

# The deep dive on OSHA's COVID vaccine mandate

OSHA's new COVID Emergency Temporary Standards (ETS) have sent businesses into a scramble trying to adjust and prepare for the deadlines, though recent court cases have also left the fate of the policy in question. Still, it's advisable to get your business practices up to date.

Assuming the court system deals efficiently with states' and businesses' lawsuits objecting to the covid vaccine mandate, here are the two key dates you need to know:

- Dec. 5, 2021: The date your vax or vax-and-test policy must be in place and the date you must check each employee's vaccination status.
- Jan. 4, 2022: The date employees must have received the full course of their shots or submit to weekly testing.

## Mandatory vaccination policies

OSHA isn't requiring you to ditch your current vax policy if you have one, but you must ensure it is at least as comprehensive as OSHA's [model policy](#).

### While OSHA calls its policy a mandatory policy, you retain some flexibility:

- Your policy can exclude employees whose health or religion prohibits them from getting shots or employees for whom medical necessity requires a delay in vaccination.
- Your policy can exclude employees who work from home all the time, employees who work outside, and employees who don't report to a workplace where other individuals are present.
- Your policy can require only certain employees to be vaccinated (e.g., employees in public-facing jobs), but allow other employees to opt for weekly testing.

## Employees' proof of vaccination

Employees don't have to present their proof in any particular medium—they can show you a hard copy or an electronic copy on their phones.

OSHA's model allows employees to attest to their vax status in only one circumstance—they can't produce proof of vaccination, despite their attempts to secure it. If this is the case, you'd want employees to identify why they can't present proof with something a little more compelling than, "The dog ate my homework." Employees should attest to the dates they received their shots, the provider, and the type of shot. OSHA then suggests the following attestation 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 who continue to refuse to get shots can be disciplined, including being terminated.

Forged vaccination cards have become a cottage industry. OSHA acknowledges this by stating you're not responsible for determining the authenticity of employees' proof, but you must provide notice to employees that criminal penalties—up to \$10,000 in fines or six months in prison—will apply if their proof is bogus. *Warning:* These penalties apply to you, too, if you know an employee's proof is fake but accept it anyway.

## Pay issues

If you're going to require employees to get shots, you're most likely going to have to pay them for the privilege. The mandate says you may be on the hook for up to four hours pay at employees' regular rate of pay if employees seek shots on company time. It also breaks down the time:

- Travel time per employee: 15 minutes each way per shot.
- Pre-shot wait time per employee: 5 minutes per shot.
- Post-shot wait time per employee: 20 minutes per shot..

Obviously, travel times will differ, but my pre-booster shot waiting time was longer than five minutes because the nurse administering the shots was late. And there may be other hang-ups, like faulty paperwork or a text that isn't returned to confirm the appointment, which of course, creates all the paperwork.

If it takes employees longer than four hours, the extra time can be unpaid or they can use their accrued leave. What you can't do is fire them for being out of the office for longer than four hours. And while employees' total time away from the office may clock in at less than four hours, you might just have to take their word for this time. Really, how can you track it?

You don't have to pay employees who get shots on their days off.

You must also provide a reasonable amount of paid sick leave to employees, including to employees who don't ordinarily qualify for paid sick leave, who need to recover from their shots. OSHA says two days is reasonable, with these limitations:

- Employees can be required to use their PTO time.
- If you provide employees with sick time and vacation time, they can only be required to use their sick time.
- You can't require employees without accrued sick time to borrow time or to accrue negative paid sick leave.

## Testing is best, but...

Not every employee needs to get shots and there may be a contingent who can't get shots or who just don't want them. OSHA's *vax-or-test-and-mask* regimen is the alternative to a mandatory vaccine policy. But it is a policy and you have to have a written one in place by Dec. 5.

OSHA has a [model policy](#) you can consider using.

To ensure proper enforcement, employees must still report their vaccination status to you by Dec. 5.

## Testing details

Employees who aren't *fully* vaccinated (i.e., they've received just one dose of the two-dose Moderna or Pfizer vaccines or no dose of the Johnson & Johnson vaccine), including employees you have accommodated, must be tested weekly for the virus. They must provide documentation of their most recent test result to you every

seven days. Employees must be tested regardless of whether they're experiencing any symptoms of the virus.

*Exception:* Employees who've received a positive test result or those who have been diagnosed with the virus can't be tested for 90 days following the date of their positive test or diagnosis. They must wear masks when they return to the office.

The mandate specifies which covid tests are acceptable and, yes, this means you will become an expert on acceptable tests and testing procedures:

- Tests must be cleared, approved, or authorized, including in an Emergency Use Authorization, by the Food and Drug Administration.
- Tests must be administered according to their authorized instructions.
- Employees can't administer and read their own tests, unless you or an authorized telehealth proctor observe them.

Examples of acceptable tests include tests processed by labs (including tests employees take at home), proctored over-the-counter tests, point-of-care tests and tests where specimen collection and processing are either done or observed by you.

Unless you have a good reason, employees don't need to get tested during working hours. According to the [Wage and Hour Division](#), while you have to pay nonexempts who get tested during the workday, paying them to take tests on their days off isn't cut and dried. You must pay if taking the test is necessary for the work nonexempts are paid to do. So you'll probably have to pay nonexempts who work in public-facing jobs.

You must maintain records of each test for each employee. These records are considered medical records, so keep them confidential. However, there is no record-retention period beyond the expiration date of the mandate. *Note:* We don't know when the mandate will expire.

Employees who don't provide their test results to you can't come to work. They can telecommute, if you and they agree. If there is no agreement, employees can use their accrued time; if they have no time, the mandate doesn't require you to pay them. On the other hand, other laws may require you to pay.

The mandate also doesn't require you to pay for the tests. But, again, it notes other laws may require you to pay. It's been pointed out to us that employers often foot the bill when employees need a medical or religious accommodation. This rule would probably apply here, which seems fair. But the opposite is also true: Employees who just don't want to get shots have to pay the piper.

## **Mask up**

Employees must wear masks when they're in the office, regardless of whether you've taken other precautions, like installing plexiglass dividers or you're enforcing physical distancing. Again, you're not required to pay for the masks, but the same caution applies: other laws may require you to pay.

Employees don't have to mask up if they're alone in an office with walls and a door (sorry residents of cube and shared-desk farms), when they're eating or drinking, when they're wearing respirators or when masking isn't feasible or creates a greater hazard.

Unfortunately, you will become the mask police. The mandate requires you to ensure employees' masks cover their nose and mouth and are replaced when they're wet, soiled or damaged.

## **COVID vaccine mandate miscellaneous considerations**

We've highlighted the key issues regarding OSHA's vaccine mandate. But like all good federal rules, the

mandate is long and complex, which means smaller items can fall by the wayside. Today we're covering some miscellaneous provisions and one unexpected issue the mandate seems to have raised.

## Removing employees with infections from the workplace

Regardless of their vax status, employees must promptly inform you if they test positive or are diagnosed with the coronavirus. You must immediately remove them from the workplace once you receive this notification. Employees can return to work when they:

- Receive negative results on nucleic acid amplification tests after a positive result on antigen tests.
- Meet the CDC's [return to work criteria](#).
- Receive the go-ahead from a licensed health-care provider.

"Promptly" is a bit vague in this situation and unfortunately, OSHA doesn't do much to clear it up. *OSHA*: Prompt means notifying you as soon as practicable before employees are scheduled to come to work. If employees are already at work, prompt means notifying you as soon as it's possible to do so safely, without exposing anyone else to the virus.

Since unvaccinated employees must wear masks and be tested weekly anyway, you don't have to remove an unvaxxed employee who's simply been exposed to an employee who tests positive. The removal rule would apply, however, when unvaxxed employees' next weekly test results are positive.

There is no federal requirement to pay employees who are sent home because they tested positive. On the other hand, state or local laws may require you to pay. These employees may telecommute if you and they agree.

## Reporting to OSHA

You must report work-related fatalities to OSHA within eight hours of learning about the fatality and each work-related in-patient hospitalization within 24 hours of learning about the hospitalization.

*Break*: You don't have to report if you believe an employee's death or hospitalization isn't work-related. OSHA acknowledges this may be difficult to discern, so it's created a [fact sheet](#) for employers.

## Recordkeeping & penalties

You don't have to keep records of employees' notifications of a positive test or diagnosis by a licensed healthcare provider. You must record information on OSHA [Forms 300, 300A and 301](#) if the following criteria are met:

- A case is a confirmed case of covid.
- A case is work-related.
- A case involves at least one OSHA's general recording criteria (e.g., medical treatment beyond first aid, days away from work).

You must maintain a record of employees' vax status and a separate roster of employees' vaccination status (employees who got shots and those who didn't) and, since these records need to be preserved, you should photocopy employees' proof of vaccination. Unvaccinated employees' weekly test results must also be maintained.

All of these records are considered medical records, so keep them confidential. There is no record-retention period beyond the expiration date of the mandate, whenever that may be.

Records must be available to OSHA within four hours of its request. Employees are also entitled to know, by the next business day, the aggregate number of fully vaccinated employees at a workplace, along with the total number of employees in the workplace.

Fail to comply with the mandate and you'll be [penalized](#) \$13,653 per serious violation and \$136,532 per willful or repeated violation.

### **Does this mean we've created an ERISA plan?**

It's happened before—one federal agency does something impacting another federal agency. In this case, it's two agencies of the Department of Labor: OSHA and the Employee Benefits Security Administration, which oversees ERISA.

The issue is whether all this paperwork, recordkeeping, testing and paying for shots and tests creates as ERISA-covered health plan. It may, according to people who know a lot more about ERISA than we do, because it creates an ongoing administrative scheme.

However, you can avoid ERISA's net if shots are considered excepted benefits provided through an employee assistance plan. The Department of Labor, the IRS and the Department of Health and Human Services addressed this issue in [FAQs](#) issued earlier this year.

*Agencies:* EAPs won't be considered to provide benefits that are significant in the nature of medical care solely because they offer shots, even if combined with testing. *Key:* no cost sharing under the EAP.