



**AmericanCoatings**  
ASSOCIATION<sup>SM</sup>

November 10, 2021

### **Summary of OSHA Vaccination and Testing Emergency Temporary Standard**

[OSHA Vaccination and Testing Emergency Temporary Standard](#) (ETS) requires employers to implement a policy for employee vaccination, verification of employee vaccination status, face coverings and testing. OSHA published the standard on November 5, 2021, with most requirements scheduled to take effect on December 6, 2021. However, the Fifth Circuit Federal Court of Appeals has issued a stay of enforcement over concerns that OSHA's authority to regulate "toxic material and harmful agents" under the OSH Act may not extend to biological hazards such as COVID-19 and other related issues. The matter is expected to go before the U.S. Supreme Court for expedited review. Until further determination, the ETS is not effective.

The standard would preempt conflicting state laws and would apply to employers with 100 or more employees. OSHA provides explanation of the 100 employee threshold for companies with multiple locations:

For a single corporate entity with multiple locations, all employees at all locations are counted for purposes of the 100-employee threshold for coverage under this ETS. In a traditional franchisor-franchisee relationship in which each franchise location is independently owned and operated, the franchisor and franchisees would be separate entities for coverage purposes, such that the franchisor would only count "corporate" employees, and each franchisee would only count employees of that individual franchise. In other situations, two or more related entities may be regarded as a single employer for OSH Act purposes if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted.

(From page 61513 of the rule: [85 Fed. Reg. 212 61402, 61513 \(Nov. 5, 2021\)](#))

Section I of the summary below provides an overview and checklist of ETS requirements. Section II provides a summary of issues OSHA identifies for further comment. OSHA will proceed with accepting comment, although the rule is currently being litigated, and no part of the rule will take effect until the matter is resolved. Comment must be submitted by December 6, 2021.

#### **I. OSHA Requirements in the ETS**

##### **Vaccination policy**

- Employer must implement a written mandatory vaccination policy, requiring vaccination for all on-site employees or implement a regular testing program while following an on-site safety protocol, including face coverings. The employer may need to accommodate employees that cannot comply with policy due to a disability, as recognized under the *Americans with Disabilities Act*. Employers cannot require vaccination where an employee cannot take the vaccine due to a medical necessity, disability or sincerely held religious belief.
- Employer must determine the vaccination status of all employees. Acceptable documentation is:
  - Record of immunization from a health care provider.
  - Copy of vaccination card.
  - Copy of medical records or immunization records documenting vaccination.
  - Other official documentation identifying vaccine, administering health care provider and date of vaccination.

In lieu of above documentation, an employee may certify vaccination status. See 29 CFR 1910.501(d) for certification requirements.

- Employer must maintain employee proof of vaccination status, treating records as confidential medical information, without disclosing except under limited circumstances, upon request by the agency or an employee inquiring about her or his status. For additional information on maintaining records, see [29 CFR 1910.20](#), applicable to records collected under the ETS. OSHA notes that record retention requirements of 29 CFR 1910.20(d)(1)(i) will not apply. Instead, records must be maintained and preserved while the ETS is in effect.
- Employer must provide up to four hours of paid time, including travel time, for vaccination of employees.
- Employer must provide a reasonable amount of paid sick leave for recovery from any symptoms caused by vaccination.

### **Testing in Lieu of Vaccination**

- Any unvaccinated employees must provide documentation of COVID-19 test results taken within 7 days prior to entering the workplace. In effect, unvaccinated employees that regularly enter the workplace must be tested weekly. The ETS does not require employers to pay testing costs, but it does not preclude such costs when required by other laws.
- An employer must maintain test results as confidential medical records.
- An employer must not allow untested or unvaccinated employees to enter a workplace where other employees are present.
- Following a positive COVID-19 test result, an employer must *not* require the employee to take a COVID-19 test for a 90-day period.

### **Protocol for Positive COVID-19 Test Results**

- Under the ETS, an employee must promptly notify its employer upon receiving a positive test result. The employer must require such notification.
- The employer must immediately remove the employee from the workplace.
- An employee may return to work upon one of the following:

- The employee has a negative result with a COVID-19 nucleic acid amplification test (NAAT) after a positive result on a COVID-19 antigen test.
- The employee meets CDC’s return to work criteria in CDC’s “Isolation Guidance.”
- A licensed health care provider recommends the employee return to work.
- The ETS does not require employers provide paid time for removal of an employee with a positive COVID-19 test.

**Face Coverings**

- Employees that are not vaccinated must wear face coverings in the workplace, except:
  - When the employee is alone in a room with floor to ceiling walls and a closed door;
  - When eating or drinking, for a limited time;
  - When required for employee identification;
  - When the employee is wearing a respirator or facemask;
  - When face coverings are not feasible or cause a greater hazard due to the type of work;
- A face covering must fully cover the employee’s nose and mouth.
- An employer cannot prevent an employee from wearing a face covering, except if the employer can show that it would cause a hazard that could result in serious injury or death.
- An employee may wear a respirator instead of a face covering, even when not required.
- An employer cannot prevent visitors from wearing face coverings.

**Information to Employees**

- Employers must provide employees with the CDC publication, [Key Things to Know About COVID-19 Vaccines](#). Employers must accommodate for language spoken and literacy level of each employee.
- Employers must inform employees of employer’s policies implementing the ETS and related requirements, in a language and literacy level each employee can understand.

**Reporting requirement**

An employer must report the following to OSHA:

- Each work-related COVID-19 fatality within 8 hours of the employer learning of such fatality.
- Each work-related COVID-19 in-patient hospitalization within 24 hours of learning about the hospitalization.
- Reporting process is further detailed at 29 CFR Part 1904.39.

**Availability of Records**

An employer must make records available for examination and copying as described below:

- An employer must make individual COVID-19 vaccination documentation of an employee that requests it, available to that employee only or an authorized representative, by the next business day after the request.

- An employer must make the aggregated number of vaccinated employees and the total number of employees available upon request by the next business day.
- Within four business hours of a request from the Assistant Secretary (Department of Labor), an employer must provide its written vaccination policy as required by this ETS and the aggregated number of vaccinated employees with total number of employees.
- An employer must provide any other requested documentation, required by the ETS, to the Assistant Secretary by the end of the next business day.

## II. Issues for Comment to OSHA

OSHA identified the following issues for comment:

- Does your company have any experience or data that would inform OSHA’s estimates in its economic feasibility analysis or any of the assumptions or estimates used in OSHA’s identification of the number of hospitalizations prevented and lives saved from its health impacts analysis?
- Would employers with less than 100 employees have sufficient administrative systems in place to implement a COVID-19 vaccination and/or testing program as described in the ETS?
- If the rule is finalized, OSHA would issue the rule under a finding that COVID-19 poses a “grave danger” to employees, as required under Section 6(c) of the OSHA Act, justifying implementation of an ETS. A “grave danger” notes a higher degree of risk than a finding of “significant risk” under Section 6(b) of the OSHA Act. How should OSHA modify the standard for a finding of “significant risk” vs. “grave danger?”
- OSHA seeks additional information regarding implementation of an exception from vaccination, testing and face mask requirements for employees that have been infected with COVID-19. OSHA seeks information about reinfection, reductions in immunity over time, verification of immunity, etc.
- Should OSHA require employers mandate all employees be vaccinated with no alternative compliance methods (e.g. testing)? OSHA seeks detailed comments on implementation especially from companies that have implemented such programs.
- OSHA seeks information about employer testing and removal practices and policies.
- Should OSHA require the use of face covering as specified in ASTM F3502-21?
- Has your company implemented other methods of workplace controls against infection, including for example, distancing, barriers, ventilation and sanitation, etc.? If so, please provide information about efficacy, including information about any measures determined as ineffective.
- OSHA seeks information about any additional educational materials distributed to employees related to the benefits of vaccination.

For additional information, please contact:

Riaz Zaman  
 Sr. Counsel, Government Affairs  
 American Coatings Association  
 901 New York Ave., Ste. 301  
 Washington, DC 22101

Telephone: 202-719-3175  
E-mail: rzaman@paint.org