

# COMPLIANCE BULLETIN



## COVID-19 Testing for Employees Not Fully Vaccinated Under the ETS

On Nov. 4, 2021, OSHA [announced](#) a [COVID-19 vaccination and testing emergency temporary standard](#) (ETS) to address the grave danger of COVID-19 infection in the workplace. The ETS affects private sector employers with **100 or more employees**.

On Dec. 17, 2021, the 6th Circuit Court of Appeals [reversed](#) the stay the 5th Circuit ordered on Nov. 12, 2021 to block the ETS. As a result, OSHA has resumed ETS implementation and enforcement nationwide. OSHA will not issue citations before Jan. 10, 2022 (Feb. 9 for testing requirement) to employers that make reasonable, good faith efforts to comply. ETS opponents have already filed an appeal with the U.S. Supreme Court challenging the 6th Circuit decision. Employers subject to the ETS should monitor legal developments closely and consider what measures they would need to adopt if the Supreme Court upholds the ETS.

The ETS creates new employer obligations with respect to employees who are not fully vaccinated, including a requirement to ensure unvaccinated employees are tested for COVID-19. While OSHA's stated preference is for employers to implement written mandatory vaccination policies, the ETS also regulates procedures to protect workers who remain unvaccinated—regular testing, use of face coverings and removal of infected employees from the workplace.

This Compliance Bulletin covers the ETS requirements for COVID-19 testing for employees who are not fully vaccinated.

### Action Steps

Employers should review, understand and implement the requirements for COVID-19 testing for their employees who are not fully vaccinated.

### Important Definitions:

Fully vaccinated means:

- A person's status two weeks after completing primary vaccination with a COVID-19 vaccine with, if applicable, at least the minimum recommended interval between doses in accordance with the approval, authorization or listing; or
- A person's status two weeks after receiving the second dose of any combination of two doses of a COVID-19 vaccine that is approved or authorized by the FDA, or listed as a two-dose series by the WHO.

### Important Dates

#### Dec. 17, 2021

The 6th Circuit reinstates the ETS.

#### Jan. 10, 2022

Planned enforcement deadline for most ETS requirements.

#### Feb. 9, 2022

Planned enforcement deadline for ETS testing requirements.





## Routine Testing Background

According to OSHA, the most effective and efficient workplace control for preventing the spread of COVID-19 is vaccination, and the ETS states OSHA strongly prefers that employers implement written mandatory vaccination policies. In addition to being more likely to become infected with COVID-19, people who are unvaccinated are more likely to experience severe clinical outcomes from COVID-19 than fully vaccinated people. However, the ETS provides a few exemptions from the mandatory vaccination requirement and allows employers to implement policies where employees may choose whether to be vaccinated or undergo regular testing and use face coverings at work.

Where employers have unvaccinated employees, regular COVID-19 screening tests are necessary so that infected employees can be identified and removed from the workplace to prevent workplace transmission. Adequate testing can also facilitate early medical intervention when appropriate.

Routine testing of unvaccinated employees is necessary regardless of whether unvaccinated employees present COVID-19 symptoms because a SARS-CoV-2 infection is often attributable to asymptomatic and/or presymptomatic transmission. Although less effective and efficient than vaccination, the CDC has recognized that regularly testing unvaccinated employees for COVID-19 is a useful tool for identifying and isolating asymptomatic and/or presymptomatic infected individuals.

## Diagnostic and Screening Testing

Testing for COVID-19 can broadly be divided into two categories: **diagnostic testing** and **screening testing**.

The purpose of diagnostic testing is to identify current infection when a person has signs or symptoms consistent with COVID-19, or when a person is asymptomatic but has recent known or suspected exposure to SARS-CoV-2. The information provided by diagnostic testing can be used by a health care provider to diagnose or treat a patient.

The purpose of screening testing is to identify infected people who are asymptomatic and do not have known, suspected or reported exposure to COVID-19. Screening testing helps to identify unknown cases so that:

- Measures can be taken to prevent further transmission to others (e.g., removal from the workplace and home isolation); and
- Allow infected (but asymptomatic) people to begin medical treatment, as appropriate, so they can better avoid the most severe outcomes of COVID-19 (e.g., high-risk individuals seeking monoclonal antibody treatment or antiviral medication).

While both types of testing can help prevent the spread of COVID-19, the testing required under the ETS is screening testing. However, the ETS does not preclude additional diagnostic testing if an employee shows signs or symptoms consistent with COVID-19 or has recent known or suspected exposure to SARS-CoV-2. Both screening and diagnostic testing involve the use of viral COVID-19 tests to detect current infection, as opposed to antibody COVID-19 tests, which are used to detect whether a person has antibodies for COVID-19. A positive antibody test indicates someone has antibodies to SARS-CoV-2, the virus that causes COVID-19. Antibodies could either result from a prior infection with the virus or vaccination against COVID-19.

It is important to note that OSHA's definition of a "COVID-19 test" requires that COVID-19 tests be cleared, approved or authorized by the FDA and administered in accordance with authorized instructions—with the noted exception of not



allowing tests that are both self-administered and self-read by the employee unless observed by the employer or an authorized telehealth proctor.

Regular screening testing of individuals for COVID-19 is an effective method of identifying asymptomatic and presymptomatic infections. Screening testing of unvaccinated employees is necessary because symptom and temperature checks will miss both asymptomatic and presymptomatic infections, which is a serious problem because presymptomatic and asymptomatic transmission are significant drivers of the continued spread of COVID-19.

Screening testing with antigen tests is a rapidly evolving and important tool that can be used to reduce the spread of SARS-CoV-2 in the workplace, particularly when coupled with other COVID-19 prevention and control measures (e.g., workplace removal of infected persons, proper use of face coverings). The CDC recommends screening testing of unvaccinated asymptomatic workers as a useful tool to detect COVID-19 and stop transmission quickly. Screening testing is particularly useful in areas with moderate to high community transmission of COVID-19, which is currently the overwhelming majority of the United States.

## Testing Requirements

OSHA has set the minimum frequency of testing unvaccinated workers at seven days in workplaces with unvaccinated employees. The agency expects that this testing frequency will be effective in slowing the spread of COVID-19 in those workplaces when used in tandem with face coverings and removal of infected individuals. OSHA emphasizes that each of these infection controls provides some protection from COVID-19 by itself, but that they work best when used together, layering their protective impact to boost overall effectiveness.

A more frequent testing schedule would result in significant additional costs, and OSHA is hesitant to impose these costs and depart from CDC recommendations without a fuller record generated through the commentary process initiated along with the ETS publication. Nonetheless, it should be noted that nothing in this rule prevents employers from conducting more frequent screening testing based on factors such as the level of community transmission, workplace experience with outbreaks and type of workplace (e.g., specific workplace factors such as high-volume retail or the critical infrastructure sector).

Employers subject to the ETS must ensure that each employee who is not fully vaccinated and reports at least once every seven days to a workplace where other individuals (e.g., co-workers, customers) are present:

- Is tested for COVID-19 at least once every seven days; and
- Provides documentation of the most recent COVID-19 test result to the employer no later than the seventh day following the date on which the employee last provided a test result.

Testing must occur every seven days regardless of an employee's work schedule. For example, an unvaccinated, part-time employee scheduled to work only every Monday and Tuesday must still be tested at least once every seven days. Because employees must provide documentation of their most recent COVID-19 test results to their employers no later than the seventh day following the date on which they last provided a test result, employees may want to set a schedule for their testing (e.g., get a COVID-19 test every Wednesday). A consistent testing day may help employees ensure their documentation is provided every seven calendar days.

## Employees Working Where Others Are Not Present



In situations where an employee does not report to a workplace where other individuals, such as co-workers or customers, are present during a period of seven or more days, employers must ensure employees are tested for COVID-19 within seven days before returning to the workplace and provide documentation of that test result to their employer upon return to the workplace.

For example, suppose an unvaccinated office employee has been teleworking for two weeks but must report to the office, where other employees will be present (e.g., co-workers, security officers, mailroom workers), on a specific Monday to copy and fax documents. In that case, that employee must receive a COVID-19 test within the seven days prior to the Monday and provide documentation of that test result to the employer upon return to the workplace.

The employee's test must occur within the seven days before the Monday the employee is scheduled to report to the office, but it also must happen early enough to allow time for the results to be received before returning to the workplace. Similarly, unvaccinated new hires would need to be tested for COVID-19 within seven days prior to reporting to a workplace where other employees will be present and provide documentation of their test results no later than arrival on their first day of work. Since point-of-care testing that uses an antigen test allows for results within minutes, OSHA does not expect that scheduling tests or providing results to employers will be an impediment.

## Employer Discretion on Satisfying ETS Obligations

An employer has some discretion regarding how to satisfy its obligations for the testing requirement, but those policies and procedures must be detailed in the employer's written policy pursuant to the employer's policies on vaccinations.

For example, an employer must specify how testing will be conducted (e.g., testing provided by the employer at the workplace, employees independently scheduling tests at point-of-care locations, etc.). The employer must also specify in their policy how employees should provide their COVID-19 test results to the employer (e.g., an online portal, to the human resources department). The Summary and Explanation of employer policies on vaccination provides additional information regarding the requirements of policies under this ETS.

Test results given to employers must contain:

- Information that identifies the worker (i.e., full name plus at least one other identifier, such as date of birth);
- The specimen collection date;
- The type of test;
- The entity issuing the result (e.g., laboratory, health care entity); and
- The test result.

If an employer is notified that an employee has a positive screening test, the employer must remove that employee from the workplace. Employees should quarantine, and employers must not allow employees to return to the workplace until they meet the requirements for the return to work criteria. Employees can return to work when they:

- Receive a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test (the most common screening test);
- Meet the return to work criteria in Centers for Disease Control and Prevention's (CDC) [Isolation Guidance](#); or
- Receive a return-to-work recommendation from a licensed health care provider.

OSHA states that it expects that most screening testing will be antigen testing, conducted at point-of-care locations due to the reduced cost and faster processing time when compared to NAAT testing in laboratories. Rapid point-of-care tests



are administered in various settings, such as physician offices, urgent care facilities, pharmacies, school health clinics, workplace health clinics, long-term care facilities and nursing homes, and at temporary locations, such as drive-through sites managed by local organizations.

COVID-19 tests that are both self-administered and self-read do not meet the definition of “COVID-19 test” in this ETS (unless observed by the employer or an authorized telehealth proctor) and therefore do not satisfy the testing requirements.

Because antigen testing in point-of-care locations will typically produce results within minutes, the use of antigen testing should not result in an inability to provide the employer with test results in a timely fashion. However, the agency recognizes that where the employee or employer uses an off-site laboratory for testing, there may be delays beyond the employee’s or employer’s control. In the event that there is a delay in the laboratory reporting results and the employer permits the employee to continue working, OSHA will look at the pattern and practice of the individual employee or the employer’s testing verification process and consider refraining from enforcement where the facts show good faith in attempting to comply with the standard.

## **Pooling Procedures for Testing**

OSHA is allowing employers to use pooling procedures to satisfy the requirements of screen testing. Pooling (also referred to as pool testing or pooled testing) means combining the same type of specimen from several people and conducting one laboratory test on the combined pool of specimens to detect SARS-CoV-2 (e.g., four samples may be tested together, using only the resources needed for a single test). The advantages of pooling include preserving testing resources, reducing the amount of time required to test large numbers of specimens (increasing throughput), and lowering the overall cost of testing.

If pooling procedures are used, and pooled test results come back negative, then all the specimens can be presumed negative with the single test. In other words, all of the employees who provided specimens for that pool test can be assumed to have a negative test result for SARS-CoV-2 infection. Therefore, documentation of the negative pooled test result would satisfy the documentation requirement for each employee in the pool, and no additional testing is necessary.

However, if the pooled test result is positive, immediate additional testing would be necessary to determine which employees are positive or negative. Each of the original specimens collected in the pool must be tested individually to determine which specimen(s) is (are) positive. If original specimens from the workers in a pooled test with a positive result are insufficient to be subsequently tested individually, those workers in the positive pool would need to be immediately re-swabbed and tested. The individual employee test results would be necessary to satisfy the employee documentation requirements. Where pooled testing is used, CDC and Food and Drug Administration (FDA) procedures and recommendations for implementing screening pooled tests should be followed. OSHA states that only some tests are authorized for pooled testing and should be performed per the authorization.

## **Responsibility for Cost of Testing**

OSHA explains that this section does not require the employer to pay for any costs associated with testing. As explained in Pertinent Legal Authority, Section II. of this preamble, the OSH Act authorizes OSHA to require employers to bear the costs of compliance with occupational safety and health standards, but OSHA has the discretion to decide whether to impose certain costs—such as those related to medical examinations or other tests—on employers “[w]here [it determines that such costs are] appropriate.” [29 USC 655\(b\)\(7\)](#).



OSHA has commonly required employers to bear the costs of compliance with standards as a cost of doing business, including requiring employers to bear the costs of medical examinations and procedures.

In the ETS, OSHA has largely required employers to bear the costs of compliance, including the typical costs associated with vaccination, but has determined that it would not be appropriate to impose on employers any costs associated with COVID-19 testing for employees who choose not to be vaccinated. This is because the ETS is designed to strongly encourage vaccinations since it is the most effective and efficient control for protecting unvaccinated workers from the grave danger posed by COVID-19. COVID-19 testing is only required under the ETS where an employee has made an individual choice to forgo vaccination and pursue a less protective option. For employees who choose to remain unvaccinated and are required to pay for their own COVID-19 testing, this ETS creates a financial incentive for those employees to become fully vaccinated and avoid that cost.

Although this ETS does not require employers to pay for testing, employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements. This section of the ETS also does not prohibit the employer from paying for costs associated with testing. Otherwise, OSHA leaves the decision regarding who pays for the testing to the employer.

Because OSHA does not specify who pays for the testing, OSHA states it expects that some workers and/or their representatives will negotiate the terms of payment. OSHA has also considered that some employers may choose to pay for some or all of the costs of testing as an inducement to keep employees in a tight labor market. Other employers may choose to put the full cost of testing on employees in recognition of the employee's decision not to become fully vaccinated. It is also possible that some employers may be required to cover the cost of testing for employees pursuant to other laws or regulations. OSHA notes, for instance, that in certain circumstances, the employer may be required, under the Fair Labor Standards Act, to pay for the time it takes an employee to be tested (e.g., if employee testing is conducted in the middle of a work shift). The subject of payment for the costs associated with testing pursuant to other laws or regulations not associated with the OSH Act is beyond OSHA's authority and jurisdiction.

As explained in a note to this ETS, under various anti-discrimination laws, workers who cannot be tested because of a sincerely held religious belief may ask for a reasonable accommodation from their employer. For more information about evaluating requests for reasonable accommodation for a sincerely held religious belief, employers should consult the Equal Employment Opportunity Commission's website: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid19-and-ada-rehabilitation-act-and-other-eeo-laws>.

## **Employee Failure to Provide Testing Results**

if an employee does not provide the result of a COVID-19 test, the employer must keep the employee removed from the workplace until the employee provides a test result. This provision of the ETS is imperative because workers with asymptomatic or presymptomatic SARS-CoV-2 infection are significant contributors to COVID-19 transmission, and screening testing will help to identify and remove those individuals from the workplace. Employees providing accurate and weekly test results to their employer is of utmost importance for preventing and reducing the transmission of COVID-19 in the workplace.

## **Positive COVID-19 Tests**

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When an employee has received a positive COVID-19 test or has been diagnosed with COVID-19 by a licensed health care provider, the employer must not require that employee to undergo COVID-19 testing for 90 days following the date of their positive test or diagnosis.

This provision is specifically intended to prohibit screening testing for 90 days because of the high likelihood of false-positive results that do not indicate active infection but are rather a reflection of past infection. Studies of patients who were hospitalized and recovered indicate that SARS-CoV-2 RNA can be detected in upper respiratory tract specimens for up to three months (90 days) after symptom onset. If employees were to be subjected to screening tests in such a situation, it would both undermine the confidence in the COVID-19 screening tests and could result in a harm to the worker of being unnecessarily removed from the workplace and subjected to the additional burden of unnecessary tests.

Where employers implement a vaccination policy that allows employees to choose to provide proof of regular testing and wear a face-covering rather than getting vaccinated, the employer's policy and procedures to implement this temporary suspension of testing must be included in their written workplace policy.

## Employer Recordkeeping

Employers must maintain a record of each test result required to be provided by each employee or obtained during tests conducted by the employer. These records must be maintained in accordance with [access to employee exposure and medical records](#) (29 CFR 1910.1020) as an employee medical record and must not be disclosed except as required by this ETS or other federal law. However, these records are not subject to the retention requirements of Employee medical records ([29 CFR 1910.1020\(d\)\(1\)\(i\)](#)), but must be maintained and preserved while this ETS remains in effect.

Additionally, this ETS includes specific timeframes for providing access to records, including COVID-19 test results. As a result, the timeframes for providing access to employee medical records in [29 CFR 1910.1020\(e\)](#) do not apply. Instead, when providing access to an employee, anyone with written, authorized consent from that employee and OSHA, employers must follow the access timeframes (by the end of the next business day after a request).

Finally, while the access timeframes in [29 CFR 1910.1020\(e\)](#) and retention requirements of [29 CFR 1910.1020\(d\)\(1\)\(i\)](#) do not apply to test result records required by this ETS, the other provisions in [29 CFR 1910.1020](#) do apply. For example, [29 CFR 1910.1020\(h\)](#) includes requirements for the transfer of employee medical records when an employer ceases to do business. Like the vaccine records requirements under this ETS and because they concern the health status of an employee, required test result records are employee medical records for purposes of [29 CFR 1910.1020](#). These test result records contain personally identifiable medical information and must be maintained in a confidential manner.

Source: [Occupational Safety and Health Administration](#)