

What Does OSHA's COVID-19 ETS Mean for New York Employers?

More Than a Vaccination Rule

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Topics

- ▶ Will this even happen?
- ▶ Who is covered?
- ▶ Do we mandate or permit testing?
- ▶ How do the paid leave provisions work?
- ▶ What does this mean for the NY HERO Act?

Status of OSHA Rule

- ▶ Pres. Biden announcement on Sept. 9
- ▶ Submitted to White House OMB on Oct. 12
- ▶ Text released Nov. 4
- ▶ ETS and proposed rule published Nov. 5
- ▶ 5th Circuit Court of Appeals stayed enforcement Nov. 6 and upheld on Nov. 12
- ▶ OSHA filed petition for multi-circuit lottery Nov. 16

Status of OSHA Rule

“While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.”



Covered Employers

100+ Employees

- ▶ All current direct employees count, regardless of hours, compensation, etc.
- ▶ If employer has 100 employees on any day ETS is in effect, remain covered for rest of effective period

Exceptions

- ▶ Subject to OSHA's Healthcare COVID-19 ETS
- ▶ Federal contractor
- ▶ Government entities (?)

Federal Contractors

- ▶ Executive Order applies to most federal contractors (not grantees)
- ▶ Triggered by new contract, including extensions, renewals, and exercise of option
- ▶ Vaccination deadline changed to January 4, 2022 to match OSHA ETS

Covered Employees

- ▶ All employees of covered employers, except those
 1. who don't report to a workplace where other individuals are present,
 2. working from home, or
 3. working exclusively outdoors



Effective Dates

- ▶ Uncertain given current stay and ongoing legislation, but per rule:
- ▶ Dec. 6, 2021: compliance with all ETS requirements except weekly testing for unvaccinated employees
- ▶ Jan. 4, 2022: full implementation deadline

Administrative Requirements

- ▶ Establish and maintain roster of employees' vaccination status and supporting documentation
- ▶ Adopt written policy
- ▶ Exclude employees who test positive for applicable isolation period
- ▶ Report work-related COVID-19 in-patient hospitalizations and fatalities to OSHA

Vaccination Documentation

- ▶ Immunization record from health care provider/pharmacy
- ▶ COVID-19 Vaccination Record Card
- ▶ Medical records documenting vaccination
- ▶ Immunization records from public health, state, or tribal immunization information system
- ▶ Other official documentation containing type of vaccine, date(s), and name of health care professional/clinic site

Employee Attestation

- ▶ Acceptable if employee is unable to produce other permissible proof of vaccination
- ▶ Signed by employee, attesting to vaccination status and that they are unable to produce other proof
- ▶ Must include: “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.”

Compliance Alternatives

Vaccine Mandate

- ▶ No testing requirement
- ▶ Possible disability and religious exceptions

Testing Option

- ▶ Weekly testing for unvaccinated employees
- ▶ Unvaccinated employees must wear masks with limited exceptions

Union Involvement

- ▶ NLRB GC has announced her view that employers must bargain with unions over ETS implementation decisions that affect terms and conditions of employment
- ▶ Where ETS requires employers to take specified action, GC reminds of effects bargaining obligation

Testing Requirements

- ▶ Unvaccinated employees cannot be at the workplace unless they have tested negative within the past 7 days
- ▶ OSHA doesn't require employers to pay for testing, but other legal obligations may apply
- ▶ Wide range of accepted tests/procedures, but not employee self-test/report



Paid Leave

Vaccination

- ▶ Up to 4 hours, including travel time, of paid time per dose
- ▶ Applies only to primary vaccination, not booster shots
- ▶ Already required under New York law

Recovery

- ▶ Reasonable paid sick leave to recover from side effects of vaccination
- ▶ OSHA says up to 2 days will generally be reasonable
- ▶ Can count toward available paid sick/PTO time, but must provide even if sick time has already been used

Employee Information

- ▶ Must inform all employees “in a language and at a literacy level the employee understands about:
 1. OSHA ETS requirements and related employer policies and procedures.
 2. CDC document: “Key Things to Know About COVID-19 Vaccines”.
 3. OSHA rules that prohibit employers from discharging or in any manner discriminating against an employee for reporting a work-related injury or illness and for exercising rights under the ETS.
 4. Federal laws providing for criminal penalties associated with knowingly supplying false statements or documentation.
- ▶ OSHA has posted sample policies on its website:
<https://www.osha.gov/coronavirus/ets2>

Penalties

- ▶ Up to \$13,653 per violation
- ▶ Up to \$136,532, per offense, for repeated and willful violations
- ▶ Proposed legislation could increase OSHA penalties to 10 times those amounts



HERO Act

- ▶ Airborne Infectious Disease Exposure Prevention Plans in effect through at least December 15th
- ▶ Doesn't cover employers subject to OSHA regulations
- ▶ Workplace Safety Committee provisions took effect November 1, but no DOL guidance

Workplace Safety Committees

- ▶ NY Labor Law § 27-d
- ▶ Applies to private employers with at least 10 employees in New York
- ▶ Review the adoption of any policy in the workplace in response to any health or safety law, ordinance, rule, regulation, executive order, or other related directive

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Questions?



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