

COMPLIANCE BULLETIN



OSHA COVID-19 ETS: Determining the Number of Employees

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 provides specific guidance to help employers determine how many employees they have for the purpose of complying with the vaccination and testing standard. This Compliance Bulletin provides an overview of specific guidance offered for:

- Offsite locations;
- Part-time employees;
- Independent contractors or subcontractors;
- Staffing agencies;
- Temporary and seasonal employees;
- Multiemployer worksites; and
- Outdoor employees.

Action Steps

Employers should familiarize themselves with the ETS and use its guidance to determine the number of employees. Nonexempt employers with 100 or more employees should prepare to comply with ETS requirements by the deadlines mentioned above.

Important Information

- Employers must consider the number of employees on their payroll on the ETS' effective date (Nov. 5, 2021), even though compliance is not required until Dec. 5, 2021 (Jan. 4, 2022, for the testing requirement).
- Employers with fewer than 100 employees must comply with the ETS (while the ETS remains in effect) if their workforce increases to or above 100 employees.
- Employers affected by the ETS remain subject to its requirements while the ETS remains effective, even if the employer's workforce fluctuates below the 100-employee threshold.

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





Affected Employers

The ETS applies to all private employers with a total of 100 employees at any time while the ETS is in effect. This standard generally covers employers in all workplaces that are under OSHA's authority and jurisdiction. This includes diverse industries such as:

- Manufacturing;
- Retail;
- Delivery services;
- Warehouses;
- Meatpacking;
- Agriculture;
- Construction;
- Logging;
- Maritime; and
- Health care.

When determining the number of employees, employers must include all employees across all of their U.S. locations, regardless of vaccination status or where they perform their work. Employers must include part-time employees in their employee count but can exclude independent contractors.

Specific Employee-count Scenarios

The ETS addresses a number of specific scenarios to help employers in diverse circumstances determine whether they meet the 100-employee threshold.

Franchises

Employers must count all employees at all their U.S. locations for the purposes of compliance with the ETS. In a traditional franchisor-franchisee relationship in which each franchise location is independently owned and operated, the franchisor and franchisees would be separate entities for coverage purposes. In these cases, franchisors would only count "corporate" employees, and each franchisee would only count employees of that individual franchise.

Related Entities

In other situations, two or more related entities may be regarded as a single employer for OSH Act purposes if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted.

Staffing Agencies

When employees of a staffing agency are placed at a host employer location, only the staffing agency will count these jointly employed workers for purposes of the 100-employee threshold for coverage under this ETS. Normally, the staffing agency and the host employer would share responsibility for these workers under the OSH Act; however, with this ETS, OSHA has set the threshold for coverage based primarily on the administrative capacity to protect workers as quickly as possible. Since staffing agencies would typically handle administrative matters for these workers, OSHA has designated they would determine their 100-employee threshold by counting these leased employees.

Host employers, however, would still be covered by this ETS if they have 100 or more employees, not counting leased employees. For enforcement purposes, traditional joint employer principles would apply where both employers are covered by the ETS.

Multiemployer Worksites

On a typical multiemployer worksite such as a construction site, each company represented—the host employer, the general contractor and each subcontractor—would only need to count its own employees, and the host employer and



general contractor would not need to count the total number of workers at each site. However, each employer must count the total number of workers it employs regardless of where they report for work on a particular day. Thus, for example, if a general contractor has more than 100 employees spread out over multiple construction sites, that employer is covered under this ETS even if it does not have 100 or more employees present at any one worksite.

Covering the employees of larger employers at multiemployer worksites would mitigate the spread of COVID-19 at the workplace even where not all employees are covered by this ETS because fully vaccinated employees (or unvaccinated employees wearing face coverings and submitting to weekly testing) would be less likely to spread the virus to unvaccinated workers at the site who are not covered by this ETS.

ETS Illustrations

Determining whether an employer is covered by the ETS should be made separately from whether individual employees are covered by the ETS requirements. The ETS offers the following examples:

- If an employer has 75 part-time employees and 25 full-time employees, the employer would be within the scope of this ETS because it has 100 employees.
- If an employer has 150 employees, 100 of whom work from their homes full-time and 50 of whom work in the office at least part of the time, the employer would be within the scope of this ETS because it has more than 100 employees.
- If an employer has 102 employees and only three ever report to an office location, that employer would be covered.
- If an employer has 150 employees, and 100 of them perform maintenance work in customers' homes, primarily working from their company vehicles (i.e., mobile workplaces), and rarely or never report to the main office, that employer would fall within the scope.
- If an employer has 200 employees, all of whom are vaccinated, that employer would be covered.
- If an employer has 125 employees, and 115 of those work exclusively outdoors, that employer would be covered.
- If a single corporation has 50 small locations (e.g., kiosks, concession stands) with at least 100 total employees in its combined locations, that employer would be covered even if some of the locations have no more than one or two employees assigned to work there.
- If a host employer has 80 permanent employees and 30 temporary employees supplied by a staffing agency, the host employer would not count the staffing agency employees for coverage purposes and therefore would not be covered. (However, so long as the staffing agency has at least 100 employees, the staffing agency would be responsible for ensuring compliance with the ETS for the jointly employed workers.)
- If a host employer has 110 permanent employees and 10 temporary employees from a small staffing agency (with fewer than 100 employees of its own), the host employer is covered under this ETS, and the staffing agency is not.
- If a host employer has 110 permanent employees and 10 employees from a large staffing agency (with more than 100 employees of its own), both the host employer and the staffing agency are covered under this standard, and traditional joint employer principles apply.
- Generally, in a traditional franchisor-franchisee relationship, if the franchisor has more than 100 employees, but each individual franchisee has fewer than 100 employees, then the franchisor would be covered by this ETS but the individual franchises would not be covered.



Workforce Size Fluctuations

The ETS applies to all employers who have the requisite number of employees at **any time this ETS is in effect**. The initial determination of whether an employer has 100 or more employees must take place as of the standard's effective date: Nov. 5, 2021. If the employer has 100 or more employees on Nov. 5, 2021, the ETS applies for the duration of the standard.

If the employer has fewer than 100 employees on Nov. 5, 2021, the standard would not apply to that employer as of the effective date. However, if that same employer subsequently hires more workers and reaches the 100-employee threshold for coverage, the employer would then be expected to come into compliance with the standard's requirements on the date the employer reaches the threshold.

Once an employer has come within the scope of the ETS, the standard continues to apply for the remainder of the time the standard is in effect regardless of fluctuations in the size of the employer's workforce. OSHA justifies covering employers that fluctuate above and below the 100-employee threshold during the term of the ETS because those employers will typically have already developed systems and capabilities for compliance. As a result, a decrease in the number of employees is unlikely to make them less capable of compliance.

For example, an employer with 103 employees on the effective date of the standard but then loses four employees the next month would continue to be subject to the ETS.

Employer Exemptions From the ETS

There are two employer exemptions to the ETS, namely:

- Those workplaces that are covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors; and
- Settings where any employee provides health care services or health care support services while they are covered by the healthcare ETS.

However, OSHA's intent was to leave no coverage gaps between the healthcare ETS and this ETS. Therefore, it will be necessary for employers with employees covered by the health care ETS to determine if they also have employees covered by the vaccine and testing ETS. For example, a healthcare employer with more than 100 employees that has nonhospital ambulatory care facilities that are exempt under the health care ETS (for nonhospital ambulatory care settings where all nonemployees are screened prior to entry and those with suspected or confirmed COVID-19 are prohibited from entry) would be required to protect the employees in those ambulatory care facilities under this ETS.

Similarly, a retail pharmacy chain that operates a series of ambulatory care clinics embedded in its stores, where those embedded clinics are the only areas in the store that are covered under the health care ETS (see [29 CFR 1910.502\(a\)\(3\)\(i\)](#)), would have to ensure that the remainder of its employees in other parts of its stores are protected under this ETS if the company has 100 or more employees companywide, including those covered under the health care ETS.

Employee Exemptions

Even if the ETS applies to a particular employer, the ETS requirements do not apply to employees:

- Who do not report to a workplace where other individuals such as co-workers or customers are present;
- While working from home (remote work); or



- Who work exclusively outdoors.

Working From Home and Working Alone

OSHA intends these provisions to exempt workplace settings where workers do not interact indoors with other individuals and exempt work performed in the employee's home regardless of whether other individuals may be present in the home. This is because OSHA has determined that the provisions of this ETS are not necessary to protect employees from COVID-19 when they are working alone or when they are working from home. These two provisions may overlap in some cases but also can apply to slightly different situations. Workplaces where other individuals are not present would apply to work in a solitary location, such as a research station where only one person (the employee) is present at a time. In that situation, the employee is not exposed to any potentially infectious individuals at work.

Working Exclusively Outdoors

Even if a particular employer is covered by the standard, the requirements of the standard do not apply to employees who work exclusively outdoors. OSHA has determined that COVID-19 does not pose a grave danger to employees who work exclusively outdoors because of the significantly reduced likelihood of transmission in outdoor settings.

However, at a construction site where workers are inside a partially complete structure, they are not truly outdoors. Some individuals on a construction site may spend significant amounts of time in a construction trailer where other individuals are present. Workers at outdoor locations may also routinely share work vehicles. These indoor exposures could account for COVID-19 clusters among employees at worksites otherwise characterized as being outdoors. Employees whose outdoor time is interrupted by the indoor periods will still be subject to the requirements in this ETS.

Whether the exemption of working outdoors applies depends on the working conditions of the individual employee. An employee will only be covered by the outdoor exemption if the employee works exclusively outdoors. Thus, an employee who works indoors on some days and outdoors on other days would not be exempt from the requirements of this ETS.

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