

# Compliance Bulletin

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## COVID-19 Vaccination and Testing ETS Frequently Asked Questions



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On Nov. 4, 2021, the Occupational Safety and Health Administration (OSHA) announced a federal emergency temporary standard (ETS) to address the danger of COVID-19 infection in the workplace. Affected employers will be required to comply with most provisions of the ETS by Dec. 5, 2021, and with its testing requirements by Jan. 4, 2022. Affected employers include private employers with 100 or more employees (firm- or company-wide count). State plans will have 30 days to adopt the federal ETS or implement their own vaccination standard.

### ETS Requirements

The ETS requires employers to:

- Develop, implement and enforce a mandatory COVID-19 vaccination policy; or
- Create a policy allowing employees to choose to get a vaccination or wear a face covering in the workplace and have weekly COVID-19 testing done.

Employers must determine the vaccination status of each employee, obtain acceptable proof of vaccination and keep a roster of each employee's vaccinations status. Employees who are not fully vaccinated must be tested weekly or within seven days before returning to work. Employers are also required to allow reasonable time—including up to four hours of paid time—to receive a primary vaccination dose. This compliance bulletin provides OSHA's answers to frequently asked questions regarding this ETS.

### Action Steps

Employers should carefully review the vaccination and testing ETS, implement and start enforcing the requirements. Employers should also continue to monitor OSHA communications so they can be updated on any changes or amendments to the ETS.

### Frequently Asked Questions

#### Purpose

1.A. How is this ETS affected by State laws that prohibit or limit employers' authority to require employees to be vaccinated?

This ETS preempts States, and political subdivisions of States, from adopting and enforcing workplace requirements relating to the occupational safety and health issues of vaccination, wearing face coverings, and testing for COVID-19, except under the authority of a Federally-approved State Plan. In particular, OSHA intends for the ETS to preempt and invalidate any State or local requirements that ban or limit an employer's authority to require vaccination, face covering, or testing. State and local requirements that prohibit employers from implementing employee vaccination mandates, or from requiring face coverings in workplaces, serve as a barrier to OSHA's implementation of this ETS, and to the protection of America's workforce from COVID-19.

To ensure that the ETS supplants the existing State and local vaccination bans and other requirements that could undercut its

effectiveness, and to foreclose the possibility of future bans, OSHA clearly defined the issues addressed by the ETS in section 1910.501(a). OSHA's authority to preempt such State and local requirements comes from section 18 of OSH Act, and from general principles of conflict preemption. As the Supreme Court has explained, under section 18, once OSHA promulgates federal standards addressing an occupational safety and health issue, States may no longer regulate that issue except with OSHA's approval and the authority of a Federally-approved State Plan. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992); see 29 U.S.C. 667.

1.B. Does the ETS preempt State or local requirements mandating face coverings in indoor spaces or that members of the public provide proof of vaccination or recent COVID-19 testing to enter restaurants, bars or other public spaces?

No, the ETS does not preempt generally applicable requirements meant to protect public health by helping to prevent the spread of COVID-19 in public spaces. This includes requirements mandating that everyone wear face coverings in indoor spaces, such as businesses, government buildings, and schools, or that members of the public provide proof of vaccination or recent COVID-19 testing to enter restaurants, bars, or other public spaces. OSHA recognizes that the OSH Act does not allow, and OSHA does not intend, for the ETS to preempt such non-conflicting State or local requirements of general applicability that apply to "workers and nonworkers alike," that "regulate workers simply as member of the general public," and that are consistent with the federal standard. *Gade*, 505 U.S. at 107.

1.C. What are State Plans' obligations with respect to this ETS?

Under section 18 of OSH Act, States that wish to assume responsibility for the development and enforcement of "occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated" may submit a State Plan to OSHA for approval. 29 U.S.C. 667(b). State Plans are required to adopt and enforce occupational safety and health standards that are at least as effective as federal OSHA's requirements. 29 U.S.C. 667(c)(2). In addition, the OSH Act requires that State Plans must cover State and local government employees (including, e.g., State and local school systems within the scope of the ETS), even though federal OSHA does not have coverage over such employees in States without OSHA-approved State Plans. When Federal OSHA promulgates an emergency temporary standard, State Plans must either amend their standards to be identical or "at least as effective as" the new standard, or show that an existing State Plan standard covering this area is "at least as effective" as the new Federal standard. 29 CFR 1953.5(b). State Plans may also choose to adopt more protective occupational safety and health requirements. Adoption of this ETS, or an ETS that is at least as effective as this ETS, by State Plans must be completed within 30 days of the promulgation date of the final Federal rule, and State Plans must notify Federal OSHA of the action they will take within 15 days. The State Plan standard must remain in effect for the duration of the Federal ETS. A State Plan standard that prohibits employers from requiring vaccination would not be at least as effective as this ETS because OSHA has recognized in this ETS that vaccination is the most protective policy choice for employers to adopt to protect their workplaces.

1.D. What happens if a State with an OSHA-approved State Plan does not adopt the ETS or an "at least as effective" emergency rule within the 30-day timeframe required by OSHA's regulations?

State Plans are required to adopt and enforce occupational safety and health standards that are at least as effective as Federal OSHA's requirements (29 U.S.C. 667(c)(2)). OSHA will work with the State Plans on adopting an emergency standard that is at least as effective as the ETS within the 30-day timeframe required by 29 CFR 1953.5(b). OSHA recognizes that 30 days is a short timeframe. In the event that a State Plan fails to adopt this ETS, or a comparable standard, such failure to act will result in a determination by Federal OSHA that the State Plan is not at least as effective as Federal OSHA. When OSHA determines that a State Plan is no longer fulfilling its statutory responsibilities under the OSH Act by failing to meet Federal requirements under Section 18 for continued approval, Federal OSHA may commence proceedings to ensure adequate protections for covered workers within the state. For State Plans covering the private sector that have final approval, this may include OSHA's reconsideration and possible revocation of the State Plan's final approval status, in order to reinstate concurrent federal enforcement authority as necessary within the State Plan. For State Plans covering the private sector without final approval, OSHA may revise the State Plan's Operational Status Agreement to provide for federal enforcement activity.

1.E. Could an employer implement additional measures to protect employees from COVID-19?

The ETS establishes minimum requirements for employers. Nothing in this section prevents employers from agreeing with their employees to implement additional measures, and this section does not displace collectively bargained agreements. The note to section 1910.501(a) references the National Labor Relations Act of 1935, which protects most private-sector employees' right to

take collective action. The purpose of this note is to remind employers and employees that OSHA's ETS establishes a floor for protections, and that it does not preclude bargaining for additional protective measures or prevent an employer from implementing additional protections if not subject to bargaining.

## Scope and Application

2.A. How must employees be counted to determine if the employer meets the 100-employee threshold for coverage under this ETS? For example:

2.A.1. Are employees who perform work at offsite locations, such as customer homes, counted?

Yes. In determining the number of employees, employers must include all employees across all of their U.S. workplaces, regardless of employees' vaccination status or where they perform their work. For example, if an employer has 150 employees, and 100 of them perform maintenance work in customers' homes, primarily working from their company vehicles (i.e., mobile workplaces), and rarely or never report to the main office, that employer would fall within the scope of the standard.

2.A.2. Is the count based on 100 employees for the entire business or 100 employees per individual location?

The count should be done at the employer level (firm- or corporate-wide), not the individual location level. Therefore, for a single corporate entity with multiple locations, all employees at all locations are counted. For example, if a single corporation has 50 small locations (e.g., kiosks, concession stands) with at least 100 total employees in its combined locations, that employer would be covered even if some of the locations have no more than one or two employees assigned to work there.

2.A.3. How are employees counted in franchisor/franchisee settings?

In a traditional franchisor-franchisee relationship in which each franchise location is independently owned and operated, the franchisor and franchisees would generally 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. For example, if the franchisor has more than 100 employees but each individual franchisee has fewer than 100 employees, the franchisor would be covered by this ETS but the individual franchises would not be covered.

2.A.4. Are part-time employees included in the 100-employee threshold?

Yes. Part-time employees do count towards the total number of employees. For example, a company with 75 part-time employees and 25 full-time employees would be considered to have 100 employees and would be within the scope of this standard. Independent contractors do not count towards the total number of employees.

2.A.5. Are independent contractors included in the 100-employee threshold?

No. Independent contractors do not count towards the total number of employees.

2.A.6. Do employees who are working from home count towards the 100-employee minimum?

Yes. If an employer has 150 employees, 100 of whom work from their homes full-time and 50 of whom work in the office at least part of the time, the employer would be within the scope of this ETS because it has more than 100 employees. However, the standard's requirements would only apply to the 50 employees who work in the office at least part time around other individuals, and not to those 100 employees working exclusively from their homes.

2.A.7. How are employees from staffing agencies counted?

In scenarios in which employees of a staffing agency are placed at a host employer location, only the staffing agency would count these jointly employed workers for purposes of the 100-employee threshold for coverage under this ETS. The host employer, however, would still be covered by this ETS if it has 100 or more employees in addition to the employees of the staffing agency. On the other hand, if a host employer has 80 permanent employees and 30 temporary employees supplied by a staffing agency, the host employer would not count the staffing agency employees for coverage purposes and therefore would not be covered. A host employer may, however, require the staffing agency to ensure that temporary employees comply with its

policy (either be fully vaccinated or tested weekly and wear face coverings).

#### 2.A.8. How will temporary and seasonal workers be addressed in the employee count?

Temporary and seasonal workers employed directly by the employer (i.e., not obtained from a temporary staffing agency) are counted in determining if the employer meets the 100-employee threshold, provided they are employed at any point while the ETS is in effect. For more information, see FAQ 2.A.7. "How are employees from staffing agencies counted?" and FAQ 2.C. "How do employers determine if they meet the 100-employee threshold for coverage under the standard if they have fluctuating employee numbers?"

#### 2.A.9. How are employees counted at multi-employer worksites?

On a typical multi-employer worksite such as a construction site, each company represented – the host employer, the general contractor, and each subcontractor – would only need to count its own employees; the host employer and general contractor would not need to count the total number of workers at each site. That said, each employer must count the total number of workers it employs regardless of where they report for work on a particular day. Thus, for example, if a general contractor has more than 100 employees spread out over multiple construction sites, that employer is covered under this ETS even if it does not have 100 or more employees present at any one worksite.

#### 2.A.10. Is vaccination status considered in counting employees?

No. Vaccination status is not considered when counting the numbers of employees. For example, if an employer has 200 employees, all of whom are vaccinated, that employer would be covered.

#### 2.A.11. Are employees who work exclusively outdoors counted?

Yes. If an employer has 125 employees, and 115 of them work exclusively outdoors, that employer would be covered. However, the standard's protections would only apply to the 10 employees working in indoor settings around other individuals (other than telework in their own homes), not to those employees working exclusively outdoors. For more information, see FAQ 2.B. "What qualifies as work done exclusively outdoors under the ETS?"

#### 2.A.12. Are employees who are minors counted and does the ETS apply to them?

Yes. Employees who are minors (who may need parental consent to be vaccinated or tested for COVID-19) must be counted in determining if the employer meets the 100-employee threshold for inclusion in the standard, and minors are subject to all requirements of the standard.

#### 2.B. What qualifies as work done exclusively outdoors under the ETS?

In order to qualify as work performed exclusively outdoors, the following criteria must be met:

- The employee must work outdoors on all days (i.e., an employee who works indoors on some days and outdoors on other days would not be exempt from the requirements of this ETS).
- The employee must not routinely occupy vehicles with other employees as part of work duties (i.e., do not drive to worksites together in a company vehicle).
- The employee works outdoors for the duration of every workday except for de minimis use of indoor spaces where other individuals may be present – such as a multi-stall bathroom or an administrative office – as long as the time spent indoors is brief, or occurs exclusively in the employee's home (e.g., a lunch break at home).

The employee's work must truly occur "outdoors," which does not include buildings under construction where substantial portions of the structure are in place, such as walls and ceiling elements that would impede the natural flow of fresh air at the worksite.

#### 2.C. How do employers determine if they meet the 100-employee threshold for coverage under the standard if they have fluctuating employee numbers?

The determination of whether an employer falls within the scope of this ETS based on number of employees should initially be made as of the effective date of the standard (November 5, 2021). If the employer has 100 or more employees on the effective date, this ETS applies for the duration of the standard. If the employer has fewer than 100 employees on the effective date of the standard, the standard would not apply to that employer as of the effective date. However, if that same employer subsequently hires more workers and hits the 100-employee threshold for coverage, the employer would then be expected to come into compliance with the standard's requirements. Once an employer has come within the scope of the ETS, the standard continues to apply for the remainder of the time the standard is in effect, regardless of fluctuations in the size of the employer's workforce. For example, if an employer has 103 employees on the effective date of the standard, but then loses four within the next month, that employer would continue to be covered by the ETS.

#### 2.D. Who has responsibility for contractor employees – the contractor or the host employer?

Contractors and host employers with at least 100 employees are each required to ensure that they meet the ETS requirements for their own employees. Nothing in this section prevents host employers from imposing additional requirements for contractor employees at their worksites, such as requiring that all employees, regardless of vaccination status, wear face coverings while working indoors.

#### 2.E. Would a state or local government employer with more than 100 employees be subject to this ETS?

The ETS does not apply to state and local government employers in states without State Plans, because state or local government employers and employees are exempt from OSHA coverage under the OSH Act (29 U.S.C. 652 (5)). However, in states with OSHA-approved occupational safety and health programs ("State Plans"), state and local government employers with 100 or more employees will be covered by State occupational safety and health requirements, and State Plans must adopt requirements for state and local employers that are at least as effective as federal OSHA's requirements in this ETS. State Plans may also choose to adopt more protective occupational safety and health requirements (29 USC 667(c)).

#### 2.F. How will the ETS apply to unionized workplaces?

Employers in unionized workplaces with 100 or more employees must, like all covered employers, follow the minimum requirements established by the ETS. Nothing in the ETS, however, prevents employers from agreeing with employees and their representatives to implement additional measures, and the ETS does not displace collectively bargained agreements that exceed the requirements of the ETS. As examples of additional measures that could be implemented via collective bargaining, employers might agree to cover the costs of face coverings or medical removal, or to adopt a requirement that all employees, regardless of vaccination status, wear face coverings while working indoors.

#### 2.G. Does the ETS apply to workplaces covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors?

No. Because covered contractor employees are already covered by the protections in those guidelines, OSHA has determined that complying with the ETS in addition to the federal contractor guidelines is not necessary to protect employees at workplaces covered by those guidelines from a grave danger posed by COVID-19.

#### 2.H. Does the ETS apply to employees of federal agencies?

No. The ETS also does not apply to employees of federal agencies, with the exception of those employed by the U.S. Postal Service (for more information on Postal Service employees, see FAQ 2.I. "Does the ETS apply to U.S. Postal Service workers?"). Under Executive Order 14043, every federal agency must implement a program requiring each of its federal employees to be vaccinated against COVID-19, except as required by law. OSHA will regard a federal agency's compliance with this requirement, and the related Safer Federal Workforce Task Force guidance issued under section 4(e) of Executive Order 13991 and section 2 of Executive Order 14043, as sufficient to meet the agency's obligation to comply with this ETS under Section 19 of the OSH Act and Executive Order 12196.

#### 2.I. Does the ETS apply to U.S. Postal Service workers?

Yes. Under the OSH Act, the U.S. Postal Service is treated as a private employer, see 29 USC 652(5), and it is therefore required to comply with this ETS in the same manner as any other employer covered by the Act.

2.J. Does the ETS apply to employees in settings covered by the Healthcare ETS (29 CFR 1910.502)?

No, the ETS does not apply to employees in settings covered by the Healthcare ETS while that ETS is in effect. Section 1910.502 was carefully tailored to the healthcare workplaces it covers and, given the full suite of protections it requires, OSHA has determined that it adequately protects the employees covered by its requirements from the grave danger posed by COVID-19. Therefore, complying with the additional requirements of this ETS is not necessary to protect those employees while they are covered by that standard's protections. It will be necessary for employers with employees covered by section 1910.502 to determine if they also have employees covered by this ETS. For example, a retail pharmacy chain that operates a series of ambulatory care clinics embedded in its stores, where those embedded clinics are the only areas in the store that are covered under 1910.502 (see section 1910.502(a)(3)(i)), would have to ensure that the remainder of its employees in other parts of its stores are protected under this ETS if the company has 100 or more employees company-wide, including those covered under 1910.502. Note, however, that if the Healthcare ETS is no longer in effect at any point while this ETS is in effect, some employees working in settings covered under section 1910.502 may become covered by this ETS.

2.K. If an employer has employees who work in settings covered by the Healthcare ETS (29 CFR 1910.502), but who would otherwise be covered by the Vaccination and Testing ETS (29 CFR 1910.501) if the Healthcare ETS were not in effect, can that employer follow the Vaccination and Testing ETS instead for those employees?

No. Employers with employees in settings covered by the Healthcare ETS must follow the provisions of that standard for those employees while the Healthcare ETS is in effect. However, nothing in either ETS prevents those employers from also requiring vaccination of employees.

## **Employer Policy on Vaccination**

3.A. I have implemented a mandatory vaccination policy; however, 5% of my employees are entitled to reasonable accommodation. Does my written policy still meet the requirements of a written vaccination policy under the ETS, even though not every employee is vaccinated?

Yes. A mandatory vaccination policy is an employer policy requiring each employee to be fully vaccinated. Such a policy must require vaccination of all employees, other than those employees who fall into one of three categories: those for whom a vaccine is medically contraindicated, those for whom medical necessity requires a delay in vaccination, or those legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement. As long as each employee that does not fall into one of those three categories is vaccinated, the written policy would still meet the definition of a mandatory vaccination policy.

3.B. Am I permitted to implement a partial mandatory vaccination policy that requires vaccination for employees that provide services directly to members of the public, but allows other employees the choice of vaccination or testing?

Yes. OSHA recognizes there may be employers who develop and implement partial mandatory vaccination policies, i.e., that apply to only a portion of their workforce. An example might be a retail corporation employer who has a mixture of staff working at the corporate headquarters, performing intermittent telework from home, and working in stores serving customers. In this type of situation, the employer may choose to require vaccination of only some subset of its employees (e.g., those working in stores), and to treat vaccination as optional for others (e.g., those who work from headquarters or who perform intermittent telework). This approach would comply with the standard so long as the employer complies in full with paragraphs (d)(1) and (d)(2) for the respective groups.

3.C. How do you determine what information to include in the written mandatory vaccination policy?

To ensure that employers' vaccination policies under paragraph (d) are comprehensive and effective, the policies should address all of the applicable requirements in paragraphs (e)-(j) of this standard, including: requirements for COVID-19 vaccination; applicable exclusions from the written policy (e.g., medical contraindications, medical necessity requiring delay in vaccination, or reasonable accommodations for workers with disabilities or sincerely held religious beliefs); information on determining an employee's vaccination status and how this information will be collected (as described in paragraph (e)); paid time and sick leave for vaccination purposes (as described in paragraph (f)); notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace (as described in paragraph (h)); information to be provided to employees (pursuant to

paragraph (j) – e.g., how the employer is making that information available to employees); and disciplinary action for employees who do not abide by the policy. In addition to addressing the requirements of paragraphs (e)-(j) of this standard, the employer should include all relevant information regarding the policy's effective date, who the policy applies to, deadlines (e.g., for submitting vaccination information, for getting vaccinated), and procedures for compliance and enforcement, all of which are necessary components of an effective plan. Having a comprehensive written policy will provide a solid foundation for an effective COVID-19 vaccination program, while making it easier for employers to inform employees about the program-related policies and procedures, as required under paragraph (j)(1).

3.D. My workplace has a mixture of vaccinated and unvaccinated workers and I do not want to require those unvaccinated workers to get vaccinated. If my written plan incorporates safety precautions at the workplace, such as physical barriers and keeping all workspaces at least 6 feet apart, can I be exempt from the testing and face covering requirements under paragraph (d)(2)?

No. Paragraph (d)(2) is a limited exemption from the mandatory vaccination policy requirement of paragraph (d)(1). If the employer decides to adopt a policy under paragraph (d)(2), that simply means that employees themselves may choose not to get vaccinated, in which case they must get tested and wear face coverings per the requirements of the standard. However, the other safety precautions recommended by the CDC, such as physical distancing, offer employees additional protection but are not required by this ETS and do not replace the need to comply with the ETS.

3.E. Must a mandatory vaccination policy address the testing and face covering requirements of the standard?

It depends on whether any of your employees are required to comply with the testing/face covering provisions of § 1910.501(g)(2) pursuant to an exemption or accommodation. If so, an employer who has both vaccinated and unvaccinated employees will have to develop and include the relevant procedures for two sets of employees in the written policy. The procedures applicable to employees who are not fully vaccinated (i.e., those who are unable to receive vaccination as a result of a medical contraindication or medical necessity requiring delay, and those entitled to reasonable accommodations), must include COVID-19 testing and face covering use as required by paragraphs (g) and (i), respectively, unless the employees are removed from the scope of § 1910.501 (e.g., full time telework consistent with one of the exceptions in § 1910.501(b)(3)).

3.F. My company has already developed and implemented a vaccination policy before this standard was published. Am I already in compliance or do I need to create a new written policy?

It is not OSHA's intent for employers to duplicate current effective policies covering the requirements of this ETS; however, each employer with a current policy must evaluate that policy to ensure it satisfies all of the requirements of this rule. Employers with existing policies must modify and/or update their current policies to incorporate any missing required elements, and must provide information on these new updates or modifications to all employees in accordance with paragraph (j)(1). Once the employer has developed its policy pursuant to paragraph (d), the policy must be reduced to writing in order to be compliant with paragraph (d).

3.G. Where should the plan be submitted?

The plan should be made readily accessible to all employees through the employer's normal methods of distributing information to employees. Employers are not required to submit their written policy to OSHA, unless requested. However, the Assistant Secretary may request the employer's written plan for examination and copying. Under paragraph (l)(3)(i), the employer must provide its written policy to the Assistant Secretary for examination and copying within 4 business hours of a request.

3.H. If I decide to have a mandatory vaccination policy, does OSHA require me to continue to employ an unvaccinated person who refuses to get vaccinated?

No. Section 11(c) of the OSH Act provides that an employer may not discharge or in any manner retaliate against an employee because the employee exercised any right under the OSH Act. However, section 11(c) of the OSH Act does not prevent employers from taking disciplinary action against employees for engaging in activities that are not protected by the OSH Act. For example, an employee's refusal to comply with the employer's policy on vaccination would generally not be protected under the OSH Act. Before taking any personnel actions, however, employers should consult applicable law and/or labor management contracts. Additional information can be found in OSHA's guidance regarding Workers' Rights under the COVID-19 Vaccination and Testing ETS and from the Equal Employment Opportunity Commission (EEOC), see "What You Should Know About COVID-19

and the ADA, the Rehabilitation Act, and Other EEO Laws.”

3.1. If an employee has previously had COVID-19, but has not been vaccinated, can they be classified as fully vaccinated under the policy assuming they have antibodies? Are there any exceptions in the standard for employees who have natural immunity through previous COVID-19 infection?

No, the ETS does not offer any exemptions to vaccination requirements based on “natural immunity” or the presence of antibodies from a previous infection. “Fully vaccinated” means a person’s status 2 weeks after completing primary vaccination with a COVID-19 vaccine with, if applicable, at least the minimum recommended interval between doses in accordance with the approval, authorization, or listing that is: (i) approved or authorized for emergency use by the FDA; (ii) listed for emergency use by the World Health Organization (WHO); or (iii) administered as part of a clinical trial at a U.S. site, if the recipient is documented to have primary vaccination with the active (not placebo) COVID-19 vaccine candidate, for which vaccine efficacy has been independently confirmed (e.g., by a data and safety monitoring board) or if the clinical trial participant at U.S. sites had received a COVID-19 vaccine that is neither approved nor authorized for use by FDA but is listed for emergency use by WHO. For “mix-and-match” vaccinations, any combination of two doses of a COVID-19 vaccine that is approved or authorized by the FDA, or listed as a two-dose series by the WHO (i.e., a heterologous primary series of such vaccines, receiving doses of different COVID-19 vaccines as part of one primary series), is also acceptable. An employee who does not meet this definition is not considered fully vaccinated, regardless if they have previously tested positive for COVID-19. Therefore, that employee must be treated as unvaccinated and either receive a vaccination or undergo weekly COVID-19 testing and wear a face covering in the workplace.

## Determination of Employee Vaccination Status

4.A. My employee has lost their copy of the COVID-19 Vaccination Record card. How can I verify their vaccination status?

An employee who does not possess their COVID-19 vaccination record (e.g., because it was lost or stolen) should contact their vaccination provider (e.g., local pharmacy, physician’s office) to obtain a new copy or utilize their state health department’s immunization information system. In instances where an employee is unable to produce acceptable proof of vaccination under paragraphs (e)(2)(i) - (e)(2)(v), paragraph (e)(2)(vi) provides that a signed and dated statement by the employee will be acceptable. The employee’s statement must:

1. attest to their vaccination status (fully vaccinated or partially vaccinated);
2. attest that they have lost or are otherwise unable to produce proof required by the standard; and
3. include the following language: “I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.”

An employee who attests to their vaccination status should, to the best of their recollection, include the following information in their attestation:

- the type of vaccine administered;
- date(s) of administration; and
- the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

Any statement provided under paragraph (e)(2)(vi) must include an attestation that the employee is unable to produce another type of proof of vaccination (paragraph (e)(2)(vi)(B)). Thus, before an employee statement will be acceptable for proof of vaccination under paragraph (e)(2)(vi), the employee must have attempted to secure alternate forms of documentation via other means (e.g., from the vaccine administrator or their state health department) and been unsuccessful in doing so. The agency recognizes that securing vaccination documentation may be challenging for some members of the workforce, such as migrant workers, employees who do not have access to a computer, or employees who may not recall who administered their vaccines (e.g., if the vaccination was provided at a temporary location, such as a church, or during a state or local mass vaccination campaign). Thus, for employees who have no other means of obtaining proof of vaccination, the standard permits employers to accept attestations meeting the requirements in paragraph (e)(2)(vi) as proof of vaccination. However, employers should explain to their employees that they need to produce vaccination proof through the other means listed in paragraph (e)(2), such as by contacting the vaccination administrator, if they are able to do so. Once the employee has provided a signed and dated attestation that meets the requirements of paragraph (e)(2)(vi), the employer no longer needs to seek out one of the other forms

of vaccination proof for that employee and, depending on the content of the attestation, the employer may consider that employee either fully or partially vaccinated for purposes of the ETS.

4.B. If my employees provide a physical copy of one of the acceptable proof of vaccination records, is that acceptable under the standard?

Yes. The employer has various options for acquiring proof of vaccination from each employee. For example, an employer may obtain a physical copy of a vaccination record or they may allow employees to provide a digital copy of acceptable records, including, for example, a digital photograph, scanned image, or PDF of such a record that clearly and legibly displays the necessary vaccination information. However, to be in compliance, the employer must ensure they are able to maintain a record of each employee's vaccination status. Therefore, the record maintenance requirements cannot be fulfilled by an employee merely showing the employer their vaccination status (e.g., by bringing the CDC COVID-19 vaccination card to the workplace and showing it to an employer representative or showing an employer representative a picture of the immunization records on a personal cellphone). The employer must retain either a physical or digital copy of the documentation

4.C. Does the roster of employee's vaccination status required by paragraph (e)(4) only apply to vaccinated employees?

No. The roster must list all employees and clearly indicate for each one whether they are fully vaccinated, partially (not fully) vaccinated, not fully vaccinated because of a medical or religious accommodation, or not fully vaccinated because they have not provided acceptable proof of their vaccination status. Although unvaccinated employees will not have proof of vaccination status, the standard requires the employer to include all employees, regardless of vaccination status, on the roster.

4.D. Are the vaccination records and roster considered medical records? Are they confidential or can they be shared with the employees?

The records and roster required by the ETS are considered to be employee medical records and must be maintained as such records in accordance with 29 CFR 1910.1020 and must not be disclosed except as required or authorized by this ETS or other federal law, including the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. OSHA considers vaccination records required by paragraph (e) of the ETS to be employee medical records concerning the health status of an employee and is requiring this personally identifiable medical information to be maintained in a confidential manner. The vaccination records and rosters must be treated as employee medical records under 29 CFR 1910.1020, without regard to whether the records satisfy the definition of employee medical record at 29 CFR 1910.1020(c)(6)(i). Under paragraph (l)(1) of the ETS, the employer must make available, for examination and copying, the individual COVID-19 vaccine documentation for a particular employee to that employee and to anyone having written authorized consent of that employee. In addition, paragraph (l)(2) of the ETS provides that by the end of the next business day after a request by an employee or an employee representative, the employer must make available to the requester the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

4.E. Some of my employees are eligible for a booster shot or additional doses of the vaccination. Am I required to collect or maintain information for these additional doses?

Employers are required to determine the vaccination status of each employee, including whether the employee is fully vaccinated. Booster shots and additional doses are not included in the definition of fully vaccinated under the ETS. Therefore, the employer is not required to obtain vaccination-related information beyond what is considered necessary to demonstrate that the employee is fully vaccinated as defined by the ETS.

4.F. One of my employees was vaccinated overseas and received a vaccination that is not administered in the United States. Is that satisfactory under the standard as long as they provide an acceptable proof of vaccination?

Vaccines are acceptable under the standard if they are:

1. approved or authorized for emergency use by the FDA;
2. listed for emergency use by the World Health Organization (WHO); or
3. administered as part of a clinical trial at a U.S. site, if the recipient is documented to have primary vaccination with the active (not placebo) COVID-19 vaccine candidate, for which vaccine efficacy has been independently confirmed (e.g., by a data and safety monitoring board) or if the clinical trial participant at U.S. sites had received a COVID-19 vaccine that is neither

approved nor authorized for use by the FDA but is listed for emergency use by WHO.

The FDA website provides a list of vaccines that have been approved or authorized for emergency use and the WHO website provides a list of vaccines that have been listed for emergency use. For "mix-and-match" vaccinations, any combination of two doses of a COVID-19 vaccine that is approved or authorized by the FDA, or listed as a two-dose series by the WHO (i.e., a heterologous primary series of such vaccines, receiving doses of different COVID-19 vaccines as part of one primary series), is also acceptable. As long as the vaccine meets one of these requirements it is satisfactory under the standard. Whatever vaccine the employee receives, the employer must still require employees to provide acceptable proof of vaccination in accordance with paragraph (e) of the standard.

#### 4.G. What documentation will be required to verify vaccination status?

The employer must require each vaccinated employee to provide acceptable proof of vaccination status, including whether they are fully or partially vaccinated. The following list includes the acceptable documentation for proof of vaccination:

- the record of immunization from a health care provider or pharmacy;
- a copy of the U.S. COVID-19 Vaccination Record Card;
- a copy of medical records documenting the vaccination;
- a copy of immunization records from a public health, state, or tribal immunization information system; or
- a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

To be acceptable as proof of vaccination, any documentation should generally include the employee's name, type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s). In some cases, state immunization records may not include one or more of these data fields, such as clinic site; in those circumstances, an employer can still rely upon the State immunization record as acceptable proof of vaccination. OSHA notes that clinic sites can include temporary vaccination facilities used during large vaccine distribution campaigns, such as schools, churches, or sports stadiums. Each employee who has been partially or fully vaccinated should be able to provide one of the forms of acceptable proof listed above. An employee who does not possess their COVID-19 vaccination record (e.g., because it was lost or stolen) should contact their vaccination provider (e.g., local pharmacy, physician's office) to obtain a new copy or utilize their state health department's immunization information system. In instances where an employee is unable to produce acceptable proof of vaccination listed above, a signed and dated statement by the employee will be acceptable. The employee's statement must:

- attest to their vaccination status (fully vaccinated or partially vaccinated);
- attest that they have lost or are otherwise unable to produce proof required by this section; and
- include the following language: "I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties."

Employees should include in their statement, to the best of their recollection, the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s) to be acceptable. Employers must require employees to provide one of the listed acceptable documents for proof of vaccination or the employee statement as described above. These are the only acceptable forms of proof of vaccination status.

#### 4.H. Do I have any responsibility or associate liability if an employee is fraudulent in representing their vaccine status?

While employers may not invite or facilitate fraud, the ETS does not require employers to monitor for or detect fraud. By defining what constitutes acceptable proof of vaccination under the ETS, OSHA is ensuring that employers can accept proof meeting the requirements of paragraph (e) for purposes of compliance with the standard. However, the standard's requirements for proof of vaccination are integral to ensuring that employees are protected appropriately, either through vaccination (the preferred and most effective workplace control in this ETS), or through regular testing and use of face coverings. Therefore, it is paramount that employees provide truthful information regarding their vaccination status. To ensure employees are aware of potential consequences associated with providing false information when complying with the standard, paragraph (j) of the ETS requires employers to provide each employee with information regarding the prohibitions of 18 U.S.C. § 1001 and Section 17(g) of the

OSH Act, which provide for criminal penalties associated with knowingly supplying false statements or documentation. This provision will help minimize the likelihood that any employee provides false information. And although employers are not required to monitor for or detect fraud, these same prohibitions on false statements and documentation apply to employers. If an employer knows that proof submitted by an employee is fraudulent, and even with this knowledge, accepts and maintains the fraudulent proof as a record of compliance with this ETS, the employer may be subject to the penalties in 18 U.S.C. § 1001 and 17(g) of the OSH Act.

## **Employer Support for Employee Vaccination**

5.A. Can I require my employees to use personal time or sick leave to get vaccinated?

No. Employers are required to support COVID-19 vaccination for each employee by providing reasonable time to each employee during work hours for each of their primary vaccination dose(s), including up to four hours of paid time, at the employee's regular rate of pay, for the purposes of vaccination. The maximum of four hours of paid time that employers must provide for the administration of each primary vaccination dose cannot be offset by any other leave that the employee has accrued, such as sick leave or vacation leave. OSHA is concerned that employees forced to use their sick leave or vacation leave for vaccination would have a disincentive to gaining the health protection of vaccination. Employers must pay employees for up to four hours of time at the employee's regular rate of pay. This may be achieved by paying for the time to be vaccinated as work hours for up to four hours. Requiring employers to pay for vaccine administration is consistent with OSHA's normal approach of requiring employers to bear the costs of compliance with safety and health standards. This requirement applies to the primary vaccination dose(s) necessary to achieve full vaccination (one or two doses depending on the vaccine). Currently-authorized FDA vaccines include Janssen (Johnson & Johnson), which is a single-dose primary vaccination, and Pfizer-BioNTech and Moderna, which have a two-dose primary vaccination series. This definition is consistent with the definition of fully vaccinated.

5.B. Some of my employees are concerned they may experience side effects from the vaccine. Can I require them to use their leave to recover from vaccination side effects? Can they borrow against future leave if they do experience side effects and do not have any sick leave?

If an employee already has accrued paid sick leave, an employer may require the employee to use that paid sick leave when recovering from side effects experienced following a primary vaccination dose. Additionally, if an employer does not specify between different types of leave (i.e., employees are granted only one type of leave), the employer may require employees to use that leave when recovering from vaccination side effects. If an employer provides employees with multiple types of leave, such as sick leave and vacation leave, the employer can only require employees to use the sick leave when recovering from vaccination side effects. Employers cannot require employees to use advanced sick leave to cover reasonable time needed to recover from vaccination side effects under paragraph (f)(2). An employer may not require an employee to accrue negative paid sick leave or borrow against future paid sick leave to recover from vaccination side effects. In other words, the employer cannot require an employee to go into the negative for paid sick leave if the employee does not have accrued paid sick leave when they need to recover from side effects experienced following a primary vaccination dose. Neither the paid time required to receive any vaccine dose(s) nor the paid sick leave required to recover from side effects experienced following any vaccination dose are retroactive requirements for vaccine dose(s) received prior to the promulgation of this ETS. This requirement applies to the vaccine dose(s) necessary to achieve full vaccination (one or two doses depending on the vaccine).

5.C. If an employee gets vaccinated outside of work hours, such as on a Saturday, do I have to still grant them reasonable time for vaccination?

No. If an employee chooses to receive a primary vaccination dose outside of work hours, employers are not required to grant paid time to the employee for the time spent receiving the vaccine during non-work hours. However, even if employees receive a primary vaccination dose outside of work hours, employers must still afford them reasonable time and paid sick leave to recover from side effects that they experience during scheduled work time in accordance with paragraph (f)(2).

5.D. Can employers set a cap on the time that they must provide to employees to recover from side effects?

Yes. Employers are required to provide reasonable time and paid sick leave to employees to recover from side effects experienced following a primary vaccination dose, but the standard does not specify the amount of paid sick leave that the employer is required to provide for that purpose. Employers may set a cap on the amount of paid sick leave available to employees to recover from any side effects, but the cap must be reasonable. The CDC notes that although some people have no

side effects, if experienced, should go away in a few days. Generally, OSHA presumes that, if an employer makes available up to two days of paid sick leave per primary vaccination dose for side effects, the employer would be in compliance with this requirement. When setting the cap, an employer would not be expected to account for the unlikely possibility of the vaccination resulting in a prolonged illness in the vaccinated employee (e.g., a severe allergic reaction). The reasonable time and paid sick leave that employers are required to provide employees to recover from side effects experienced, is in addition to the reasonable time and four hours of paid time to receive each primary vaccination dose also required by the standard.

5.E. If the employer does not implement a mandatory vaccination policy under paragraph (d), and instead allows employees the choice to be vaccinated, are they still required to provide support for vaccination for each employee?

Yes. Regardless of what plan is implemented under paragraph (d), the employer must comply with the vaccination support requirements under paragraph (f). This includes providing paid time for vaccination and time for recovery for each employee.

5.F. If I offer vaccination on-site at the workplace, do I still need to comply with the time for vaccination and recovery requirements?

Yes. An employer may make other efforts to facilitate vaccination of its employees by, for example, hosting a vaccine clinic at the workplace (e.g., mobile trailer) or partnering with another entity, such as a pharmacy or healthcare provider, so that employees can be vaccinated at the workplace. If an employer chooses to make the vaccine available to its employees on site, they must assure the availability of reasonable time and paid time to each employee to receive the full vaccination series, and reasonable time and paid sick leave to recover from side effects that they may experience the same as they would if the employee received the vaccine off-site. Employers should note that any additional costs incurred to bring vaccination on-site would be covered by the employer, though such an approach would likely reduce the amount of paid time needed for vaccine administration (but not side effects) because of reduced employee travel time.

5.G. Are employers obligated to reimburse employees for transportation costs (e.g., gas money, train/bus fare, etc.) incurred to receive the vaccination?

No. The ETS requires employers to support COVID-19 vaccination for each employee by providing reasonable time to each employee during work hours for each of their primary vaccination dose(s), including up to four hours of paid time, at the employee's regular rate of pay, for the purposes of vaccination. Reasonable time may include, but is not limited to, time spent during work hours related to the vaccination appointment(s), such as registering, completing required paperwork, all time spent at the vaccination site (e.g., receiving the vaccination dose, post-vaccination monitoring by the vaccine provider), and time spent traveling to and from the location for vaccination (including travel to an off-site location (e.g., a pharmacy), or situations in which an employee working remotely (e.g., telework) or in an alternate location must travel to the workplace to receive the vaccine). Employers are not, however, obligated by this ETS to reimburse employees for transportation costs (e.g., gas money, train/bus fare, etc.) incurred to receive the vaccination. This could include the costs of travel to an off-site vaccination location (e.g., a pharmacy) or travel from an alternate work location (e.g., telework) to the workplace to receive a vaccination dose.

## **COVID-19 Testing for Employees Who Are Not Fully Vaccinated**

6.A. Do unvaccinated employees who work remotely need to submit to weekly COVID-19 testing?

No. The requirements of the standard do not apply to the employees of covered employers who do not report to a workplace where other individuals such as coworkers or customers are present or while working from home. This includes the testing requirements of paragraph (g) of the ETS.

6.B. If an unvaccinated employee only comes into the workplace once a month is that employee required to be tested every seven days?

No. The employee does not need to be tested for COVID-19 on a weekly basis. However, the employer must ensure the employee is tested for COVID-19 within seven days prior to returning to the workplace and provides documentation of that test result to the employer upon return to the workplace. For example, if an unvaccinated office employee has been teleworking for two weeks but must report to the office, where other employees will be present (e.g., coworkers, security officers, mailroom workers), on a specific Monday to copy and fax documents, that employee must receive a COVID-19 test within the seven days prior to the Monday and provide documentation of that test result to the employer upon return to the workplace. The

employee's test must occur within the seven days before the Monday the employee is scheduled to report to the office, but it also must happen early enough to allow time for the results to be received before returning to the workplace.

6.C. Can an unvaccinated employee still come to the workplace if they did not obtain a COVID-19 test but wears a face covering and is isolated while on site?

No. If an employee does not provide the result of a COVID-19 test as required by paragraph (g)(1) of the standard, the employer must keep the employee removed from the workplace until the employee provides a test result. In addition to being tested for COVID-19 on a weekly basis, unvaccinated employees must also wear a face covering at the workplace.

6.D. May pool testing be used to comply with the ETS? What are pooling procedures and how do they satisfy the testing requirements under this standard?

Yes. Pool testing is one form of testing that can satisfy the testing requirements in paragraph (g). Pooling (also referred to as pool testing or pooled testing) means combining the same type of specimen from several people and conducting one antigen laboratory test on the combined pool of specimens to detect SARS-CoV-2 (e.g., four samples may be tested together, using only the resources needed for a single test). According to the CDC, the advantages of pooling include preserving testing resources, reducing the amount of time required to test large numbers of specimens (increasing throughput), and lowering the overall cost of testing. If pooling procedures are used and a pooled test result comes back negative, then all the specimens can be presumed negative with the single test. In other words, all of the employees who provided specimens for that pool test can be assumed to have a negative test result for SARS-CoV-2 infection. Therefore, documentation of the negative pooled test result would satisfy the paragraph (g)(1) documentation requirement for each employee in the pool and no additional testing is necessary. However, if the pooled test result is positive, immediate additional testing would be necessary to determine which employees are positive and/or negative. Each of the original specimens collected in the pool must be tested individually to determine which specimen(s) is (are) positive. If original specimens from the workers in a pooled test with a positive result are insufficient to be subsequently tested individually, those workers in the positive pool would need to be immediately re-swabbed and tested. The individual employee test results would be necessary to satisfy the employee documentation requirements of paragraph (g)(1). Where pooled testing is used (in accordance with paragraph (g)(1)), CDC and FDA procedures and recommendations for implementing screening pooling tests should be followed. OSHA notes that only some tests are authorized by the FDA for pooled testing, and should be performed per the authorization.

6.E. How do the testing requirements apply to those employees who previously tested positive for COVID-19?

The standard provides that when an employee has received a positive COVID-19 test, or has been diagnosed with COVID-19 by a licensed healthcare provider, the employer must not require that employee to undergo COVID-19 testing for 90 days following the date of their positive test or diagnosis. This provision is specifically intended to prohibit screening testing for 90 days because of the high likelihood of false positive results that do not indicate active infection but are rather a reflection of past infection. However, when the employee returns to work they must continue to wear a face covering in accordance with paragraph (i) of this ETS.

6.F. Do I have to maintain a copy of each COVID-19 test result for each of my unvaccinated employees?

Yes. The employer must maintain a record of each test result required to be provided by each employee pursuant to this ETS or obtained during tests conducted by the employer. These records must be maintained in accordance with 29 CFR 1910.1020 as employee medical records and must not be disclosed except as required by this ETS or other federal law. However, these records are not subject to the retention requirements of 29 CFR 1910.1020(d)(1)(i) (Employee medical records), but must be maintained and preserved while this ETS remains in effect.

6.G. Does the ETS require employers to cover the costs associated with COVID-19 testing?

No. The ETS does not require employers 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. OSHA notes that the ETS also does not prohibit the employer from paying for costs associated with testing required by the ETS. Otherwise, the agency leaves the decision regarding who pays for the testing to the employer. OSHA expects that some workers and/or their representatives will negotiate the terms of payment. OSHA has also considered that some employers may choose to pay for some or all of the costs of testing as an inducement to keep employees in a tight labor market. Other employers may

choose to put the full cost of testing on employees in recognition of the employee's decision not to become fully vaccinated. It is also possible that some employers may be required to cover the cost of testing for employees pursuant to other laws or regulations. The subject of payment for the costs associated with testing pursuant to other laws or regulations not associated with the OSH Act is beyond OSHA's authority and jurisdiction.

6.H. If an employee is entitled to a reasonable accommodation due to a disability or sincerely held religious belief that prevents them from being vaccinated, would the employee still need to be tested weekly?

Yes. The ETS requires weekly COVID-19 testing of all un-vaccinated employees, including those entitled to a reasonable accommodation from vaccination requirements. However, if testing for COVID-19 conflicts with a worker's sincerely held religious belief, practice or observance, the worker may be entitled to a reasonable accommodation. For more information about evaluating requests for reasonable accommodation, employers can consult the Equal Employment Opportunity Commission's website: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

6.I. How long does an employee have to submit to weekly COVID-19 testing if they choose not to be vaccinated?

The employer is required to comply with the requirements of the ETS as long as it is in effect. If an employer has unvaccinated workers in the workplace, those employees will be required to have weekly tests until they are fully vaccinated or the ETS is no longer in effect.

6.J. What type of COVID-19 tests are acceptable under the rule?

Under the ETS, a "COVID-19 test" must be a test for SARS-CoV-2 that is:

- cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the U.S. Food and Drug Administration (FDA) to detect current infection with the SARS-CoV-2 virus (e.g., a viral test);
- administered in accordance with the authorized instructions; and
- not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

Examples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens), proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer. COVID-19 tests can broadly be divided into two categories, diagnostic tests and antibody tests. Diagnostic tests detect parts of the SARS-CoV-2 virus and can be used to diagnose current infection. On the other hand, antibody tests look for antibodies in the immune system produced in response to SARS-CoV-2, and are not used to diagnose an active COVID-19 infection. Antibody tests do not meet the definition of COVID-19 test for the purposes of this ETS. Diagnostic tests for current infection fall into two categories: nucleic acid amplification tests (NAATs) and antigen tests. NAATs are a type of molecular test that detect genetic material (nucleic acids); NAATs for COVID-19 identify the ribonucleic acid (RNA) sequences that comprise the genetic material of the virus. Most NAATs need to be processed in a laboratory with variable time to receive results (approximately 1–2 days), but some NAATs are point-of-care tests with results available in about 15–45 minutes. Antigen tests may also meet the definition of COVID-19 test under this standard. Antigen tests indicate current infection by detecting the presence of a specific viral antigen. Most can be processed at the point of care with results available in about 15–30 minutes. Antigen tests generally have similar specificity to, but are less sensitive than, NAATs. Antigen tests are the only type of diagnostic tests that can be self-administered. To be a valid COVID-19 test under this standard, an antigen test may not be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. If an over-the-counter (OTC) test is being used, it must be used in accordance with the authorized instructions. The employer can validate the test through the use of a proctored test that is supervised by an authorized telehealth provider. Alternatively, the employer could proctor the OTC test itself. It should be noted that point-of-care (POC) testing must be performed in accordance with the Clinical Laboratory Improvement Amendments of 1988 (CLIA). The FDA has authorized POC tests that can be used at a place of employment when the facility is operating under a CLIA certificate of waiver. A CLIA certificate of waiver can be issued by the Centers for Medicare and Medicaid Services (CMS).

6.K. May a COVID-19 over-the-counter-test from a local pharmacy be used to satisfy the testing requirements under paragraph (g)?

Yes; however, to satisfy the requirements of the standard an over-the-counter (OTC) antigen test may not be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. Antigen tests indicate current

infection by detecting the presence of a specific viral antigen. Most can be processed at the point of care with results available in about 15–30 minutes. OSHA included the requirement for some type of independent confirmation of the test result in order to ensure the integrity of the result. This independent confirmation can be accomplished in multiple ways, including through the involvement of a licensed healthcare provider or a point-of-care test provider. If an OTC test is being used, the employer can validate the test through the use of a proctored test that is supervised by an authorized telehealth provider. Alternatively, the employer could proctor the OTC test itself.

6.L. Would the employer be cited for not getting an employee tested if there is a lack of adequate testing supplies?

OSHA has determined that there are sufficient COVID-19 tests available and adequate laboratory capacity to meet the anticipated increased testing demand related to compliance with the ETS testing requirements. However, in the event that an individual employer is unable to comply with paragraph (g) of this ETS due to inadequate test supply or laboratory capacity, OSHA will look at efforts made by the employer to comply, as well as the pattern and practice of the employer's testing program, and consider refraining from enforcement where the facts show good faith in attempting to comply with the standard.

6.M. What is CLIA and do I need a CLIA certification?

COVID-19 tests that are cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the FDA to detect current infection with the SARS-CoV-2 virus (e.g., a viral test) are permitted under the ETS when used as authorized by the FDA and with a Clinical Laboratory Improvement Amendments of 1988 (CLIA) certification when appropriate. The FDA has authorized point-of-care tests that can be used at a place of employment when the facility is operating under a CLIA certificate of waiver. A CLIA certificate of waiver can be issued by the Centers for Medicare and Medicaid Services (CMS). However, a CLIA certificate of waiver is not required for over-the-counter employee self-tests that are observed by employers.

6.N. How will the Administration ensure the availability of adequate testing capacity to satisfy the potential increase in demand the ETS may create?

The ETS encourages vaccination, and most employers can comply with the ETS by requiring their employees to become fully vaccinated, which will avoid any increased need for testing. But even if most employers were to forgo that option, and most of their employees were to choose not to be vaccinated, there would still be adequate testing capacity. OSHA thoroughly reviewed current and future projections of the availability of COVID-19 tests, testing supplies, and laboratory capacity. Following that review, OSHA determined that there is sufficient testing capacity to meet the anticipated increased testing demand related to compliance with the ETS testing option and found that the standard is technologically feasible. For more information about OSHA's feasibility analysis, see the detailed discussion in Technological Feasibility (Section IV.A. of the ETS preamble).

6.O. Will OSHA recognize good faith efforts in attempting to comply with the standard for testing delays beyond the employee's or employer's control?

Yes. Because antigen testing in point-of-care locations will typically produce results within minutes, the use of antigen testing should not result in an inability to provide the employer with test results in a timely fashion. However, the agency recognizes that where the employee or employer uses an off-site laboratory for testing, there may be delays beyond the employee's or employer's control. In the event that there is a delay in the laboratory reporting results and the employer permits the employee to continue working, OSHA will look at the pattern and practice of the individual employee or the employer's testing verification process and consider refraining from enforcement where the facts show good faith in attempting to comply with the standard.

6.P. Do employees who have received one dose of a two-dose sequence have to test weekly? Will employees who have received a second dose but are not yet two weeks past that second dose need to test weekly?

Employers must ensure that each employee who is not "fully vaccinated" complies with the testing requirements in paragraph (g)(1) of this ETS, including weekly testing for employees who report at least once every 7 days to a workplace where other individuals such as coworkers or customers are present. In the case of a two-dose primary vaccination series (e.g., Pfizer-BioNTech and Moderna), an employee is not considered "fully vaccinated" until 2 weeks after receiving the second dose of the series. Therefore, employers would need to ensure employees continue to test weekly until 2 weeks after receiving their second dose. However, employers have until 60 days after publication in the Federal Register to comply with the testing requirement in paragraph (g), and employees who have completed the entire primary vaccination by that date do not have to be tested, even if they have not yet completed the 2-week waiting period.

## Employee Notification to Employer of Positive COVID-19 Test and Removal

7.A. Do vaccinated employees need to be removed from the workplace if they test positive for COVID-19? What criteria do they have to satisfy before returning?

Yes. Regardless of COVID-19 vaccination status or any COVID-19 testing required under paragraph (g) of the ETS, the employer must immediately remove from the workplace any employee who receives a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider and keep the employee removed until the employee:

- receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if the employee chooses to seek a NAAT test for confirmatory testing;
- meets the return to work criteria in CDC's "Isolation Guidance" (incorporated by reference, § 1910.509); or
- receives a recommendation to return to work from a licensed healthcare provider.

7.B. If an employer utilizes pooled testing to satisfy the requirements under paragraph (g), do all employees need to be removed if there is a positive result?

No. If an employer conducts pooled testing for COVID-19, a positive pooled test result would trigger a need to immediately re-test those employees in the pool using an individual COVID-19 test because the positive pooled result would not satisfy the requirements of paragraph (g). Only those employees who test positive on their individual re-test would need to be removed from the workplace.

7.C. What does OSHA mean by "promptly" notifying employers?

Promptly notifying the employer means notifying the employer as soon as practicable before the employee is scheduled to start their shift or return to work. In the event that the employee is in the workplace when they receive a positive COVID-19 test result or diagnosis of COVID-19, promptly notifying the employer means notifying the employer as soon as safely possible while avoiding exposing any other individuals in the workplace.

7.D. Do I have to provide my employee with paid time off if they are removed from the workplace?

No. This ETS does not require employers to provide paid time off to any employee for removal as a result of a positive COVID-19 test or diagnosis of COVID-19; however, paid time off may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements. On the other hand, the ETS does not preclude employers from choosing to pay employees for time required for removal under this standard. Additionally, employers should allow their employees to make use of any accrued leave in accordance with the employer's policies and practices on use of leave. This provision, while not placing the burden on the employer to provide paid time off, should not be read as depriving employees of the benefits they are normally entitled to as part of their employment.

7.E. My employee received a positive COVID-19 test but is not exhibiting any symptoms. They decided to take another test which came back negative. Can I allow them in the workplace based on the results of the second test?

The employee can return to work if they receive a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test (the most common screening test). According to the FDA, there is a small possibility for employees to receive false positive test results when conducting regular screening with an antigen test. Positive results are usually highly accurate at moderate-to-high peak viral load, but false positives can occur, depending on the course of infection. OSHA recognizes that an employee might choose to seek a NAAT test for confirmatory testing. According to the CDC, NAATs are considered the "gold standard" for clinical diagnosis of SARS-CoV-2 and may have a higher sensitivity (i.e., ability to correctly generate a positive result) than antigen tests. If an employee tested positive for COVID-19 via an antigen test, but then received follow-up confirmatory testing via a NAAT and the NAAT was negative, the positive antigen test can be considered a false positive and the employee can return to work. If the original positive test result did not occur using an antigen test (i.e., occurred with a NAAT test), the employer must wait for the employee to provide a return to work recommendation from a licensed healthcare provider or meet the return to work criteria in CDC's "Isolation Guidance" before allowing the employee to return to the workplace.

7.F. Should an unvaccinated employee be removed from the workplace if they have been in close contact with a COVID-19 positive person at the workplace?

The standard does not require the removal of an unvaccinated employee if they have been exposed to a COVID-19 positive person. All unvaccinated workers must wear face coverings and submit to weekly COVID-19 testing, but employers are only required to remove employees if they have tested positive for or been diagnosed with COVID-19. OSHA's removal requirements, as outlined in paragraph (h)(2) of the ETS, are intended to set the floor for what is required; however, OSHA encourages employers who are able to do so to have a more robust program of medical removal, as indeed some employers have already done.

7.G. If an employee has been removed from the workplace because they are COVID-19 positive, are they still allowed to work remotely (e.g., telework)?

Yes. Any time an employee is required to be removed from the workplace, the employer can require the employee to work remotely or in isolation if suitable work is available and if the employee is not too ill to work. In cases where working remotely or in isolation is not possible, OSHA encourages employers to consider flexible and creative solutions, such as a temporary reassignment to a different position that can be performed by telework. However, if an employee is too ill to work, remote work should not be required, and sick leave or other leave should be made available as consistent with the employer's general policies and practices, and as may be required under applicable laws.

7.H. If an employee tests positive for or is diagnosed with COVID-19, is the employer required to conduct contact tracing?

No. The ETS does not have a provision requiring notification alerts or contact tracing after an employee tests positive for COVID-19. Employers should follow state and local public health guidance for contact tracing. For more information, the CDC provides guidelines on contact tracing, which can be found at <https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/contact-tracing.html>.

7.I. Do I have to keep records when I receive notice that an employee tested positive for or was diagnosed with COVID-19?

No. The ETS does not contain specific requirements for the employer to establish or maintain records of employee notifications of a positive COVID-19 test or diagnosis of COVID-19 by a licensed healthcare provider. However, should an employer determine that a reported case of COVID-19 is work-related, the employer must record that information on the OSHA Forms 300, 300A, and 301, or on equivalent forms, if required to do so under 29 CFR part 1904. This also includes confirmed cases of COVID-19 identified under paragraph (h) that an employer determines are work-related. Under 29 CFR part 1904, COVID-19 is a recordable illness and employers are responsible for recording cases of COVID-19 if: (1) the case is a confirmed case of COVID-19 as defined by the Centers for Disease Control and Prevention (CDC); (2) the case is work-related as defined by 29 CFR part 1904.5; and (3) the case involves one or more of the general recording criteria set forth in 29 CFR part 1904.7 (e.g., medical treatment beyond first aid, days away from work). Under 29 CFR part 1904, employers must generally provide access to the 300 log to employees, former employees, and their representatives with the names of injured or ill employees included on the form. If, however, the employee requests that their name not be entered on the 300 log, the employer must treat their illness as a privacy concern case and may not enter their name on the log (see 29 CFR 1904.29(b)(6), (b)(7)(vi)).

## Face Coverings

8.A. What is a face covering?

A "face covering" means a covering that: (1) completely covers the nose and mouth; (2) is made with two or more layers of a breathable fabric that is tightly woven (i.e., fabrics that do not let light pass through when held up to a light source); (3) is secured to the head with ties, ear loops, or elastic bands that go behind the head. If gaiters are worn, they should have two layers of fabric or be folded to make two layers; (4) fits snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and (5) is a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings. This definition of face covering allows various different types of masks including clear face coverings or cloth face coverings with a clear plastic panel that, despite the non-cloth material allowing light to pass through, otherwise meet this definition and which may be used to facilitate communication with people who are hearing impaired or others who need to see a speaker's mouth or facial expressions to understand speech or sign language, respectively. Face coverings can be manufactured or homemade, and they can incorporate a variety of designs, structures, and materials. Face coverings provide variable levels of protection based on their

design and construction.

8.B. If I utilize the exemption under paragraph (d)(2) and adopt a policy allowing employees to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace instead of vaccination, do all employees need to wear a face covering?

No. Only employees who are not fully vaccinated are required to wear a face covering under the standard when indoors and when occupying a vehicle with another person for work purposes, with exceptions listed in the next FAQ (8.C.). However, the employer must not prevent any employee, regardless of vaccination status, from voluntarily wearing a face covering or facemask unless the employer can demonstrate that doing so would create a hazard.

8.C. Are there any exceptions to the face covering requirements for not fully vaccinated workers required under the standard?

Yes. The employer must ensure that each employee who is not fully vaccinated wears a face covering when indoors and when occupying a vehicle with another person for work purposes, except:

1. When an employee is alone in a room with floor to ceiling walls and a closed door.
2. For a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements.
3. When an employee is wearing a respirator or facemask.
4. Where the employer can show that the use of face coverings is infeasible or creates a greater hazard that would excuse compliance with this paragraph (e.g., when it is important to see the employee's mouth for reasons related to their job duties, when the work requires the use of the employee's uncovered mouth, or when the use of a face covering presents a risk of serious injury or death to the employee).

8.D. If I provide my employees with respirators instead of face coverings are there any special requirements to comply with this standard?

Yes. The employer must also comply with 1910.504 (the mini respiratory protection program). The mini respiratory protection program is designed to strengthen employee protections with a small set of provisions for the safe use of respirators designed to be easier and faster to implement than the more comprehensive respiratory protection program under 29 CFR 1910.134. The requirements of the mini respiratory protection program section are discussed in the agency's prior rulemaking on 1910.504.

## Information Provided to Employees

9.A. Are employers required to provide specific information regarding each provision of the ETS to the employees?

Yes. The employer must inform each employee, in a language and at a literacy level the employee understands, about:

- the requirements of §1910.501 and any policies and procedures the employer establishes to implement this ETS. This includes:
  - any employer policies under paragraph (d);
  - the process that will be used to determine employee vaccination status, as required under paragraph (e);
  - the time and pay/leave they are entitled to for vaccinations and any side effects experienced following vaccinations, as required by paragraph (f);
  - the procedures they need to follow to provide notice of a positive COVID-19 test or diagnosis of COVID-19 by a licensed healthcare provider, as required under paragraph (h);
  - and the procedures to be used for requesting records under paragraph (l).
- Employers must provide additional information to unvaccinated employees, including information about the employer's policies and procedures for COVID-19 testing and face coverings, as required by paragraphs (g) and (i), respectively.

In addition the information provided to employees must address:

- COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated (by providing the document, "Key Things to Know About COVID-19 Vaccines," available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>);
- the requirements of 29 CFR 1904.35(b)(1)(iv), which prohibits the employer from discharging or in any manner discriminating

against an employee for reporting work-related injuries or illness, and Section 11(c) of the OSH Act, which prohibits the employer from discriminating against an employee for exercising rights under, or as a result of actions that are required by, the ETS. Section 11(c) also protects the employee from retaliation for filing an occupational safety or health complaint, reporting a work-related injuries or illness, or otherwise exercising any rights afforded by the OSH Act (fact sheet available in English and Spanish); and

- the prohibitions of 18 U.S.C. § 1001 and of Section 17(g) of the OSH Act, which provide for criminal penalties associated with knowingly supplying false statements or documentation (fact sheet available in English and Spanish).

9.B. Is there a specific manner (e.g., electronically, in-person training) that information needs to be provided to employees?

The manner in which employers provide the required information to employees may vary based on the size and type of workplace. Employers have flexibility to communicate this information to employees using any effective methods that are typically used in their workplaces, and may choose any method of informing employees so long as each employee receives the information specified in the standard in a language and at a literacy level they understand. For example, an employer may provide this information to employees through email communications, printed fact sheets, or during a discussion at a regularly scheduled team meeting. There are no formal training requirements.

9.C. How often must information be provided to employees? Is one time sufficient?

The ETS does not specify the frequency with which employers must provide information to employees. However, when an employer's policies or procedures change, the employer must provide any updated or supplemental information to employees. For example, an employer may initially opt to allow only paper copies as proof of COVID-19 test results. Over time, however, the employer may decide that it wants to accept electronic proof of test results. If that employer modifies its policy to permit employees to submit electronic proof of test results, the employer must inform employees of any new or altered policies and procedures that the employer implements as a result.

9.D. Why are we required to provide information to our employees?

Information requirements are routine components of OSHA standards. The inclusion of information requirements in this ETS reflects the agency's conviction that informed employees are essential to the implementation of any effective occupational safety and health policy or procedure. The ETS cannot be effective if employees do not have sufficient knowledge and understanding of the requirements of the ETS, their employer's policies and procedures, information about available COVID-19 vaccines, their protections against retaliation and discrimination, and the potential penalties for knowingly providing false information to their employer. OSHA believes that providing this information to employees will help increase the number of employees vaccinated and will facilitate effective implementation of the standard by employers.

## **Reporting COVID-19 Fatalities and Hospitalizations to OSHA**

10.A. If an employee dies from or is in-patient hospitalized due to COVID-19 and the employer does not believe that the death or in-patient hospitalization is work-related (e.g., because the employee was working remotely), is the employer required to report the fatality or in-patient hospitalization to OSHA?

No. An employer is only required to report work-related COVID-19 fatalities and in-patient hospitalizations.

10.B. How do I determine if a COVID-19 fatality or in-patient hospitalization was work-related?

OSHA recognizes that it may be difficult for an employer to determine whether an employee's COVID-19 illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace. For purposes of this ETS, when evaluating whether a fatality or in-patient hospitalization is the result of a work-related case of COVID-19, employers must follow the criteria in OSHA's recordkeeping regulation at 29 CFR 1904.5 for determining work-relatedness. Applying the criteria in 29 CFR 1904.5 under paragraph (k) of this ETS is consistent with how employers make work-relatedness determinations when reporting fatalities and other serious events under 29 CFR 1904.39. For more information, OSHA has prepared a fact sheet explaining these reporting requirements.

10.C. How do I report a fatality or in-patient hospitalization of an employee?

Employers have three options for reporting work-related fatalities and in-patient hospitalizations to OSHA:

1. by telephone to the OSHA Area Office that is nearest to the site of the incident;
2. by telephone to the OSHA toll-free central telephone number, 1-800-321-OSHA (1-800-321-6742);
3. by electronic submission using the reporting application located on OSHA's public website at [www.osha.gov](http://www.osha.gov).

Be prepared to provide: The employer's business name; the name of the deceased or hospitalized employee; the time and location of the work-related incident (i.e., exposure) that led to the fatality or in-patient hospitalization, if known; the type of reportable event (i.e., fatality or in-patient hospitalization); a brief description of the incident; and the name and contact information of the employer's designated contact person.

## Availability of Records

11.A. Are employers required to provide employees with access to their COVID-19 test records?

Yes. The ETS states that the employer must make available, for examination and copying, the individual COVID-19 vaccine documentation and any COVID-19 test results required by the ETS for a particular employee to that employee and to anyone having written authorized consent of that employee by the end of the next business day after a request. Prompt employee access to this information ensures that employees have the information necessary to take an active role in their employers' efforts to prevent COVID-19 transmission in the workplace. In particular, in circumstances where employers or employees choose to have the employee's COVID-19 test results go directly to the employer, the standard gives the employee access to their own records.

11.B. Why are employers required to provide OSHA with the aggregate number of fully vaccinated employees at the workplace along with the total number of employees at that workplace within 4 hours of a request?

Providing OSHA with prompt access to the written policy and the aggregate numbers allows the agency to more rapidly focus inspections on employers that may not be in compliance with the requirements of this ETS. In addition, this information will help OSHA determine what to focus on in an investigation. For example, if an employer has established, implemented, and is enforcing a written mandatory vaccination policy under paragraph (d)(1) and its aggregate numbers indicate that its entire workforce is fully vaccinated against COVID-19, the agency might approach the investigation differently than in a workplace where the employer's written policy (under paragraph (d)(2)) allows employees to provide proof of regular testing for COVID-19 in accordance with paragraph (g) and wear a face covering in accordance with paragraph (i), instead of being fully vaccinated. This information also provides OSHA representatives with the ability to quickly check any vaccination claims made by an employer without undertaking an employee-by-employee assessment and assists OSHA representatives in their evaluation of the effectiveness of the employer's written policy.

11.C. Why are employers required to provide an employee or an employee representative with the aggregate number of fully vaccinated employees at the workplace along with the total number of employees at that workplace by the end of the next business day after a request by that employee or representative?

OSHA believes that access to this information will allow employees and employee representatives to calculate a percentage of fully vaccinated employees at a workplace, evaluate the efficacy of the employer's vaccination policy, raise any concerns identified to OSHA, and actively participate in the employer's vaccination efforts. Without the provision of this information to employees and their representatives, the only potential check on whether the employer is complying with the requirements of the ETS would be OSHA inspections. The agency believes that making this information available to employee representatives will help ensure compliance with the requirements of the ETS and thereby protect workers.

11.D. How should requesters request these records from employers?

OSHA does not prescribe specific methods for requests for records in this ETS. Employees, employee representatives, and OSHA can submit requests in any manner that provides adequate notice of the request to the employer. This may include requests by in writing (e.g., email, fax, letter), by phone, or in person.

## Dates

## 12.A. What are the effective date and the compliance dates for 1910.501?

The effective date for the ETS is November 5, 2021, which is the date the ETS was published in the Federal Register. Although the ETS becomes effective immediately, employers are not required to comply with the requirements of the ETS until the compliance dates, as follows:

- All provisions except paragraph (g)
  - 30 days after date of publication in the Federal Register
- Paragraph (g) – COVID-19 testing for employees who are not fully vaccinated
  - 60 days after date of publication in the Federal Register

## 12.B. How much time does an employee have to get vaccinated before the testing requirements of paragraph (g) are initiated?

If an employee completes the entire primary vaccination series within 60 days following publication in the Federal Register, that employee does not have to be tested under paragraph (g), even if the employee has not yet completed the two-week waiting period that is required to meet the definition of fully vaccinated in paragraph ©. Employers must begin compliance with the testing requirements of paragraph (g) only for employees who have not yet received the requisite number of doses for a primary vaccination series (i.e., employees who have not received any doses, employees who have received only one dose of a two-dose series) by 60 days after the date of publication in the Federal Register. Because the timing of doses for the three main vaccination series available in the U.S. is different, employers and employees must keep in mind the following dates in order to complete a vaccination series by 60 days after the date of publication in the Federal Register:

- For the Janssen (Johnson & Johnson) COVID-19 vaccine, the primary vaccination series takes 1 day to complete. Employees who receive the Janssen vaccine therefore have to get their one Janssen dose on or before 60 days after publication to be exempt from the testing requirements of paragraph (g).
- For the Pfizer-BioNTech COVID-19 vaccine, the primary vaccination series takes 21 days to complete. Employees receiving the Pfizer-BioNTech series therefore have to begin their primary vaccination series (i.e., get their first dose) on or before 39 days after publication and get their second dose 21 days later.
- For the Moderna COVID-19 vaccine, the primary vaccination series takes 28 days to complete. Employees receiving the Moderna series therefore have to begin their primary vaccination series (i.e., get their first dose) on or before 32 days after publication and get their second dose 28 days later.

Employers and employees should note that this is not a complete list of vaccinations that are acceptable under the ETS. The ETS allows for vaccination with vaccines that have been approved or authorized for emergency use by the FDA, vaccines listed for emergency use by the WHO, vaccines used in clinical trials, and “mix-and-match” vaccination series. Employers and employees should consult the definition of “fully vaccinated” in paragraph © of the ETS for more details.

## 12.C. How long will the ETS be in effect?

OSHA anticipates that the ETS will be in effect for six months from the date of publication in the Federal Register. However, OSHA will continue to monitor trends in COVID-19 infections and deaths as more of the workforce and the general population become vaccinated and the pandemic continues to evolve. Where OSHA finds a grave danger from the virus no longer exists for the covered workforce (or some portion thereof), or new information indicates a change in measures is necessary to address the grave danger, OSHA will update the ETS, as appropriate.

## 12.D. Will OSHA have a comment period for the ETS?

Yes. OSHA has initiated a 30-day public comment period and is inviting comments on any aspect of this ETS and whether the ETS should become a final rule. The public comments will allow OSHA to gather information, diverse perspectives, and technical expertise to help the agency in considering next steps. Additional information on opportunities to participate and what information OSHA is seeking is provided in OSHA’s Vaccination and Testing ETS: How You Can Participate.

Source: Occupational Safety and Health Administration

