

## **Q&A: Department of Labor Emergency Temporary Standards Regarding COVID-19**

Prepared by Dustin Cammack, Udall Shumway PLC

November 5, 2021

The Department of Labor on Thursday published a new Emergency Temporary Standard (“ETS”) under the Occupational Safety and Health Act (“OSH Act”) requiring that employers with 100 or more employees either mandate vaccination for COVID-19 or require the use of face coverings and weekly testing.<sup>1</sup>

This Q&A will address questions relevant to Arizona public schools and charter schools. More detailed information can be found on the Occupational Safety and Health Administration’s (“OSHA”) website: <https://www.osha.gov/coronavirus/ets2/faqs>.

### **Q: Why am I hearing conflicting information about the ETS from the state and federal governments?**

A: Under the OSH Act, 22 states, including Arizona, have OSHA-approved state plans. Arizona’s plan is administered by the Arizona Division of Occupational Safety and Health (“ADOSH”), which is a division of the Industrial Commission of Arizona (“ICA”). To qualify as an OSHA-approved state plan, the plan must be “at least as effective in providing safe and healthful employment and places of employment as the standards promulgated [by the Federal Department of Labor.]” The plan must also have occupational safety and health measures that apply to all employees of state agencies and political subdivisions, which would include public school districts and charter schools. State plans must adopt the ETS or another plan that is “at least as effective” by December 5, 2021.

Yesterday, the ICA publicly [stated](#), “Until such time that the Industrial Commission takes formal action to adopt all or part of the vaccination ETS, however, the temporary standards are not binding or enforceable against Arizona’s private and public sector employers and employees.”

Based upon the assumption that ADOSH will adopt rules substantially similar to the ETS, this Q&A will discuss the requirements of the ETS itself. However, employers should keep in mind that the details in the rules adopted by ADOSH may differ.

### **Q: When does the ETS go into effect?**

A: While, per the federal Department of Labor, the ETS goes into effect on November 5, 2021, employers are not required to comply until December 5, 2021, except for the testing requirement, which becomes mandatory on January 4, 2022. That said, applicability to Arizona employers will depend on exactly how ADOSH implements the ETS.

### **Q: Does the ETS apply to public schools?**

A: The ETS applies to all private sector employers with 100 or more employees. Arizona public sector employees are covered by Arizona’s occupational safety and health plan. It is uncertain how ADOSH will implement the new ETS, but for the plan to comply with the OSH Act, the plan would likely have to at least

---

<sup>1</sup> 29 C.F.R. 1910.501.

cover school districts and charter schools with 100 or more employees. ADOSH could choose to implement standards that cover **all** school districts and charter schools, regardless of size. Alternatively, the federal government could interpret the OSH Act to require that the ETS apply to all public employees. Whether the ETS applies to Arizona schools with fewer than 100 employees remains to be seen, but for now, the safest assumption is that the rules will be applicable to school districts and charter schools with at least 100 employees.

The application of the ETS to charter schools in other states depends on whether the state treats charter schools as public-sector employers and whether the state is one of 22 states with OSHA-approved safety and health plans. Questions about applicability of the ETS to charter schools in other states should be directed to legal counsel in those states.

**Q: How are employees counted?**

A: All employees of a single employer, whether full time or part time, are counted toward the 100-employee threshold, regardless of their work location, including work-from-home employees and employees who exclusively work outdoors.

Workers provided by a staffing agency do not count toward the 100-employee threshold. The staffing agency would be responsible for determining applicability of the ETS to its own employees and for implementing policies accordingly. The Department of Labor and OSHA may need provide additional guidance on how the ETS applies to employers using staffing agencies.

**Q: Does the ETS require that all employers have a vaccine mandate?**

A: An employer must either implement a general vaccination requirement or require unvaccinated employees (other than employees who are exempt due to work location) to wear a face covering and be tested for COVID-19 at least every seven days.

**Q: What does the ETS require employers to do, generally?**

A: The ETS requires employers to establish, implement, and enforce written policies either mandating vaccination against COVID-19 for all employees or requiring unvaccinated employees to use a face covering and provide weekly testing for COVID-19. The ETS also requires employers to remove employees who test positive for COVID-19 from the work site, keep and provide records regarding employee vaccination status, and support employees seeking to get a COVID-19 vaccine.

**Q: What if an employee works remotely?**

A: Although all employees count toward the 100-employee threshold, employees who either work from home, work at a location without any coworkers or customers (which would include students and parents), or work exclusively outdoors are exempt from the ETS while those circumstances apply. Employees who work primarily outside but perform some tasks inside with others are subject to the ETS.

**Q: What counts as “vaccinated”?**

A: If an employee has received all recommended doses of an FDA approved COVID-19 vaccine, the employee is considered fully vaccinated two weeks after receiving the final dose of the vaccine. Employees are not required to get optional or recommended booster shots, and employers are not required to keep records of booster shots.

**Q: What if an employee has naturally acquired immunity through prior infection?**

A: The ETS does not provide an exception for employees who have previously had COVID-19.

**Q: What type of face covering is required for unvaccinated employees? Do face shields count?**

A: The ETS requires a minimum standard for face coverings. A face covering must be made of a tightly woven fabric (a fabric that does not let light through) with two layers that completely covers the nose and mouth. A face shield may be worn in addition to a face covering but is not a replacement for a face covering.

**Q: When does the ETS require employees to wear a face covering?**

A: Unvaccinated employees must wear a face covering while indoors or in a vehicle with at least one other person. The requirement does not apply if the employee is alone in a room with floor-to-ceiling walls and a closed door, for brief periods while the employee eats or drinks, or when wearing a face covering would present a greater hazard than not wearing a face covering (for example, while working with certain kinds of equipment).

**Q: How does the testing requirement work?**

A: In addition to the use of a face covering, the ETS requires unvaccinated employees to be tested for COVID-19 once every seven days, if the employee works at a worksite with other people at least once every seven days. The employee must report the results of tests within seven days of receiving a result.

**Q: Who pays for testing?**

A: Employers may choose to pay for employees' testing, but they are not required to.

**Q: What if an unvaccinated employee who normally works from home occasionally works on site?**

A: Unvaccinated employees must be tested no more than seven days before their return to a work location where others are present and provide documentation to the employer before returning to work.

**Q: Are there any exemptions?**

A: As noted above, employees who work from home, work at a location alone, or work exclusively outdoors are not subject to the ETS. Further, employers must grant exemptions to a vaccine mandate regardless of work location if one of the following applies:

- vaccination is medically contraindicated;
- medical necessity requires a delay in vaccination; or
- the employee is entitled to a reasonable accommodation because
  - the employee has a disability, or
  - the employee has a sincerely held religious belief, practice, or observance that conflicts with the vaccination requirement.

**Q: If an employee is exempt from vaccination, must they wear a face covering and be tested?**

A: Generally, yes. The exemptions from the vaccination requirement do not apply to alternative requirements to wear a face covering and weekly testing. However, an employee may still be subject to a

reasonable accommodation under the Americans with Disabilities Act (ADA) or Title VII of the Civil Rights Act if the employee can demonstrate such a need. In these circumstances, the employer should follow the same procedures as with other requests for reasonable accommodation.

**Q: What are the employer’s record-keeping requirements?**

A: Employers may consider an employee vaccinated if the employee has provided documentation proving vaccination. Documentation includes:

- a record of immunization from health care provider or pharmacy
- a copy of COVID-19 Vaccination Record Card
- a copy of medical records documenting the vaccination
- a copy of immunization records from a public health, state, or tribal information system
- another official document; or
- a signed and dated statement attesting the employee’s vaccination status and that the employee is unable to produce documentation, if no other proof is available

Employers must also keep records of testing for unvaccinated employees. If an employee requests copies of these records, the employer must provide copies to that employee. Further, employers must provide data on the aggregate number of employees who have been vaccinated. The employer may also be required to produce records to state and federal inspectors.

**Q: What kind of support must an employer provide for employees being vaccinated?**

A: Employers must provide up to four hours of *paid* time off at the employee’s regular rate of pay for receiving a vaccination when an employee needs time off to receive a vaccination. Employers must also provide reasonable *unpaid* time off for employees to obtain a vaccine (if, for example, an employee needs more than the four hours of paid leave) or to recover from side effects of receiving the vaccine.

**Q: What information does an employer need to provide to employees about the ETS?**

A: Employers must provide all employees with the employer’s policy adopted pursuant to the ETS. Additionally, employers must provide the following:

- Information about vaccine safety and efficacy
  - <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
- Information about workers’ rights under the ETS
  - <https://www.osha.gov/sites/default/files/publications/OSHA4159.pdf>
- Information for employees on penalties for false statements and records
  - <https://www.osha.gov/sites/default/files/publications/OSHA4157.pdf>

**Q: Will there be legal challenges to this rule?**

A: Undoubtedly! Legal challenges will likely make their way through the courts challenging the ETS on procedural grounds. However, until such challenges are decided, schools should assume that the ETS will go into effect.