

The logo features the text "AFSCME" in large, bold, white letters on a blue background. Below it, "Health & Safety Fact Sheet" is written in a white, cursive-style font. To the right, there is a stylized graphic of a star with three curved lines above it, all in shades of blue and white. The background is split into blue and green horizontal bands.

AFSCME

Health & Safety Fact Sheet

On Jan. 13, 2022, the U.S. Supreme Court suspended implementation and enforcement of these requirements pending further rulings by federal courts on whether these requirements are permitted under federal law. This fact sheet describes the OSHA rule as it was originally issued.

New OSHA COVID-19 Vaccination and Testing Requirements November 5, 2021

The Occupational Safety and Health Administration (OSHA) released a COVID-19 vaccination and testing emergency temporary standard (ETS) that generally applies to employers with 100 or more employees. Under this ETS, employers must either require employees to get vaccinated or give them a choice between getting vaccinated and both undergoing regular testing and wearing a mask at work. This fact sheet describes key parts of this new ETS and tells you where you can get more information.

What is an emergency temporary standard?

An ETS is an OSHA-issued workplace safety and health standard that takes effect immediately after it is issued. To issue an ETS, OSHA must determine that workers are in grave danger due to exposure to certain toxic substances or agents or to new hazards and that an emergency standard is needed to protect them. An ETS can be made permanent after going through the usual procedure for adopting a permanent standard.

When does the COVID-19 vaccination ETS go into effect?

This ETS went into effect on Nov. 5, 2021, and is effective for at least six months. Employers will have to comply with most of the rule within 30 days but will have until Jan. 4, 2022, before they must implement the COVID testing requirement for unvaccinated workers. In effect, this means that an employer's workers have until then to get their vaccination shots (i.e., both shots for the two-shot vaccines or a single shot for the one-shot vaccine).

Since state and local government workers are not covered by federal OSHA and are only covered if their state has a state OSHA plan, these dates do not apply to them. For employers covered by state OSHA plans instead of federal OSHA, the ETS does not go into effect until their state adopts its own rule. These states are required to adopt their own rules that are at least as effective as the

OSHA ETS by Dec. 5, 2021. For a list of states that have state plans, visit OSHA's State Plans webpage: <https://www.osha.gov/stateplans/>.

Note that there may be some jurisdictions that have committed to following OSHA requirements for state or local government workers even though an OSHA state plan is not in effect. This commitment may exist in a law or in a collective bargaining agreement.

How does the ETS affect other state and local directives or guidance that apply in a workplace?

The ETS does not limit state or local government mandates or guidance (e.g., executive order, health department order) that goes beyond and is not inconsistent with the requirements of the ETS. An ETS (or other OSHA rule), however, does supersede or preempt a state or local government rule or guidance that provides less protection than or conflicts with the OSHA requirements. In addition, this ETS explicitly overrides any state or local law that attempts to block employers of any size (even those with fewer than 100 employees) from requiring employees to get vaccinated or tested or to wear masks.

Which employers are covered by this ETS?

Employers with a total of 100 or more employees at any time this ETS is in effect *are covered*, with certain exceptions described below. In determining an employer's size, all employees of the employer are counted, regardless of whether they are full time or part time or work at different locations.

This ETS *does not cover*:

- State and local government workers in states that do not have an OSHA state plan or have not otherwise committed to following federal OSHA rules. (See discussion under "When does the COVID-19 vaccination ETS go into effect?") For a list of states that have state plans, visit OSHA's State Plans webpage: <https://www.osha.gov/stateplans/>. In state plan states, state and local government workers will be covered by a state rule that is at least as effective as the federal ETS. Those states have 30 days to adopt a rule.
- Federal contractor and subcontractor workplaces covered by the federal contractor vaccination requirement. Note that for employers that are federal contractors, some of their workers could be covered by the federal contractor vaccination requirement while others are covered by this ETS.
- Settings where any employee provides health care services or support services when subject to the COVID ETS for health care settings, which was issued in June of 2021.
- Federal agency employees, except U.S. Postal Service employees.
- Employees of covered employers who:
 - Don't report to a workplace where there are other employees or customers.
 - Are working from home.
 - Work exclusively outdoors and do not regularly ride with other employees in an employer vehicle.

What does this new ETS require?

Employer Policy on Vaccination

Employers are required to develop, implement and enforce a policy that either:

- (1) Requires employees to get vaccinated; or
- (2) Gives employees a choice between (a) getting vaccinated or (b) undergoing regular COVID-19 testing *and* wearing a face covering in the workplace.

Determination of Vaccination Status

Employers are required to determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each employee's vaccination status (including copies of the proof provided by an employee) and maintain a roster of each employee's vaccination status. For purposes of this ETS, being vaccinated means getting the so-called primary series of shots. That is the first two shots of the two-shot vaccinations (Pfizer-BioNTech or Moderna) or the first shot of the single-shot vaccination (Johnson & Johnson). It does not require any booster shots.

Acceptable Proof of Vaccination Status

As proof that a worker has been vaccinated, employers can accept things like the COVID-19 Vaccination Record Card that has the CDC logo in the upper righthand corner and other records from health care providers, pharmacies and government immunization record systems.

Employees who cannot provide any of these can instead provide a signed and dated statement saying whether they are fully or partially vaccinated, that they have lost and cannot provide proof and the details of their vaccination (when, which vaccine and by which provider). This statement also must include the following specific 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.

COVID-19 Testing for Employees who Are Not Fully Vaccinated

The ETS requires employers to 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 seven 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. The employer must maintain a record of each test provided by each employee.

Face Coverings for Employees Who Are Not Fully Vaccinated

The ETS requires employers to 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. Employers are not required to pay for face coverings.

Exemptions for Certain Employees

Employers are required to exempt an employee from the vaccination or testing and masking requirements and provide a reasonable accommodation when required under the Americans with Disabilities Act (e.g., a medical condition that means an employee cannot be vaccinated) or due to the employee's sincerely held religious beliefs.

Information Provided to Employees

The ETS requires employers to provide employees with the requirements of the ETS and workplace policies, COVID-19 vaccines and information about protections against retaliation and discrimination.

Employee Notification to Employer of a Positive COVID-19 Test and Removal

The ETS requires employers to:

- Require employees to promptly provide notice when they receive a positive COVID-19 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 employees out of the workplace until they meet criteria for returning to work. The ETS does not require employers to provide paid time off to any employee who is kept out of work because of a positive COVID-19 test or diagnosis of COVID-19.

Reporting COVID-19 Fatalities and Hospitalizations to OSHA

The ETS requires employers to report work-related COVID-19 fatalities to OSHA within 8 hours, and work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization.

Availability of Records

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.

Does the ETS require employees to get vaccinated?

No. Employers can decide to implement a policy that gives employees a choice between getting vaccinated or tested regularly (and wearing a mask), instead of a vaccination requirement.

Does the employer have to provide paid time for vaccination?

Yes. Employers must give 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. For recovery leave, employers can require employees to take accrued sick leave.

Who pays for testing and face masks under the ETS?

Under the ETS, the employer is not required to pay for testing, face coverings or removal time when an employee has tested positive for or been diagnosed with COVID-19. This is something unions can bargain with employers over, and other laws may require employers to pay for some of these costs.

What type of COVID-19 testing is accepted?

The COVID-19 test must be one that is cleared, approved or authorized by the Food and Drug Administration (FDA) to detect current infection (e.g., a viral test). The test cannot be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

How are covered employers expected to enforce this ETS?

The ETS does not provide detailed direction about how employers should enforce the ETS requirements for employees who do not comply. Employers that do provide a testing option are required to exclude or remove from the workplace any unvaccinated employee who does not provide proof of a negative COVID test (at least every seven days for someone who works at least once per week).

Can an employer do more than what the ETS requires?

Yes. OSHA standards set minimum safety and health requirements. An employer can always do more, and unions might consider asking employers to implement additional controls or asking employers with fewer than 100 employees to implement protections. Unions also can bargain with employers over things like who pays for testing and masks.

Where can I get more information about this ETS?

For general information about this ETS, visit the new OSHA landing page created especially for the ETS: <https://www.osha.gov/coronavirus/ets2>. Especially helpful is a detailed set of frequently asked questions: <https://www.osha.gov/coronavirus/ets2/faqs>. For answers to specific questions about the ETS, contact AFSCME's health and safety specialist, Eunice Salcedo, at esalcedo@afscme.org.

How does this ETS affect the COVID-19 health care ETS OSHA issued in June 2021?

Workers covered by the COVID-19 ETS for health care setting are excluded from this new ETS so long as the Health Care ETS is in effect. For more information about that other ETS, see AFSCME’s fact sheet, “New COVID-19 Workplace Protections for Certain Health Care Workers,” which is available on the AFSCME Staff Rep Portal: <https://www.afscmestaff.org>.

How does this ETS relate to the new federal vaccine requirement that applies to certain health care facilities, like hospitals?

At the same time OSHA issued this new ETS, the Centers for Medicare and Medicaid Services (CMS), part of the Department of Health and Human Services, issued a rule that requires health care facilities (e.g., hospitals, nursing homes and intermediate care facilities) that participate in Medicare and state Medicaid programs to implement vaccination requirements among their employees, with no option to get regular tests instead of getting vaccinated. The CMS requirements take precedence where they apply to an employer. For more information about the CMS vaccination requirement, see AFSCME’s fact sheet, “New CMS COVID-19 Vaccination Requirements for Health Care Facility Staff,” which is available on the AFSCME Staff Rep Portal: <https://www.afscmestaff.org>.