

Is the ETS a Stay or Will It Go? Understanding OSHA's Vaccination Mandate – Webinar Q & A

On November 23, MRA hosted a second webinar addressing the vaccination mandates, titled *Is the ETS a Stay or Will It Go? Understanding OSHA's Vaccination Mandate*. Attorneys Christine Liu McLaughlin with Godfrey & Kahn and Sean Scullen with Quarles and Brady answered several questions about OSHA's Emergency Temporary Standard (ETS), as well as vaccination mandates issued by the Centers for Medicare and Medicaid Services (CMS) for healthcare workers and the Safer Federal Workforce Task Force applying to government contractors and subcontractors.

Prior to the webinar, and since, several injunctions against OSHA and the CMS have been issued. There has also been an injunction issued toward compliance with the federal contractor mandate that impacts several states. Although these injunctions temporarily halt the requirement to comply with the mandates, they do not overturn them. It is still recommended that employers continue to prepare to be compliant with the requirements. It is unknown if the current legal process will alter any of the compliance dates and it is possible that immediate compliance will be enforced if they are not overturned.

Employers should also consider labor contracts and state, local, city, or tribal laws that may alter the requirements of the mandates. For example, if the ETS does not specify how something should be handled but a state indicates that the employer is responsible, state law will prevail.

Although the attorneys responded to many questions during the webinar, there were still several unanswered questions.

Compliance and Policies

Q. How should employers handle situations where an employee refuses vaccination and wearing a mask?

A. Under the ETS, if an employee refuses both the vaccine and weekly testing and does not qualify for an exemption, the employee is no longer be able to be employed by the company.

Q. Since the stay is in place, what should employers do in regard to the compliance dates?

A. While the stay is in place, OSHA cannot enforce the requirements of the ETS and employers do not need to implement them. It is advised that employers continue to prepare to meet the requirements of the ETS, in case it is upheld.

Q. If an employer provides the option of being vaccinated or weekly testing, should exemption forms still be obtained from employees who are not vaccinated due to religious beliefs or medical reasons?

A. It is not necessary to obtain exemption forms if the option to test is available. Employees may choose the option of weekly testing and wearing a mask without sharing the reason for doing so.

Q. Do the requirements of the ETS apply to others inside your building, such as tenants, visitors, and vendors?

A. The ETS only applies to employees that are on your payroll. It does not include others that may occupy the same space that are not employed by your company.

Q. If our company is required to comply with the ETS, but employees visit locations that are not, which guidance should they follow?

A. It is recommended that employees follow the requirements of the employer, not the customer or client.

CMS, federal contractor, and other mandates

Q. Are federal contractors required to follow the guidance of the ETS?

A. Federal contractors and subcontractors are covered under the vaccination requirements set forth by the Safer Federal Workforce Task Force. Complying with the ETS may meet some of the requirements, but will not satisfy all of them issued by that organization under [Executive Order 14042](#).

Q. What are the requirements for federal contractors as issued by the Safer Federal Workforce Task Force?

A. The [Safer Federal Workforce Task Force](#) has provided guidance on their website for federal contractors and subcontractors related to vaccination and exemptions, including resources for employers.

Q. As a federal contractor, how do we determine appropriate accommodations for religious exemption requests?

A. Employers may determine the accommodations they make for a religious exemption request. These do not have to follow OSHA's ETS protocols and there is no requirement, at this time, for employers to pay for testing. The Safer Federal Workforce Task Force has published an [FAQ](#) to help answer additional questions about accommodations.

Q. Are the mandates different for healthcare workers under the CMS from those issued by OSHA under the ETS or for federal contractors by the Safer Federal Workforce Task Force?

A. Yes. While there may be common guidance issued by each organization, the guidance does vary in several ways. Federal contractor and subcontractors should follow the guidance issued by the [Safer Federal Workforce Task Force](#) and are not required to follow what OSHA has published in the [ETS](#). Healthcare workers have additional guidelines issued by the [CMS](#) that differ from the ETS as well.

Q. If a company may be covered by more than one mandate, can the employer choose which to follow?

A. Only facilities subject to CMS regulation are subject to the CMS interim final rule. While facilities with 100 or more employees may also be subject to the OSHA ETS, there does not appear to be a contradiction in coverage or scope of compliance. Employers can determine how they want to develop policies for the company and may have multiple approaches within one company between guidance issued by OSHA and CMS. If a company holds government contracts or is a subcontractor, that company must follow the guidance set forth by the Safer Federal Workforce Task Force.

Q. Our facility accepts Medicaid for services other than healthcare. Are we required to comply with CMS guidelines?

A. Companies providing services through hospitals, ambulatory surgical centers, nursing homes, or federally qualified health centers must comply with CMS guidance. Providers outside those operations, although receiving Medicare or Medicaid funding, do not need to comply.

Q. If some employees are on jobsites with federal contracts, do all employees need to follow the federal contractor mandate?

A. Yes, any employee performing work tied to a federal contract must comply with the mandate.

Q. Is there any guidance on how the Department of Housing and Urban Development (HUD) will handle the mandates?

A. The Department of Housing and Urban Development released a [memo](#) at the end of September with additional guidance on new procedures for onsite contractors in HUD facilities. It addresses the new requirements for contract compliance, vaccination requirements, mask wearing, and testing.

Q. Do mining facilities governed by MSHA (Mine Safety and Health Administration) need to comply with the federal vaccination mandates?

A. MSHA has authority over mining industries and is a separate agency from OSHA. MSHA is an agency under the Department of Labor, like OSHA, but is specific to the mining industry. Since the two operate separately, employers covered by MSHA do not need to comply with OSHA mandates.

Q. If our company has union representation, which items under the ETS can be bargained?

A. The requirement for employees to be vaccinated or test at least weekly is in compliance with a federal mandate, so a union cannot bargain to not be vaccinated. You may bargain for the option to test if the company does not hold any federal contracts or is not a federal contractor. Other items may be negotiated, such as who will pay for testing, how much time will be paid for vaccination or testing, or the amount of compensation that will be provided if there is an adverse reaction or side effects after being vaccinated, for example.

Q. Are churches and other religious organizations required to comply with the ETS?

A. It depends on the function of the entity within a religious organization. Any person employed by a school, hospital or other business associated with a church is covered by OSHA. However, any person working to perform religious activities, such as conducting a religious service or leading a church choir, is not covered. OSHA looks at the entity's function to determine whether or not it is covered under its regulation. If the entity contributes to and affects the economic sector of society, it falls under OSHA regulation.

Exemptions

Q. Is there an exemption for natural immunity or for someone who has previously been diagnosed with COVID-19?

A. The ETS does not offer any exemptions to vaccination requirements based on natural immunity or the presence of antibodies from a previous infection.

Q. Are employees who have been granted a medical or religious exemption excluded from weekly testing? Does a medical or religious exemption also apply to testing?

A. No. Employees with an exemption from vaccination will still need to test at least weekly and wear a mask while in indoor workspaces. It is very difficult to prove that an exemption from both vaccination and testing is necessary, however, if an employee requests an exemption from both, it is recommended the employer go through the regular accommodation request process to determine if there is a legitimate reason for the exemption.

Q. If an employee chooses to test rather than be vaccinated, should an exemption request still be completed?

A. It is not necessary for an employee to complete an exemption request if the testing requirement is being met.

Q. Can an employee request an exemption from being vaccinated and wearing a mask? What can employers do in that situation?

A. It is not common for an employee to require an exemption from testing or wearing a mask. If an employee does make such a request, it is recommended that it be evaluated as any other request would be. Some employees may ask for an accommodation for wearing a mask, but an exemption is very rare.

If it has been determined that an employee is not able to be vaccinated or wear a face covering in the workplace, an alternative may be to allow that employee to work from home. If that is not an option either, it is possible that the employment relationship cannot continue.

Q. How can employers evaluate if a request for a religious exemption from vaccination is legitimate? How can employers determine if a request is a political view or religious belief?

A. Sincerely held religious beliefs are difficult to disprove, so the attorneys suggested employers focus on if accommodating the request will cause undue hardship to the employer. Given the potential time and cost requirements of testing and masking, an employer may be able to determine an undue hardship and not need to provide the accommodation.

It can be difficult to distinguish between a sincerely held religious belief and a political view. A religious belief typically references the process of testing or developing the vaccine or an opposition to accepting any type of medical treatment. A religion does not need to be mainstream or widely followed for the beliefs tied to it to qualify. Political or personal views typically include fear of side effects or statements related to political campaigns.

Determining the Number of Employees

Q. Does our company need to comply with the ETS if we have less than 100 employees? How long will we have to comply if we go over 100 employees while the ETS is in effect?

A. Companies with less than 100 employees do not need to comply with the requirements of the ETS. You may choose to implement policies that follow the ETS guidelines, but that is optional. If your employee count reaches 100 at any time the ETS is in force, you are required to comply from that date forward.

Q. How is employee count determined if there are different locations or Employer Identification Numbers?

A. In general, employee count should be done at the employer level, not the individual location level. For example, if an organization has several locations, the number of employees at each location are combined to determine the total number of employees for that organization. Separate Employer Identification Numbers (EIN) alone does not indicate separate businesses if the companies share common ownership and policies, among other things.

Because the ETS is issued by OSHA, locations may be considered separate based on the safety programs they have in place. If a company has several locations and each has a distinctly different safety program in place, it may be counted as a separate entity when taking an employee count. Safety programs are considered distinct if they have dedicated safety managers, have filed independent responses to prior safety inspections done by OSHA, file separate OSHA logs, and handle all safety issues separately from other locations. This is a fact-specific analysis, so it is recommended to consult with an attorney before making a final determination based on safety programs.

Q. Should the employee count include volunteers, seasonal workers, independent contractors and employees working through temporary agencies? Should it include part-time workers and minors?

A. The employee count only includes those employees on your payroll. Any person paid through another agency, accounts payable, or other non-payroll method are not considered employees and do not need to be counted. Both part-time and minor workers on your payroll should be included in the employee count.

Q. Should remote workers be counted or those who are not in the office 100 percent of the time?

A. Employees working remotely or those who are not in the office every day should be counted toward the 100-employee threshold to determine if the company will need to comply with the ETS requirements. Remote workers may not be required to be vaccinated or test weekly if they truly work remotely and are not in contact with any other employees, unless involved with a government contract. Employees who are intermittently at the workplace will need to comply with the vaccination and testing requirements outlined in the ETS.

Q. Will the ETS apply to companies with less than 100 employees in the future?

A. It has not been determined if the ETS will change in the future.

Vaccination Status and Recordkeeping

Q. Can an employer ask for an employee's vaccination status?

A. Yes. An employer can ask an employee to disclose their vaccination status. Vaccination status is like other information employers might collect, such as fitness for duty reports, results of pre-employment physicals and drug tests, medical leave certifications, etc. Employers should not ask for information that is not related to employment with the company or any information that is prohibited by law.

Q. Can an employer identify unvaccinated employees within the workplace?

A. Employers need to be careful to not share vaccination status with others beyond those that have a business need to know. Employee vaccination status should be treated as confidential health information and the protection of this information should be covered under existing confidentiality and recordkeeping policies.

Q. Are the employee's vaccination status and their vaccination status records considered protected health information under the Health Insurance Portability and Accountability Act?

A. Yes and No. HIPAA does not prohibit an employer from asking if an employee has received any vaccines and providing documentation supporting vaccination status, including a COVID-19 vaccine. An employee's doctor, however, must follow HIPAA privacy rules regarding the release of the employee's medical information and records. Employees must authorize the release of medical information and records when it is provided directly to the employer by a doctor.

Compensation for Testing and Vaccination

Q. Is time spent getting the vaccination compensable?

A. Under the ETS, employees may be granted up to four hours per vaccination dose during normal work hours. These hours do not need to be included in overtime calculations and vaccination that occurs prior to an employee's start date or after the last day of employment are not compensable. Prior to the effective date of ETS, and while it is on hold, employers should follow local or state laws that may require an employer to pay for the time spent being vaccinated, either during or outside regular work hours.

Q. Is time spent getting tested compensable?

A. The ETS does not require an employer to pay an employee for the time spent testing. If testing is provided by the employer and done during regular work hours, however, the time spent testing is considered compensable. It is recommended that employers check their local, state, and tribal wage and hours laws, as well as union contracts, to determine compensability for specific worksites.

Q. Are vaccination costs the responsibility of the employer?

A. No. Vaccination costs are not the responsibility of the employer unless required by local or state regulation or law, or renegotiated union contracts.

Q. Are COVID-19 tests considered employment-based tests and who is responsible for the cost?

A. The ETS does not require employers to pay for testing of unvaccinated employees. However, COVID-19 testing may be considered employment related according to some local, state, or tribal laws. Employers with employees in areas that consider testing a condition of employment may be responsible for all costs associated with testing, including time spent to test, whether during business hours or outside of them. Union contracts may also address who is responsible for the costs associated with testing.

Q. Are employers required to compensate employees who are unable to work due to side effects from receiving the COVID-19 vaccine?

A. Yes. If the employee has paid sick leave (not vacation, personal, etc.) available, an employer can require use of that time for the absence. If the employer does not specify between types of paid time off benefits (i.e., offers a general PTO bank), required use of that time is permitted as well. An employer cannot require an employee to borrow against future accruals. If the employee does not have applicable sick pay benefits available, employers may grant reasonable unpaid time off. Employers may determine what is considered reasonable time off and it is recommended that it be included in any COVID-19 policies the company creates.

Testing

Q. Who is covered under the testing requirement? Does this include temporary employees or contract workers?

A. All unvaccinated employees that are included on a company's payroll are included in the testing requirements. This includes temporary, seasonal, and part-time employees. Employees that are hired through temporary agencies are not included, however, companies should work with those agencies to ensure they understand the requirements and place people who are able to comply. Contract workers are also not required to comply. Although temporary employees and contracted employees are not required to test, companies may include them in regular testing.

Q. Are employers able to determine the date employees test each week? If employees don't provide test results on the designated day, or if test results will not be available for several days, are they able to work?

A. Employers may determine the day of the week employees should test each week. Staggering the collection of data when many employees are testing may also help alleviate the administrative burden. Employees that have not provided a test result in more than seven days should test prior to returning. According to CDC guidelines, employees should not return to the workplace until a negative test result is received and should remain away from the workplace until that is received.

Q. Can employers offer testing at the workplace? Where can testing be done, if not at work, and what types of test may be used?

A. Employers may offer testing at the workplace but should be sure the tests are done in a confidential manner and by someone trained to administer testing. That may include employees of the company or a third-party provider.

If testing is done outside the workplace, employees have several options that comply with the ETS.

- At home tests may be used but must be proctored by a trained professional to be acceptable, according to the ETS.
- Test results administered by another employer may be used, as long as they are ETS compliant.
- Test results obtained from a lab.

Acceptable tests must be cleared, approved, or authorized, including those approved in an Emergency Use Authorization (EUA), by the Food and Drug Administration to detect current infection with COVID-19. Tests should be administered in accordance with the instructions provided with each test and observed by the employer or an authorized proctor (from OSHA's frequently asked questions).

Q. Can an employer offer testing and not require vaccination? Do employees that have been granted an exemption from vaccination need to comply with testing requirements?

A. Yes. Employers may choose to offer testing and not require vaccination. If this option is chosen, employers will need to be able to provide documentation of testing and results for all unvaccinated employees. Unvaccinated employees should also wear a mask when working in indoor spaces.

Testing is an alternative to vaccination and is required for unvaccinated employees under the ETS. An exemption from vaccination would not exempt the employee from the testing requirement. In addition, unvaccinated employees should wear a mask while in indoor spaces.

Q. Do employees working from home 100 percent of the time need to comply with vaccination or testing requirements? Does this apply to any employee working remotely?

A. Employees that work 100 percent remotely are not required to be vaccinated under the ETS; however, if that employee is doing any work related to a government contract, or is working as a sub-contractor, vaccination is required.

Remote workers may include employees that travel or are involved in work activities that do not require them to report to the employer's physical location. Those employees do not need to comply with the company's vaccination or testing policy. If an employer does not require vaccination but it is required in locations the employee interacts with, it is recommended that employers contact those businesses to learn what their policy is for visitors and vendors.

Q. What is test pooling and can it be used to satisfy the requirements of the ETS?

A. Test pooling can satisfy the requirements of the ETS. It involves combining specimens from several employees and conducting one antigen test on the combined pool of specimens. When the pooled sample comes back negative, all employees included are considered negative. If the test is positive, each original specimen should be tested individually to determine which is positive. If this is not possible, all employees included in the sample should be tested individually to determine which is positive. The FDA has authorized certain tests for pooling.

Q. If a person has antibodies, are they required to test? Can an employee request an exemption from testing?

A. Having antibodies does not exempt a person from the testing requirement unless that person has recovered from COVID-19 within the past three months. Employees may request an exemption from testing, but the same steps should be followed as would be followed for requesting an exemption from vaccination. Employers may provide a medical or religious exemption form that is completed by the employee for consideration.

Miscellaneous Questions

Q. Are minors (employees under the age of 18) included in the mandate?

A. Employees who are minors must be counted when determining if the employer needs to comply with the ETS. Minors are also subject to all other standards of the ETS. Parents may need to provide consent for vaccination, sharing of vaccination records, and testing. It is suggested that employers check with state laws to determine what information will require the consent of a parent or guardian.

Q. Who bears the responsibility of adverse reactions to vaccination? Will an adverse reaction qualify as a worker's compensation claim?

A. Employers are not responsible for adverse reactions to vaccination. However, because vaccination is work-related, adverse reactions may be covered under worker's compensation insurance. It is recommended that employers contact your provider to learn if side effects or adverse reactions are covered under your policy and to what extent.

Q. Can employer offer incentives, rewards, or other considerations that unvaccinated employees do not qualify for?

A. It is not recommended that employers offer incentives or rewards to vaccinated individuals that are not available to unvaccinated individuals. This can be seen as discriminatory action and a violation of the ADA. Raffles, monetary rewards, or other gifts that are available to vaccinated individuals should also consider including unvaccinated employees.

One option is to incentivize vaccination as part of a wellness program; however, employers should keep in mind that when tying a health-contingent qualification to an incentive, a wellness program is created. To be compliant, the value of wellness plan incentives cannot exceed 30 percent of the total cost of medical plan coverage (50 percent if tobacco-cessation incentives are included).

It is not recommended that employers tie other employment-related considerations, such as promotions, pay increases, preferential work locations, etc., to vaccination status. Any favorable treatment related to vaccination status could be seen as discriminatory to individuals who are not able to be vaccinated for religious or medical reasons.

Q. Will employees who are unvaccinated qualify for unemployment benefits?

A. The requirement for vaccination is issued under OSHA, which is a federal mandate. Unemployment eligibility is determined at the state level and each state determines if employees that quit or are terminated for being unvaccinated are eligible for benefits. Currently, only four states pay benefits to individuals who experience job loss for not being vaccinated: Iowa, Tennessee, Kansas, and Florida. Other states have determined that employees who quit or are fired for not being vaccinated are in violation of a company policy, therefore, are not eligible for benefits. Several states have reviewed this matter and it remains to be seen if others will eventually allow benefits.