is available at [https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf](https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf)