



**ACEC** *Massachusetts*

*American Council of Engineering Companies of Massachusetts*

Covid-19 update:  
OSHA COVID-19 Emergency  
Temporary Standard (ETS)

ACEC/MA Health & Safety Forum

November 29, 2021



## Topics to be Discussed

OSHA COVID-19 ETS Overview

US Court of Appeals for Fifth Circuit Update

Update on Safer Federal Workforce Task Force COVID-19 Guidance for Federal Contractors

Open Discussion

# OSHA COVID-19 ETS

- On November 4, 2021, the federal Occupational Safety and Health Administration (OSHA) issued an [COVID-19 Vaccination and Testing Emergency Temporary Standard \(ETS\)](#) requiring employers with at least 100 employees to ensure their workers are fully vaccinated against COVID-19 or submit to weekly COVID-19 testing.
- The ETS took effect November 5, 2021, upon publication in the *Federal Register*.
- 29 CFR 1910.501



# OSHA COVID-19 ETS

- OSHA has determined that many employees in the U.S. who are not fully vaccinated against COVID-19 face grave danger from exposure to COVID-19 in the workplace.
- This finding of grave danger is based on the severe health consequences associated with exposure to the virus along with evidence demonstrating the transmissibility of the virus in the workplace and the prevalence of infections in employee populations.



# OSHA COVID-19 ETS

- The ETS protects workers through the most effective and efficient control available – vaccination – and further protects workers who remain unvaccinated through required regular testing, use of face coverings, and removal of all infected employees from the workplace.
- OSHA also concludes, based on its enforcement experience during the pandemic to date, that continued reliance on existing standards and regulations, the General Duty Clause of the OSH Act, and workplace guidance, in lieu of an ETS, is not adequate to protect unvaccinated employees from COVID-19.



## OSHA COVID-19 ETS – Who is Covered?

- Employers with 100 or more employees
  - At any time the ETS is in effect
- Employers in all workplaces that are under OSHA's authority and jurisdiction
- The standard is intended to preempt States, and political subdivisions of States, from adopting and enforcing workplace requirements relating to these issues, except under the authority of a Federally-approved State Plan.
- OSHA intends to preempt any State or local requirements that ban or limit an employer from requiring vaccination, face covering, or testing.





## OSHA COVID-19 ETS – Who is Not Covered?

- Workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors.
- Settings where employees provide healthcare services or healthcare support services when subject to the requirements of the Healthcare ETS (29 CFR 1910.502).
- Employees who do not report to a workplace where other individuals such as coworkers or customers are present.
- Employees while they are working from home.
- Employees who work exclusively outdoors.



## OSHA COVID-19 ETS – Effective Dates

- *December 5, 2021\** - 30 days after publication: All requirements other than testing for employees who have not completed their entire primary vaccination dose(s)
- *January 4, 2021\** - 60 days after publication: Testing for employees who have not received all doses required for a primary vaccination

\* Dependent on outcome of appeal





# OSHA COVID-19 ETS – Minimum Requirements

## *Employer Policy on Vaccination*

- Covered employers develop, implement, and enforce a mandatory COVID-19 vaccination policy with an exception for employers that instead establish, implement, and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace.



# OSHA COVID-19 ETS – Minimum Requirements

## *Determination of Employee Vaccination Status*

- Employers are to determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status.

## *Employer Support for Employee Vaccination*

- Employers are to support vaccination by providing employees reasonable time, including up to four hours of paid time, to receive each vaccination dose, and reasonable time and paid sick leave to recover from side effects experienced following each dose.



## OSHA COVID-19 ETS – Minimum Requirements

### *COVID-19 Testing for Employees not fully vaccinated*

- Ensure that each employee who is not fully vaccinated is tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer).
- The ETS does not require employers to pay for any costs associated with testing.
- Employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements.
- Nothing prohibits employers from voluntarily assuming the costs associated with testing.



## OSHA COVID-19 ETS – Minimum Requirements

### *Employee Notification to Employer of a Positive COVID-19 Test*

- Require employees to promptly provide notice when they receive a positive COVID19 test or are diagnosed with COVID-19
- Immediately remove any employee from the workplace, regardless of vaccination status, who received a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider
- Keep removed employees out of the workplace until they meet criteria for returning to work.



# OSHA COVID-19 ETS – Minimum Requirements

## *Face Coverings*

- Ensure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances.
- Employers must not prevent any employee, regardless of vaccination status, from voluntarily wearing a face covering unless it creates a serious workplace hazard (e.g., interfering with the safe operation of equipment).



# OSHA COVID-19 ETS – Minimum Requirements

## *Information Provided to Employees*

- Information about the requirements of the ETS and workplace policies and procedures established to implement the ETS
- The CDC document “Key Things to Know About COVID-19 Vaccines
- Information about protections against retaliation and discrimination; and
- Information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.





# OSHA COVID-19 ETS – Minimum Requirements

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

- Report work-related COVID-19 fatalities to OSHA within 8 hours of learning about them.
- Report work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization.



# OSHA COVID-19 ETS – Minimum Requirements

## *Availability of Records*

- Make available for examination and copying an employee's COVID-19 vaccine documentation and any COVID-19 test results to that employee and to anyone having written authorized consent of that employee.
- Employers are also required to make available to an employee, or an employee representative, the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.



# US Court of Appeals for Fifth Circuit Update

- Appeal transferred to the Sixth Circuit on November 16, 2021.
- Done in effort to consolidate the number of challenges to the ETS filed in 12 different circuit courts.
- Businesses continue to be advised to continue to plan for the ETS to survive the appeal.
- Decision to uphold the stay typically heard by a 3-judge motions panel, however a petition was made to skip this and be heard by the full Sixth Circuit. A response to this is due November 30<sup>th</sup>.
- Likely to proceed to the Supreme Court for a ruling.
- Not likely to have a ruling on the stay until likely after December 6<sup>th</sup>. Ruling on ETS not likely until after new year.



## Update on Safer Federal Workforce Task Force COVID-19 Guidance for Federal Contractors

- The General Services Administration (GSA) stated a new position that utility companies with energy supply contracts to serve the federal government will not be required to comply with the EO vaccine mandate on the basis of those supply contracts. Given the GSA's change, at this time, we have concluded that Utility Company is not subject to the federal contractor EO vaccine mandate. Accordingly, **we are suspending any movement towards complying with the EO vaccine mandate. Thus, your contract with Utility Company no longer obligates you to comply with the EO vaccine mandate and your efforts in that regard also may be suspended.**



OPEN DISCUSSION, REACTION,  
QUESTIONS