

# HR COMPLIANCE BULLETIN

## Paid Employee Leave Required Under Vaccination ETS

**UPDATE:** On Nov. 12, 2021, the 5th Circuit Court of Appeals affirmed a preliminary stay against the enforcement of the federal emergency temporary standard discussed here. Employers should nonetheless prepare to comply with the rule, as the final outcome of litigation over this matter is uncertain.

On Nov. 5, 2021, OSHA published a [federal emergency temporary standard](#) (ETS) to address the danger of COVID-19 infection in the workplace. Along with the adoption of mandatory COVID-19 vaccination or testing policies, the standard requires covered employers to provide **paid leave** for employees to be vaccinated against COVID-19 and recover from vaccination.

This Compliance Bulletin discusses the employee leave requirement of the ETS and includes information from the ETS Preamble (Preamble) and OSHA [FAQs](#) on the ETS.

### Employee Leave Requirement

The “employer support” provisions of the ETS require employers to provide a reasonable amount of time to each employee for each primary vaccination dose; up to four hours paid time, including travel time, at the employee’s regular rate of pay for vaccination doses; and reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination.

The ETS applies to employers with at least 100 employees, with exceptions. Employers must comply with the leave requirement by Dec. 6, 2021.

### Action Steps

Employers should monitor the ongoing litigation concerning the ETS and provide the required employee leave when the rule takes effect.

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### Highlights

#### Up to Four Hours per Dose

Employees must be given a maximum of four hours of paid leave for obtaining each primary vaccination dose.

#### Up to Two Days for Recovery

In general, providing two days of paid leave will satisfy the ETS requirement for reasonable leave to recover from side effects.

#### Use of Other Paid Time Off (PTO)

Workers cannot be required to use other PTO for receiving the vaccination but may be required to use accrued paid sick time for recovery from side effects.

### Important Dates

#### Nov. 4, 2021

OSHA announced the ETS.

#### Dec. 6, 2021

Employers must comply with the leave provisions of the ETS.





## Time for Vaccination

The ETS requires employers to provide reasonable time to each employee for each of their primary vaccination doses, and provide up to four hours of paid time, including travel time, at the employee's regular rate of pay for this purpose. The Preamble and FAQs state that this means up to **four hours of paid time is required for each primary vaccination dose**.

The Preamble and FAQs further explain that "reasonable time" may include, but is not limited to, time spent during work hours related to the vaccination appointments. This includes activities such as registering; completing required paperwork; spending time at the vaccination site (for example, receiving the vaccination dose or post-vaccination monitoring by the vaccine provider); and traveling to and from the location for vaccination, including travel to an off-site location such as a pharmacy or a situation in which an employee working remotely or in an alternate location must travel to the workplace to receive the vaccine.

The Preamble states that any additional reasonable time used to obtain a primary dose **beyond the required four hours** is **unpaid but protected** leave. The employee cannot be fired for using a reasonable amount of time for a primary dose.

## Transportation Costs

Employers are not obligated to reimburse employees for transportation costs such as gas money or train or bus fare incurred to receive the vaccination.

## Vaccination Outside Work Hours

Employers are not required to grant employees paid time to receive a primary vaccine dose during nonwork hours. However, these employees must be provided with the vaccination recovery time required by the ETS, if needed (described below).

## Time for Recovery

The ETS requires employers to provide employees with reasonable time and paid sick leave to recover from side effects following any primary vaccination dose. According to the FAQs and Preamble, providing up to **two days of paid sick leave per primary vaccination dose** will generally comply with the requirement. However, this amount must be allowed in addition to the time provided to receive the vaccination.

The Preamble comments that employees would not typically be expected to need leave solely to address redness or swelling at the site of injection, but it is not uncommon for vaccine recipients to require some recovery time for other side effects recognized by the Centers for Disease Control and Prevention (CDC).

## Use of Other PTO

The paid time employers must provide for each **primary vaccination dose** cannot be offset by any other leave the employee has accrued, such as sick leave or vacation leave. The Preamble notes that this prohibition is due to OSHA's concern that an offset would create a vaccination disincentive.

However, employees who need **time off to recover from vaccine side effects** may be required to use their available accrued sick leave. If the employee does not have available sick leave, leave must be provided. Employers may not require employees to accrue negative paid sick leave or borrow against future paid sick leave for vaccination recovery time.

Employers who grant only one type of leave may require employees to use the leave when recovering from side effects. However, employers who provide different types, such as sick leave and vacation leave, can only require employees to use sick leave.

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## **Retroactivity**

The Preamble makes clear that the paid leave requirements do not apply to vaccination received before the ETS was issued.