

OSHA's COVID-19 Vaccination, Testing, and Face Coverings Emergency Rule

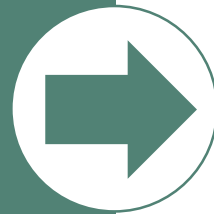
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Topics of Conversation



- Where are we and how did we get here?
 - Background and Legal
- ETS Requirements
 - Coverage
 - Vaccination Status
 - Vaccine & Testing Rules
 - Positive COVID cases
 - Policy & Reporting Requirements
- Best Practices for Implementation and Administration (throughout)





Scott, where are with the
OSHA ETS?



Legal Challenges

- The U.S. Court of Appeals for the Sixth Circuit (MI, KY, OH, TN) has been selected in a random draw to hear the many consolidated challenges to the recent OSHA Emergency Temporary Standard (ETS) issued by the Occupational Safety and Health Administration (OSHA). The Sixth Circuit's decision will be applied across the United States.
- The Sixth Circuit inherits one of the broadest challenges to federal agency action in recent memory. Petitions were filed in all 12 federal circuit courts of appeals and represent a wide variety of state and private interests.
- It also inherits the Fifth Circuit's recent nationwide stay on implementation and enforcement of the ETS. The Sixth Circuit will have to decide whether to modify, revoke or extend the stay. As for now, the ETS remains frozen.



Legal Challenges

What Do We Know About the Sixth Circuit?

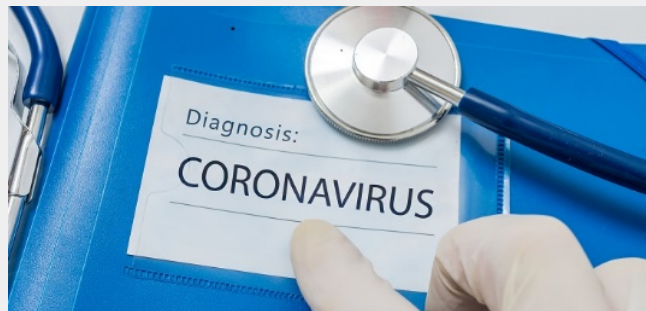
- The petitioners seeking to set aside the ETS are likely happy with their draw.
- The Sixth Circuit was traditionally viewed as a middle-of-the-road or conservative-leaning district.
- However, the circuit's composition has changed dramatically over the last several years, with the addition of six Republican-(Trump) appointed judges between 2017 and 2019. The current balance of the active judges on the court now favors Republican nominees, 10-6. So the three-judge panel for the case, which will be randomly selected, has many favorable permutations for the petitions.



Legal Challenges

OSHA has issued 10 Emergency Temporary Standards previously, and none in the last 35+ years (since 1983)

6 have been challenged legally; only 1 has survived? Guess where . . . If you said the 6th Circuit, you'd be correct!!!



Deadlines

Requirement	Dec. 5	Jan. 4
Establish vaccination or test policy	X	
Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status	X	
Provide paid leave for employee vaccination	X	
Ensure employees who have not received all doses required for primary vaccination and/or are not fully vaccinated are tested for COVID-19 at least weekly		X
Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis and remove any employee who received positive COVID-19 test or COVID-19 diagnosis	X	
Require employees who are not fully vaccinated to wear face coverings when indoors or when occupying a vehicle with another person for work purposes	X	
Provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation	X	
Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 inpatient hospitalizations within 24 hours	X	
Make certain records available	X	

What's the Big Deal?

OSHA can issue a citation for **EACH** "serious" violation (e.g. unvaccinated not wearing masks) of the standard could =
\$13,653


Repeat or willful violations \$136,532, **PER violation**

&

If/when the Build Back Better Act is enacted, the maximum individual fine may be \$70,000 and the repeat or willful violation cap may be:

\$700,000





COVID-19 emergency temporary standard requirements



Employers Covered

- All employers with a total of at least 100 employees across all US locations (i.e. firm-or-corporate wide), regardless of where work is performed, and regardless of employee's vaccination status.
 - 150 employees (50 work exclusively outside, 50 work exclusively remote; 50 work exclusively in customers' homes); covered.
- Includes part-time employees, and includes temporary employees when employed at ANY TIME the ETS is in effect
- Franchisor/Franchises are separate entities for coverage purposes
- Two or more related entities may be regarded as a single entity for OSHA purposes **if they handle safety matters as one company**
- Staffing agency counts its staffing agency employees it placed at a host employer for purposes of its 100-ee threshold; not counted by the host employer's toward its 100-ee threshold.
- **Once covered, either as of 11/5/21, or after effective date, you stay covered, even if you go below 100 employees.**

Employers Covered

Workplaces not covered:

- Those with **less than 100 employees** during the pendency of the ETS (unless while ETS is in effect you employ 100 or more employees)
- Those covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for **Federal Contractors or Subcontractors**
- Those covered under the **Healthcare ETS**



Employees Not Subject to ETS (but still counted toward 100-employee threshold)

- Employees who work remotely from home
- Employees who work exclusively outdoors on all days **and** who do not routinely occupy vehicles with other employees as part of their work duties (e.g. drive to worksite in a company vehicle).
 - very **brief** use of an indoor office bathroom or an administrative office is ok
 - employers cannot cheat by tearing down a wall or cutting out part of the ceiling
- Employees who report to a workplace where other individuals such as **co-workers or customers are never present**
- Independent contractors (who are truly independent contractors). But, company can require vaccination, weekly COVID testing, and masks.



Minimum Requirements of ETS

- Determination of the vaccination status for each employee
- Mandatory vaccination policy **OR** a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID19 testing AND wear a face covering at the workplace (**EMPLOYER'S CHOICE!**)
- Paid leave to receive each vaccination dose and to recover from any side effects
- Protocols surrounding employees with COVID
- OSHA reporting
- Recordkeeping and provision of certain information to employees





Vaccination Status



Determination of Vaccination Status

Employers “must require each vaccinated employee to provide acceptable proof of vaccination status.” Employees who do not provide acceptable proof must be treated as not fully vaccinated.

Acceptable proof is:

1. The record of immunization from a healthcare provider or pharmacy;
2. A copy of the COVID-19 Vaccination Record Card;
3. A copy of medical records documenting the vaccination;
4. A copy of immunization records from a public health, state, or tribal immunization information system; or
5. 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).



What if my Employee is Unable to Provide Proof of Vaccination?

CDC guidance on how to obtain proof of vaccination:

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccination-card.html>

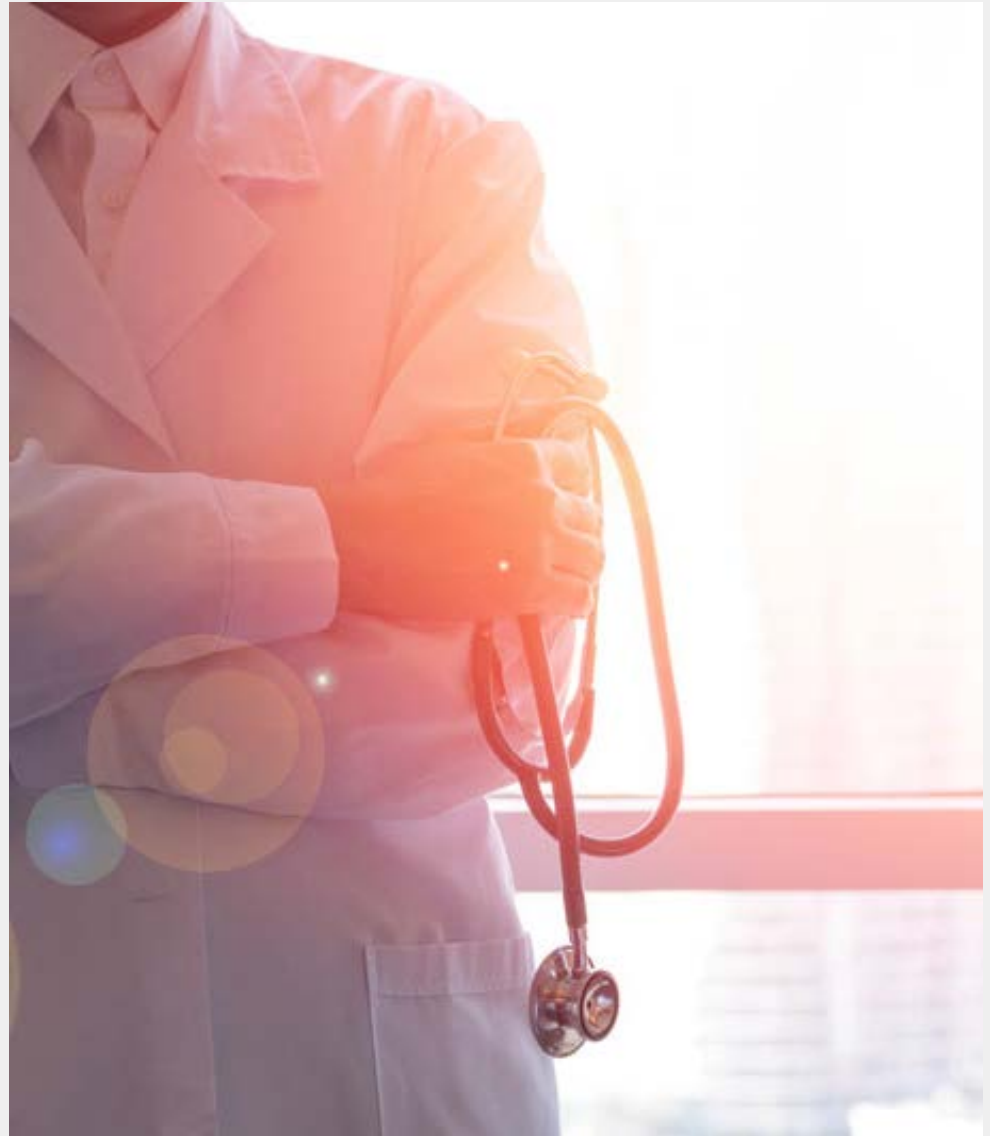
The employee must submit a **signed and dated statement**:

- ✓ Attesting to their vaccination status (fully vaccinated or partially vaccinated);
- ✓ Attesting that they have lost and are otherwise **unable to produce proof required by the ETS (i.e. must have at least attempted to obtain proof by other means and failed)**; 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."
- ✓ An employee who attests to their vaccination status, to the best of their recollection, should include the following information in their attestation: (a) the type of vaccine administered; (b) date(s) of administration; and (c) the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

What about proof for boosters?



“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.”



Employers Need Not Police for Fraud, but...

- Employers may not invite fraud. The ETS does not require employers to monitor or detect for fraud.
- Employers **must** provide each employee with information regarding criminal penalties associated with knowingly supplying false statements or documentation. (See 18 U.S.C. § 1001 and Section 17(g) of the OSH Act (\$10K fine and 6 months in jail).
- An employer may be subject to criminal penalties and OSHA fines if an employer knows that proof submitted by an employee is fraudulent and accepts and maintains the fraudulent proof as a record of compliance with this ETS.



What must employers do with the proof of vaccination?

- Preserve acceptable documentary proof of vaccination as a **medical record**. Not enough for employee to just show you; employer has to retain.
- Create a **roster** of EVERY employee's vaccination status, which is also a medical record (*i.e.* **fully vaccinated; partially vaccinated; not fully vaccinated b/c of a religious or medical accommodation; or not vaccinated b/c they have not provided acceptable proof of vaccination status**)
- These records must be maintained (**as confidential and not in a personnel file**) throughout the duration of the ETS



What must employers do with the proof of vaccination?

- If an employee or anyone who has written authorized consent from the employee **requests the employee's vaccination proof**, or weekly COVID test results, the employer must provide the proof for examination and copying, **by the end of the next business day**.
- Upon request by an employee or their representative, **the employer must make available by the end of the next business day** (1) the **total number of fully vaccinated employees at a workplace**; and (2) **the total number of employees at the workplace**.
- **Within 4 hours** of receiving request from the **Assistant Secretary of Labor for OSHA**, employers must provide for copying and inspection all documents required to be maintained by the ETS, including information pertaining to the aggregate number of vaccinated employees and total number of employees at the workplace.



What if we already went through this exercise before the ETS came out?!?!?

Employers who already obtained vaccination status prior to the effective date of the ETS **through another form of attestation or proof**, and retained records of that ascertainment, are **exempt from the requirement only for each employee whose fully vaccinated status is already documented.**

Examples:

emails, dated form, internal portal, or some other means of documentation



Best Practices for Proof of Vaccination

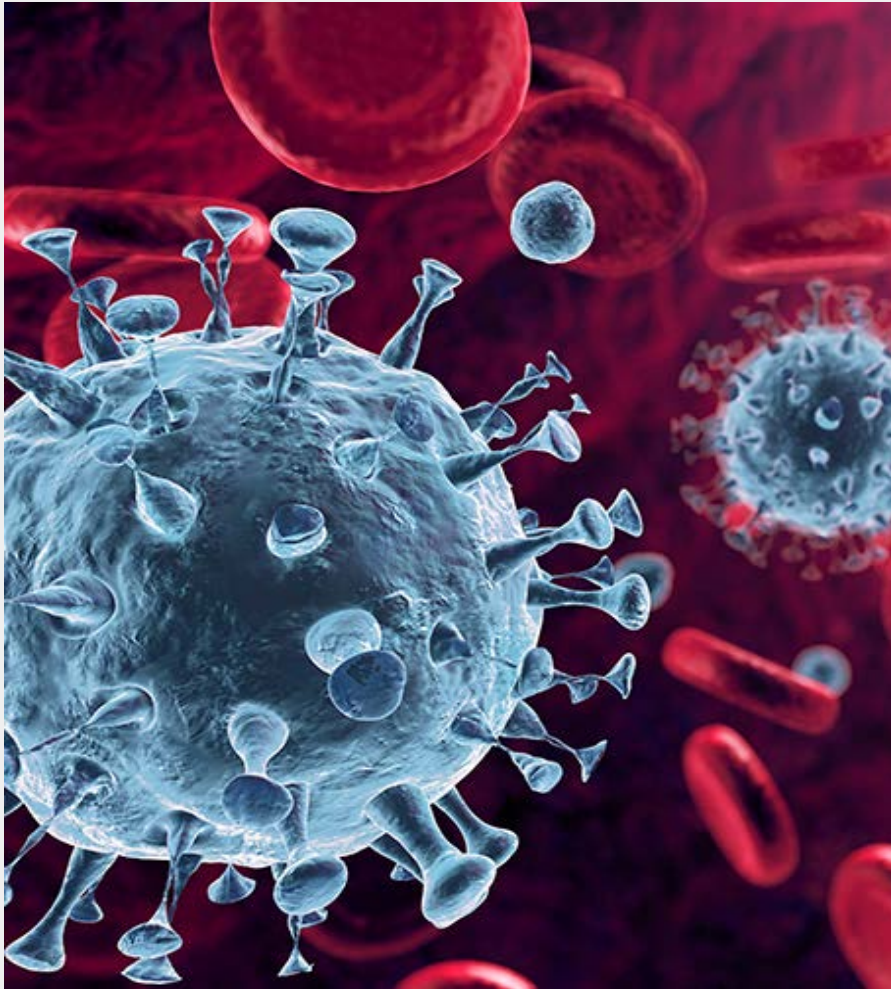
- Communicate that this is not a vaccination requirement, it is a data collection requirement
- Designate individual(s) appropriately trained on medical records to facilitate the process
- Provide employees with CDC guidance on how to obtain proof of vaccination: <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccination-card.html>
- Provide an internal deadline appropriate to meet OSHA's deadline (e.g. if you give until Nov. 19th, you will have time to follow up as necessary if deadline of December 5 stays)
- Create attestation form for those employees who cannot locate proof of vaccination, but only make it available upon request
- Assure employees that all information will be kept confidential as required by law
- Process will need to be shared with employees in a written document
- Remember: process will need to be ongoing to ensure accuracy of aggregate data





Vaccinations and Testing Rules





“[A] Mandatory Vaccination Policy is an employer policy requiring each employee to be fully vaccinated. To meet this definition, the policy must require: vaccination of all employees, **including vaccination of all new employees as soon as practicable...**





....[O]ther than those employees:

- (i) For whom a vaccine is medically contradicted;
- (ii) For whom medical necessity requires a delay in vaccination; or
- (iii) Who are 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."

EEOC GUIDANCE AVAILABLE AT:

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-adarehabilit>



When is an employee “fully vaccinated?”

- ETS defines “fully vaccinated” as 2 weeks after completing vaccination with, if applicable, at least the minimum recommended interval between doses
- NOTE, HOWEVER: 1-4-22 deadline only requires completion of the full course of a 1 or 2 dose vaccination series (rather than the additional 2 weeks to meet the “fully vaccinated” definition)
- **BOOSTERS DO NOT COME INTO PLAY**



Paid Leave Requirement

- Up to 4 hours at **regular rate of pay** to obtain vaccination doses when completed **during work hours** and cannot run concurrent with other leave.
 - This is a new bucket of leave employers must provide; but does not apply retroactively to vaccines received pre-ETS.
 - It cannot be offset by any other leave the employee has accrued
 - Any reasonable needed time beyond 4 hrs is protected leave, **just not paid**
 - Outside of employee's normal work hours, no paid leave requirements.
 - Does not apply to booster shots
 - Includes time spent during work hours:
 - Making vaccine appointments and completing related paperwork
 - Traveling to and from vaccine sites but NOT travel costs (e.g. gas, train/bus fare)
 - Waiting to and getting vaccinated, and post-vaccination monitoring
 - Chicago Ordinance requires pay, up to 4 hours, at regular rate, per dose for mandatory vaccine policies



Paid Leave Requirement

- Provide a “**reasonable**” amount of time to recover from the side effects following each dose (even if vaccinated outside of work hours)
 - Does not apply retroactively to vaccinations received pre-ETS
 - Does NOT apply to booster shots
 - **CAN REQUIRE EMPLOYEES USE THEIR PTO OR SICK LEAVE FOR SIDE EFFECTS, BUT NOT VACATION. IF EMPLOYEES DON'T HAVE PTO/SICK LEAVE, EMPLOYERS MUST STILL PAY.**
 - May not require employee to borrow against future paid sick leave
 - **CAN SET A CAP OF UP TO 2 DAYS PAID LEAVE FOR RECOVERY AFTER EACH DOSE**, presumed by OSHA to be reasonable and in compliance with the ETS
 - NOT expected to cover unlikely prolonged illness (e.g., severe allergic rx)



Practical Considerations For Paid Leave

- **Under ETS**, only have to pay for **vaccination** time spent during work hours, per ETS.
- **The Illinois Department of Labor's March 2021 guidance states that pursuant to the Illinois Minimum Wage Law and the Federal Fair Labor Standards Act, if an employer requires employees to get vaccinated, then the time the employee spends getting the vaccine "is likely compensable," even if the employee gets vaccinated during non-working time.**



Testing in lieu of Vaccination

- This is your other policy/choice if you don't wish to mandate vaccination
- Weekly testing **if in the workplace at least once a week**: documentation of a negative COVID test result must be provided to employer no more than 7 days from last test result (and wear mask), or
- Weekly testing in the case of a person who is away from the workplace a week or longer: employee must take the COVID test within 7 days prior to returning to work and provide documentation of a negative COVID test to employer upon return to the workplace (and wear a mask).
- Employees who do not provide documentation of negative COVID test result **must be removed from workplace until**

■ ■ **they do so.**



A COVID-19 test means a test that is:



“(i) Cleared, approved, or authorized [including EUA]. . .by the FDA . . .

(ii) Administered in accordance with the authorized instructions; and

(iii) Not both self-administered and self read unless observed by the employer or an authorized telehealth proctor.”



Examples: lab processed tests (even if collected at home), proctored OTC tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer



Other Testing Rules

- Must maintain copies of test results as medical records for duration of ETS
- **Employees with a positive COVID test during duration of ETS cannot be required to continue weekly COVID testing for 90 days following positive COVID test or diagnosis (still have to wear a mask)**
- Employers are not required to pay for weekly testing by ETS, but may be required by other laws, regulations, CBAs, or required as a reasonable accommodation. *However*, OSHA leaves decision up to employer regarding who pays for weekly testing.
- **IL Reimbursement law.** "An employer is not liable under this Section unless the employer authorized or required the employee to incur the necessary expenditure."
- **IL Medical Examination of Employee's Act.** "No employer shall require any employee or applicant for employment to pay the cost of a medical examination or the cost of furnishing any records of such examination required by the employer as a condition of employment."



What about pay for time spent going to and getting tested?

- ETS analysis mentions that if during work shift, FLSA may require it, but ETS defers as that issue being beyond OSHA's authority (see also requirement to pay up to 4 hours for vaccination during work hours...)
 - Analogies: Donning/doffing protective gear; security & temperature screenings
 - Integral and indispensable to work (can worker perform job without the preliminary activity?)
 - Testing during work: Likely Yes
 - Testing before/after work, or on off days: Authority mixed
- Assess case-by-case, consider your risk, remember state law, & consult with employment lawyer!**



Practical Considerations for Testing

- Testing at work would minimize potential costs associated with travel and waiting time and the administrative burden of tracking/paying for time outside of normal working hours
- Testing at work would require careful consideration of privacy concerns, similar to when employers were taking temperatures at work
- Testing at home would still require employer or lab oversight
- Could require employees to go a testing facility within a certain proximity to work or home and agree to pay a set fee based on the location
- Choosing a consistent testing day will help with monitoring employees' ability to be onsite.
- Employees who aren't onsite regularly will need to coordinate their visits with HR to ensure compliance with the testing requirement.
- Current Treasury guidance requires most COVID-19 testing to be covered by employer sponsored health plans (but is it medically necessary? Check with

■ ■ your insurance agent)



Testing In Lieu of Vaccination – Masking Requirement

- Each worker who is **not fully vaccinated** must wear a face covering while indoors or in a shared vehicle for work purposes EXCEPT
 - ✓ When alone in a closed room
 - ✓ While eating or drinking
 - ✓ When being identified
 - ✓ When wearing a respirator or facemask
 - ✓ When infeasible or creates a greater hazard
- **REMEMBER, Governor Pritzker’s EO 2021-20, requiring masks to be worn by all employees, regardless of vaccination status, if unable to consistently remain 6-feet apart.**
- The standard does NOT require employers to pay for “any costs associated with face coverings” BUT may be required by other laws, CBA, or if required as a reasonable accommodation

Definition of “Face Covering”

Face covering means a covering that:

- Completely covers the nose and mouth
- Is made with **2 or more layers** of tightly woven breathable fabric (does not let light pass through when held up to a light source)
- Is secured to the head with ties, ear loops, or elastic bands
- Gaiters are permitted if they have 2 fabric layers or are folded into 2 layers
- Fits snugly over the nose, mouth, and chin w/ no large gaps on the sides
- Is a solid piece of material **without slits, exhalation valves, visible holes, punctures, or other openings**



Considerations for Decision on Which Approach to Adopt

- Labor shortage/"the Great Resignation"/employee morale
- Can have differing policies (i.e. mandatory for some; choice to do weekly testing for others) based on division/department, etc. (i.e. customer facing)
- Temperature of labor management relationship
- Availability (and potentially cost) of testing
- Administrative burden associated with testing
- Paid leave expenses associated with mandatory vaccination (presuming, most employees who wanted to be vaccinated have already been vaccinated)
- Need a religious/medical exemption (accommodation) protocol either way





Positive COVID Cases



Required Protocols when an Employee is Diagnosed with COVID

- Employees (vaccinated or not) must be required to **promptly** (i.e. as soon as practicable) provide notice when they have tested positive for COVID-19 or diagnosed with by a licensed health care provider
 - If not at work, **as soon as practicable**, before the employee is scheduled to start their shift or return to work
 - If at work, as soon as safely possible while avoiding exposing any other individuals in the workplace
- Employers are required to immediately remove any employee from the workplace who has tested positive for COVID-19 or has been diagnosed with COVID-19, regardless of their vaccination status or whether they are symptomatic.
- No requirement under ETS to provide paid time off to employee for removal as a result of a positive COVID test or diagnosis.



When can employees with COVID-19 return to work?

WHEN THEY COMPLETE ONE OF THE FOLLOWING REQUIREMENTS:

1. Receive a negative Nucleic Acid Amplification Tests (NAAT) COVID-19 test result;
2. Meet the return to work criteria in the CDC's Isolation Guidance; or
 1. Symptoms and positive test (10 days since symptoms; 24 hours with no fever; other symptoms are improving)
 2. No symptoms and positive test (10 days since positive test)
3. Receive a recommendation to return to work from a licensed healthcare provider





Written Policy Requirements



Policy Requirements

***in a language and at a literacy language the employee understands (not a training requirement)**

1. The Employer's vaccination policy (either mandatory or vaccination/ weekly COVID testing/mask)
 - including information about the employer's policies and procedures for COVID-19 weekly testing and face coverings [mandatory in IL regardless of vaccination status] (if option, or if used for exemptions)
 - Upon request by OSHA, the policy must be produced within 4 hours
2. The process that will be used to determine employee vaccination status
3. The time and pay/leave they are entitled to for vaccinations and any side effects experienced following vaccinations (remember use of PTO and sick leave can be required for **time off related to side effects**)
4. 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
5. The procedures to be used for requesting records



Information Employers are Required to Provide Employees

Continued . . .

6. “Key Things to Know About COVID-19 Vaccines,” available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
7. OSHA’s prohibition against retaliation for reporting workplace illnesses or injuries and OSHA’s whistleblower protections
8. The criminal penalties associated with knowingly supplying false statements or documentation
9. OSHA has incorporated into the ETS CDC’s Isolation Guidance (2-18-21) & can cite employers who do not follow it:
https://www.osha.gov/sites/default/files/CDC's_Isolation_Guidance.pdf

Granular details: the effective date of the policy, who is covered, how it applies to new hires, deadlines, procedures for compliance and enforcement (including disciplinary action)

- ■ * “Employers have flexibility to communicate this information to employees using any effective methods that are typically used in their workplaces”



Employer Reporting Requirements



Employers Must Report Work Related COVID-19 Fatalities and Hospitalizations

- Employers must report each ***work related*** employee COVID-19 **fatality** to OSHA **within 8 hours** of learning about the **work related** fatality.
 - No duty to report if employee was exclusively working remotely
- Employers must also report each employee COVID-19 ***work related*** in-patient hospitalization to OSHA **within 24 hours** of learning about the ***work related*** in-patient hospitalization.
- OSHA Fact Sheet on How to Report:
<https://www.osha.gov/sites/default/files/publications/OSHA4129.pdf>



Bargaining Obligations




Bargaining Obligations

- Wednesday 11/10/21, NLRB GC issued a memorandum discussing bargaining obligations related to ETS.
- Per NLRB, “Although an employer is relieved of its duty to bargain where a specific change in terms and conditions of employment is statutorily mandated, the employer may not act unilaterally so long as it has some discretion in implementing those requirements.”
- Per NLRB, “To the extent the ETS does not provide covered employers with discretion, employer is required to bargain over the effects of the decision.”



Questions?

GETTING IN TOUCH 



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Required Illinois Training

- Must be completed annually
- Virtual training available on demand



VIRTUAL TRAINING SERIES:

Sexual Harassment Prevention



All Illinois employers are required to conduct annual sexual harassment prevention training. At a minimum, this must include:

- an explanation and examples of what constitutes unlawful sexual harassment
- a summary of relevant federal and state provisions and remedies available to victims
- a summary of employers' responsibilities in preventing, investigating and taking corrective measures in regard to sexual harassment

Greensfelder is providing multiple virtual options to meet the needs of all Illinois employers. Each session not only meets but exceeds Illinois' annual training requirements.

WHY CHOOSE OUR TRAINING?

- ☑ Our comprehensive training courses offer separate and distinct sessions for employees and supervisors, with each covering the prevention of discrimination, harassment, retaliation and bullying in the workplace under Illinois and federal laws. The full program covers all aspects of a true comprehensive training on these important topics for employers of all types, in all industries.
- ☑ Following the U.S. Supreme Court's recent ruling that all employers are prohibited from discriminating against employees based on the employee's sexual orientation and/or gender identity, our training covers this important change as well.
- ☑ Failure to provide training each year is a violation of the Illinois Human Rights Act. Illinois employers who do not provide compliant training will be subject to civil penalties, including a \$500 penalty to any business with fewer than 4 employees, or \$1,000 to those with 4 or more employees. Penalties for subsequent violations can rise to \$5,000 each.



Trainings will be led by Greensfelder Officer [Scott Cruz](#), an experienced labor and employment attorney. For more information or to order training sessions, contact Scott at 312-345-5008 or scruz@greensfelder.com.

TRAINING OPTIONS

PRE-RECORDED TRAININGS

Employee or supervisor recording
(one program)

\$499

Employee and supervisor recordings
(two programs)

\$899

BEST VALUE

Programs are about 2 hours each. Recordings are password-protected and available via any internet streaming platform through Dec. 31, 2021, when links will be removed from the cloud.

LIVE VIRTUAL TRAININGS

Live virtual training via Zoom customized for your workplace, including a live Q&A opportunity

\$2,400

Live programs will run about 2 hours. Recordings can be provided afterward as well, available via any internet streaming platform until Dec. 31, 2021, when the link will be removed from the cloud.

Because employers must maintain documentation for each employee establishing compliance with the training requirement, a certificate of attendance/completion will be made available for each employee, and a copy of the PowerPoint also will be made available to download.



Thank you!

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

