

# Get Ready: Mandatory Vaccination Is Here for Large Employers

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At long last, the United States Department of Labor's Occupational Safety and Health Administration (OSHA) has released its emergency temporary standard (ETS) requiring employers with 100 or more employees to take certain measures to protect against the spread of COVID-19 in the workplace. In regulations that total close to 500 pages, OSHA has spelled out details on a range of requirements in this deeply anticipated rule.

If you are a private-sector employer with 100 or more employees (referred to in this alert as an "Impacted Employer"), here is an overview of what you need to know:

- **General Overview and Deadline for Implementation.**  
Impacted Employers must issue a written policy by December 5, 2022, that either mandates vaccination for all employees (subject to religious and medical exemptions) or alternatively offers unvaccinated employees the choice to be tested for COVID-19 weekly and wear masks. If an unvaccinated employee does not provide a negative test within the required time frame, the employer must remove that employee from the workplace. All employees who test positive for COVID-19 must promptly notify the employer of the positive test result and must leave the workplace.
- **Who Qualifies as an Employee for the 100 Threshold?**  
All workers across the U.S. are considered employees, including employees who work part time, are minors, or who are already vaccinated. Independent contractors are not considered employees.
- **Who Is Excused From Mandatory Vaccination?**  
Employees who do not report to a workplace where other individuals are present or who telework from home are exempt from

mandatory vaccination. Employees who perform work exclusively outdoors are also exempt.

Employees (1) for whom a vaccine is medically contraindicated or a medical necessity requires vaccination delay; or (2) who require an accommodation due to a disability or sincerely held religious belief that conflicts with the requirement, are in each case exempt from mandatory vaccination. These employees, however, must adhere to the alternative weekly testing requirement.

- **Who Pays for Vaccination Time?**  
Impacted Employers must provide up to four hours of paid time off for employees to get vaccinated and must pay for any sick leave employees need to recover from vaccine side effects. Impacted Employers are not required to pay for other costs associated with vaccination, such as transportation to and from the vaccination site.
- **Who Pays for Testing and Testing Time?**  
Under the OSHA ETS, Impacted Employers are not required to provide or pay for any costs associated with screening or diagnostic testing and/or the time spent being tested. However, employers will still need to be mindful under the Fair Labor Standards Act and state wage and hour laws about the time that nonexempt employees spend being tested, and be mindful of laws in states like California and Illinois that require employers to reimburse employees for their business expenses. It is anticipated in those states that Impacted Employers would still need to pay for COVID-19 testing.
- **Masks.**  
Masks are mandatory for all unvaccinated employees, except when they are alone in a room with the door closed, when eating or drinking, when being identified by security

personnel, when wearing respirators (employees may opt to wear respirators instead of masks), or when wearing a face mask is infeasible or causes greater hazard. Masks continue to be optional for vaccinated employees, except where required under certain local ordinances.

- **Record-Keeping and Reporting Requirements.** Record-keeping requirements begin on December 5, 2021. Impacted Employers must maintain records with each employee's vaccination status and proof of vaccination. Those Impacted Employers that permit the alternative of weekly COVID-19 testing must maintain records of each employee's weekly COVID-19 test results. All records are confidential medical records and may only be disclosed as required by the ETS or by federal law. These records must be maintained for as long as the ETS is in effect, which is currently anticipated to be six months.
- **What Vaccination Documentation Is Required?** Vaccinated employees must provide one of the following to their employer: (1) a vaccination record from their health care provider or pharmacy; (2) a COVID-19 vaccination card; (3) medical records showing vaccination; (4) a vaccination record from a public health, state, or tribal immunization information system; or (5) a signed and dated employee attestation

that states that the employee is vaccinated but lost the vaccination documentation and that confirms whether the employee is partially or fully vaccinated. The attestation must contain specific legal language that the employee verifies the information is true and accurate.

- **If I Am an Impacted Employer, What Do I Need to Do?**

Impacted Employers must provide their employees with information about the ETS and their company's policy by December 5, 2021. The mandatory testing requirement for unvaccinated employees begins January 4, 2022.

As noted, the ETS is close to 500 pages and the rules are complex. The summary above does not address every aspect of the ETS and therefore you should consult with legal counsel to ensure full compliance in all respects. Lowenstein Sandler's Employment Counseling & Litigation group is ready to help you develop your vaccination policy and counsel you through the myriad legal issues brought about by the COVID-19 pandemic.

***To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/ COVID-19: Facts, Insights & Resources page of our website by clicking [here](#).***

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