



MISSOURI Restaurant News

November 5, 2021



OSHA ISSUES EMERGENCY TEMPORARY STANDARD RELATED TO THE COVID-19 PANDEMIC

(Important: See links to additional resources, including webinars below)

Although not officially being published until November 5, 2021, the United States Department of Labor's Occupational Safety and Health Administration (OSHA) released their (*long awaited*) Emergency Temporary Standard (ETS) related to COVID-19 vaccination, face covering, and testing. The ETS will be effective for up to six (6) months or until OSHA publishes a permanent standard.

The majority of the 460-page document released by OSHA provides legal justifications regarding OSHA's use of the ETS process. OSHA explains why they consider COVID-19 to be a "grave danger" and how the Occupational Safety and Health Act endows them with the authority to utilize the ETS process under current circumstances. OSHA also provides insights into why they believe the standard is both technically and economically feasible for employers.

While there are likely to be many questions as employers work towards compliance and courts grapple with the legality of the ETS, significant takeaways and highlights including:

- **Employers Must Comply with the ETS.** The new ETS creates legal responsibilities with which covered employers must comply within thirty (30) days of publication, on December 5, 2021.
- **Applies to Employers with 100+ Employees.** The ETS applies to all employers with one hundred (100) or more employees. For calculation

purposes, employers must include every employee, including part-time employees, who works for the company, regardless of workplace or exemption status of the employee, during the six (6) months in which the ETS is effective. Individuals performing work for a company through a staffing agency should be counted as employees of the staffing agency only. Independent contractors are not considered employees.

- **Required Vaccination Policy.** Employers covered under the ETS must establish, implement, and enforce a written mandatory vaccination policy. Employers must require all non-exempt employees to become fully vaccinated and provide proof of vaccination by December 5, 2021, unless (1) a vaccine would be medically contraindicated for the employee; (2) a medical necessity required a delay in vaccination; or (3) the employee is entitled to a medical or religious accommodation.

- **Remote and Outside Workers Are Exempt.** Employers may exempt from their vaccine mandate any employees who work remotely not in the presence of others or who mainly perform work outside.

- **Paid Time Off.** Policies by covered employers must provide up to four (4) hours of paid time off for employees to receive a vaccine dose and additional paid leave for employees experiencing side effects (the ETS does not specify an amount of paid leave employers must provide, but merely states it must be a “reasonable” amount). Employers are not permitted to require employees to use other leave already available to them.

- **Record Keeping Requirements.** Employers must collect proof of vaccine status from employees in the form of copies of their vaccine cards. If an employee is unable to produce a vaccine card the employee may sign a document declaring their vaccination status and attesting to their inability to produce the vaccine card. All vaccine records must be turned over to an employer or their adequately appointed representative before the end of the next business day following the request. If OSHA requests copies of the records, employers must turn records over to OSHA within four (4) business hours of the agency making the request.

- **Weekly Testing Option.** Employers may adopt a policy allowing unvaccinated employees who do not qualify for an exemption or reasonable accommodation to continue to work if they undergo weekly testing and wear a face mask, but are not required to do so. Employers allowing unvaccinated employees this option have sixty (60) days until January 4, 2022, to begin testing.

- **Cost of Weekly Testing Option.** Although employers are typically required to undertake the cost associated with workplace safety, OSHA has advised that employers can require the employees to pay for weekly COVID-19 testing and face masks because a safer option (vaccination) is available that the employee has refused.

- **ETS Preempts State and Local Requirements.** OSHA expressly states that the ETS is intended to preempt all State and local workplace requirements that “relate” to the issues of vaccination, face covering, and testing, except those pursuant to an OSHA approved State Plan. If State or local requirements exceed those required by Federal law, the State or local requirement will remain valid.

· **Prior Guidance.** OSHA acknowledges that the prior guidance issued by the agency regarding COVID-19, with the exception of the Healthcare ETS issued earlier this year, were merely recommendations and did not create any legal obligations for employers.

McMahon Berger anticipates there will be significant and ongoing litigation regarding the ETS as soon as it is published and implemented. The Attorney Generals of multiple states, including Missouri, have indicated they will immediately file a lawsuit challenging the legality of the ETS once it is formally published tomorrow. This is not unsurprising given at least nineteen states have filed lawsuits to stop a similar COVID-19 vaccine mandate for federal contractors, arguing that the requirement violates federal law.

Resources regarding the ETS

NRA webinar with legal experts **Monday, November 8th at 3:00 pm CST** to review the rule and discuss the most recent guidance. [Register Here](#)

[OSHA ETS Summary](#)

[OSHA FAQ](#)

[DOL Webinar](#)

[White House Fact Sheet](#)

[Federal Register](#)

McMahon Berger webinar: MB attorneys will discuss the ETS and other workplace safety concerns on **Wednesday, November 17, 2021, at 12:00 pm CST**. [Register Here](#)

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