

# Employers Must Ensure Employees are Vaccinated or Tested: Addressing These Challenges Practically and Legally

November 8, 2021

# Speakers

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# President Biden's COVID-19 Action Plan

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- September 9, 2021 Announcement
- Six-pronged approach
  1. **Vaccinate the unvaccinated**
  2. **Protect the vaccinated**
  3. Keeping schools open
  4. Increasing testing and requiring masking
  5. Protecting economic recovery
  6. Improving care for those with COVID-19



# Vaccinate the Unvaccinated: Large Employers

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- September 9: Announcement that the Department of Labor's Occupational Safety and Health Administration (OSHA) will develop a rule to require all employers with 100 or more employees to ensure the workforce is either:
  - Fully vaccinated, or
  - Produces a negative test result on at least a weekly basis before coming to work
- OSHA to issue an Emergency Temporary Standard implementing this requirement



# Authority of OSHA to Issue Emergency Temporary Standard

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Establish minimum vaccination, vaccination verification, face covering, and testing requirements to address grave danger of COVID-19 in the workplace

To preempt inconsistent state and local requirements relating to these issues

To override state and local requirements that ban or limit employers' authority to require vaccination, face covering, or testing

Does not supplant stricter state or local rules, terms of individually negotiated agreements, or collective bargaining agreements

# The Emergency Temporary Standard (“ETS” or “Interim Rule”)

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## Covered employers

- Businesses with 100 or more employees working in the U.S.
- Deemed not to be administratively burdensome at that size, also aimed at locations with greatest risk of virus transmission
  - Includes part-time employees
  - Includes fully remote workers (as to coverage only)
  - Excludes independent contractors
  - Count already-vaccinated and unvaccinated workers when determining if ETS applies
  - Fluctuating headcount





# Special Coverage Issues

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## **Affiliates:**

- May require aggregating affiliates if they handle safety matters as one company

## **Staffing companies**

- Staffing company/payroll employer to ensure vaccination status.
- If the host employer also has 100 or more employees, it must ensure its workforce is compliant with the Interim Rule.
- General contractors and subcontractors in construction
- ETS does not apply to employers receiving Medicare/Medicaid funding or federal contractors subject to Executive Order
- ETS does not apply to those working only at home, never interacting with customers or coworkers, or those who work exclusively outdoors

# Vaccination Option

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- Employees of covered employers must be “fully vaccinated” by January 4, 2022 (but recommended “as quickly as possible”)
- *Fully vaccinated*: two weeks have passed since administration of (i) single-dose (e.g., Johnson & Johnson) vaccine, or (ii) second dose of two-dose (e.g., Pfizer, Moderna) vaccine
  - May be vaccinated with any vaccine approved, authorized, or EUA by FDA; listed for emergency use by WHO; or administered as part of clinical trial at US site if confirmed to be injected with active, independently confirmed efficacious vaccine candidate
  - Two-dose series can be from different manufacturers if both FDA- or WHO-approved or authorized
- *Fully vaccinated* refers to primary course of vaccination; booster shots not addressed



# Vaccination Verification

Employer must determine vaccination status of each employee and require each vaccinated employee to provide proof of vaccination status.



## Acceptable Proof

(i) Record of immunization from HCP/pharmacy

(ii) Copy of COVID-19 vaccination record card;

(iii) Copy of medical records documenting vaccination

(iv) Copy of immunization records from public health, state, or tribal immunization information system

(v) Copy of other official documentation with type of vaccine, date(s) of administration, and name of administering HCP or clinic site administering vaccine

(vi) Signed, dated statement under penalty of perjury if proof of vaccination is lost

# Records and Roster Requirement

- Employer must maintain a record of each employee's vaccination status with proof of vaccination for each employee who is fully or partially vaccinated.
  - Eyeballing proof of vaccination electronically not sufficient
- Employer must maintain roster of each employee's vaccination status
- Records and roster constitute confidential employee medical records
- Retention applicable for duration of ETS applicability



# Supporting Vaccination

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- Employers must support COVID-19 vaccination by:
  - Providing up to 4 hours paid time, including travel time, at regular rate of pay, to each employee for each of their primary vaccination dose(s), including travel time
  - Providing reasonable time and paid sick leave to recover from side effects following any primary vaccination dose to each employee for each dose
    - “Reasonable time” for side effects not defined, but employers may set a “reasonable cap”
    - Employers may require use of accrued paid sick time or PTO (if time off is not allocated to sick or vacation) for this purpose, but not require use of dedicated vacation time
    - If no sick leave is available, employer must provide it
    - Cannot require employees to “go negative” on sick leave for this purpose
  - No requirement to retroactively award paid sick leave to previously vaccinated employees

# Testing Alternative

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- Anyone failing to provide acceptable proof of full vaccination by January 4, 2022 deemed not fully vaccinated and subject to weekly testing
  - Employees who received their second dose but not through the 2-week waiting period by Jan 4 do not need to be tested
- Employees reporting at least once every 7 days to a workplace where other individuals are present (e.g., coworkers or customers) must be tested for COVID-19 at least once every 7 days and provide negative test result documentation no later than the 7<sup>th</sup> day following the date on which the employee last provided a test result
- Employees who do not report to a covered workplace at least weekly but intend to report to a workplace with others must be tested for COVID-19 within 7 days prior to returning to the workplace and provide documentation of that test result upon return to the workplace
- If employee fails to produce negative COVID-19 test result as and when required, “the employer must keep that employee removed from the workplace until the employee provides a test result”. Employees must disclose positive test result promptly and be kept out of workplace until specific requirements are met
- Recordkeeping requirements apply for duration of ETS applicability

# Paying for Testing

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- OSHA comment to testing requirement states that the ETS itself does not require employer to pay for any costs associated with testing, however...
  - “Employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements”
  - Employer may elect to pay for costs of testing even if not required
- Only certain types permissible:
  - (i) Must be cleared, approved, or authorized (incl. EUA) by FDA to detect SARS-CoV-2 virus
  - (ii) administered in accordance with authorized instructions; and
  - (iii) not both self-administered and self-read



# Face Coverings Required

- Beginning **December 5, 2021**, employers must ensure employees who are not fully vaccinated wear a face covering when indoors or when occupying a vehicle with another person for work purposes
- “Face covering” must completely cover nose and mouth; be made of 2 or more layers of tightly woven, breathable fabric; must be secured to the head with ties, ear loops or elastic bands; must fit snugly over nose, mouth and chin without gapping; be solid material without slits, exhalation valves, holes, or punctures; may be a gaiter if it is two-layered; may have a clear panel for communication purposes if solid throughout
  - Face shields may be worn with, but not in place of, face coverings
- Requirement lifted only when eating/drinking; alone in a fully enclosed office with closed door; briefly for security/safety purposes; while wearing a work-related respirator or job-required medical mask
- Employers may not prohibit customers or visitors from wearing face coverings, or prohibit employees from wearing respirators instead of face coverings if desired



# Written Policy Required

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- All covered employers:
- “must establish, implement, and enforce a written ***mandatory vaccination policy***,” or
- “establish, implement, and enforce a written policy allowing any employee not subject to a mandatory vaccination policy to choose either to be fully vaccinated against COVID-19 or provide proof of regular testing for COVID-19 .... and wear a face covering[.]”
- A ***mandatory vaccination policy*** is one that requires vaccination of all employees, including new employees as soon as practicable, other than those
  - for whom a vaccine is medically contraindicated,
  - for whom medical necessity requires a delay in vaccination, or
  - who are legally entitled to a reasonable accommodation under federal civil rights laws
- Must refer to anti-retaliation provisions of OSHA and inform about benefits of vaccination and criminal penalties for supplying false documentation



# Reasonable Accommodation

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## Disability, as defined by ADA

If worker requesting a reasonable accommodation cannot be vaccinated and/or wear a face covering because of a disability, as defined by ADA, worker may be entitled to reasonable accommodation unless accommodation poses:

- Undue burden
- Direct threat

## Sincerely Held Religious Belief, Practice or Observance

If vaccination and/or testing and/or wearing a face covering conflicts with a worker's sincerely held religious belief, practice or observance, worker may be entitled to a reasonable accommodation:

- Undue hardship (more than de minimis burden)
- Cumulative effects taken into account

# Penalties and Consequences

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- Goal of ETS is to “prescribe specific measures employers covered by this standard must implement,” and for OSHA to determine whether employers have intentionally disregarded their obligations or exhibited “a plain indifference to employee safety or health,” allowing for citations for willful misconduct.
  - OSHA's maximum penalties for serious and other-than-serious violations are up to \$13,653 per violation.
  - The maximum penalty for willful or repeated violations is **\$136,532 per violation**.
- Per Preamble: “The provisions of this ETS have been intentionally drafted to make clear OSHA’s authority to separately cite employers for each instance of the employer’s failure to protect employees and for each affected employee, where appropriate.”
- Employers must report COVID-19 workplace fatalities and hospitalizations and be ready with documentation of ETS compliance upon inspection
- Focus on complaints and major outbreaks

# State Plans

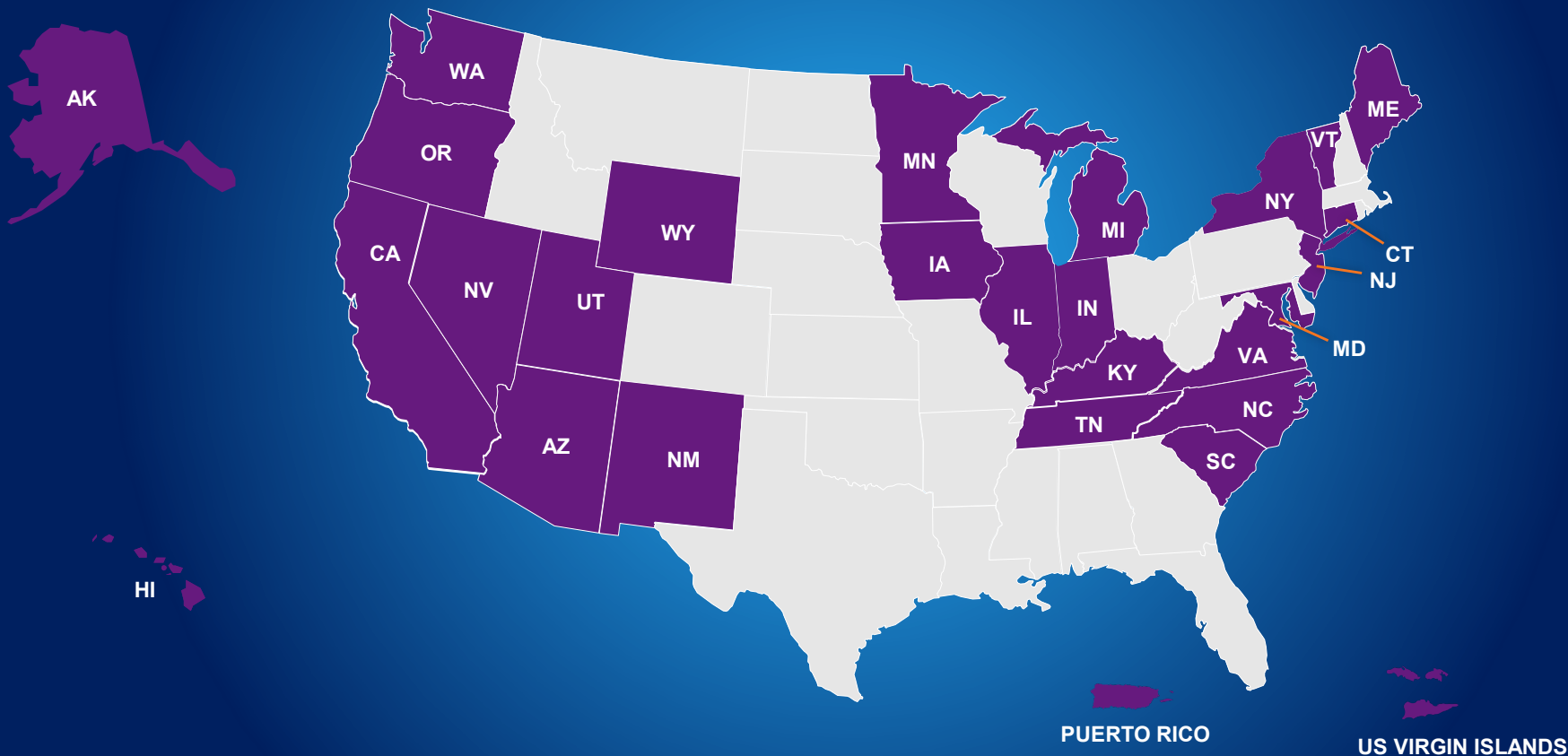
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ETS applies to employers in states without OSHA-approved State Plans and preempts contradictory state requirements

States with State Plans have 30 days from November 5 to adopt measures “at least as effective in providing safe and healthful employment and places as employment as the Federal standards, including, now, the ETS.



## States with OSHA-Approved Plans



# Vaccinate the Unvaccinated: Large Employers

## Unknowns Addressed in September – Current Status

Measuring the 100+ threshold?

Is testing only available as a reasonable accommodation or by preference?

Notice and compliance timeline?

Who bears the cost of weekly testing?  
Different if preference versus accommodation?

Is cost of weekly testing an issue for union bargaining?

Is testing time compensable?

Proof of vaccination/negative test status?

Establish baseline for workers' compensation purposes?

Duration of the ETS?



# Practical Next Steps

## Recommendations

Develop a vaccination policy, with or without mandatory vaccination requirement.

- Include religious and disability reasonable accommodation process

Budget for paid time off, testing kits

Begin to procure testing kits if in rural areas where weekly testing would be prohibitively distant otherwise

Develop vaccine attestation protocols and security measures

HR/Payroll and Manager training on discipline, privacy, testing alternatives, reasonable accommodation analysis

# Questions? Please let us know.

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