



# Detailed FAQs for Schools on the OSHA Vaccine Emergency Temporary Standard

Insights

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Educational institutions across the country are facing an upcoming compliance deadline as [the mandate-or-test workplace vaccine emergency rule](#) will soon take effect (pending the outcome of ongoing litigation). The rule will require all covered schools with 100 or more employees to either mandate that their workforce receive the vaccination against COVID-19 or test them weekly to ensure they are not infected. And despite the fact that [the ETS is currently blocked by a court order](#), there is a good chance that the rule will ultimately be upheld and OSHA will be given the green light to proceed with enforcement – meaning schools will need to prepare now. While our firm has developed [a comprehensive and updated series of Frequently Asked Questions for employers](#) about the Emergency Temporary Standard (ETS) developed by the Occupational Safety and Health Administration (OSHA), our Education Law attorneys know that schools have their own questions unique to our field that demand special treatment. [In conjunction with our general FAQs](#), here are a comprehensive set of FAQs about the ETS that will enable your school to expertly navigate this new requirement will.

## The Basics

### What is an “ETS”?

The OSH Act permits the agency to issue an Emergency Temporary Standard (ETS) it can enforce immediately if it determines that a “grave danger” to worker safety exists. For this reason, the rule did not go through the typical notice-and-comment period that federal regulations usually follow.

### What does the ETS require?

Generally, OSHA's ETS requires private employers with more than 100 employees – including secular and religious schools – to either mandate that covered employees be fully vaccinated against COVID-19 or require covered employees who are not fully vaccinated to test for COVID-19 at least weekly and wear a face covering.

As part of OSHA's ETS, schools must also:

1. establish, implement, and enforce a written policy on vaccines, testing, and face coverings;
2. provide certain information to employees on vaccines and the requirements of the ETS;
3. provide paid time off to employees to obtain the vaccine and reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination series dose to each employee for each dose (Schools cannot require an employee to use their own PTO to get vaccinated.);
4. obtain and maintain records and a roster of employee vaccination status; and
5. comply with certain notice requirements when there is a positive COVID-19 case and report to OSHA when there is an employee work-related COVID-19 fatality or hospitalization.

### **What are the ramifications of non-compliance?**

Covered employers who ignore the ETS while it is in effect could face OSHA citations and penalties of up to \$13,653 per violation, and additional citations or penalties as determined by OSHA or state OSHAs for willful or egregious failures to comply. This means a covered employer could face a penalty of that amount for each school, area within a school, or each employee within a school. In addition to OSHA citations and penalties, covered employers may face potential exposure for individual whistleblower, retaliation, negligence and other claims potentially asserted by employees.

**For further information, including how long the ETS will be in place and what to do should your school have already implemented a mandatory vaccine policy that is more restrictive than the ETS, please see [“The Basics” subsection of our Comprehensive FAQs for Employers on the OSHA Vaccine Emergency Temporary Standard \(ETS\).](#)**

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### **Coverage**

#### **Which employers are covered by the ETS?**

All private employers with 100 or more employees – including secular and religious schools – must comply with the ETS, unless they meet one of the limited exceptions. Many schools may not realize that they are covered because they have not had to interact with OSHA in the past. Regardless of your prior experience with OSHA, if you are a covered employer, you should still comply with the ETS

## Are religious schools covered by the ETS?

Yes, a religious school will be covered if it has enough covered employees. Under the OSH Act, churches or religious organizations, like charitable and non-profit organizations, are considered employers under the Act if they employ one or more persons in secular (non-religious) activities. This would include employees in the school's business office, facilities, lunch services, etc. However, as a matter of enforcement policy, the performance of or participation in religious services will be regarded as not constituting employment under the Act. Any person, while performing religious services or participating in them to any degree is not regarded as an employee under the Act during that period of time, notwithstanding the fact that such person may be regarded as an employee for other purposes.

For example, during the time when a minister is performing or participating in religious services, they are not regarded as an employee under the OSH Act. In addition, other participants in religious services such as choir masters, organists, other musicians, choir members, ushers, and similar personnel, are not regarded as employees during that period of time.

You should note, however, that if the minister (or other employee) who performs or participates in religious services has any secular duties, such as exam proctoring, college admissions, lunchroom supervision, business office work, etc., such person will be subject to the ETS and must be vaccinated or tested.

In addition, the church/religious organization itself would be covered under the ETS if it has 100 or more employees, even if some of those employees may be totally exempt under the religious exception (i.e. even if some of the school's ministers spend 100% of their time participating in religious duties). In other words, OSHA would still count clergy toward the 100-employee count for coverage but would not require exempt ministers to comply with the vaccination and testing requirements **unless those ministers also engage in any secular duties** as discussed above.

A more difficult question is whether those employees that the school believes qualify for the ministerial exception under *Hosanna-Tabor/Our Lady of Guadalupe* (such as teachers, administrators, guidance counselors, etc.) will be covered by the Act. There is no guidance on this issue and no cases have tested the issue yet. Our preliminary assessment is that the religious exemption under the OSH Act may be narrower than the ministerial exception under *Hosanna-Tabor/Our Lady of Guadalupe*. This is because the OSH Act exemption only applies "while performing religious services" as opposed to the ministerial exception as discussed in *Hosanna-Tabor/Lady of Guadalupe*, which applies to functional ministers at all times during the course of their employment (and bars employment claims by such employees against a religious employer) – not only while they are performing religious services.

Until there is more guidance from OSHA or the courts, religious schools and organizations may be in a difficult position. OSHA could take the position that a teacher who would otherwise fall under the *Hosanna-Tabor/Our Lady of Guadalupe* ministerial exception will only be exempt from the OSH Act

*Hosannan-Iabor/Our Lady of Guadalupe* ministerial exception will only be exempt from the OSH Act (i.e. the vaccination, testing, and masking requirements) if 100% of their duties involve performance of religious duties, which may be difficult to establish. You should work with your school's legal counsel to discuss how your school may be able to strengthen its position as to these employees.

## **How do we determine whether we have 100 or more employees?**

Schools must include (i.e. count) all employees across all of their U.S. locations, regardless of an employee's vaccination status or where they perform their work. Part-time employees do count towards the total number of employees, but independent contractors do not. As in other employment law contexts, you should be cautious about independent contractors who may be misclassified and could be found to meet the legal definition of an employee. For example, schools will need to include part-time or seasonal coaches who are employed (receiving compensation from the school) on or after November 5, 2021.

For a school created as a single corporate entity (i.e. 501(c)(3)) with multiple campuses or locations, all employees at all locations are counted for purposes of the 100-employee threshold for coverage under this ETS.

## **What about joint employment or related entities under an ownership umbrella?**

The ETS provides different standards for these business arrangements.

### *Related Entities*

The ETS states that "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." The ETS does not give further guidance on what "safety matters" may be considered, nor does the ETS discuss whether OSHA intends to look at how an employer is treated under other employment laws when deciding if you are a single employer for purposes of the ETS. OSHA did state that traditional joint employer principles would apply "where both employers are covered by the ETS in terms of who is responsible for which workers," but did not further discuss the role of joint employment principles in situations where there are multiple entities that each have less than 100 employees but are somehow related in ownership or operations. Accordingly, you should expect OSHA to decide coverage on a fact-specific basis. In assessing whether the ETS may apply to related entities, we suggest that you analyze several factors.

- First, and of primary importance, you should look at how interrelated your entities are in handling workplace safety issues. This includes whether you have integrated safety directors, whether you have responded to prior OSHA inspections through an umbrella entity rather than the entity that employed the employee(s) at issue, and other workplace safety matters. For example, consider whether your COVID-19 policies (or other safety policies such as policies relating to safety threats, intruder alerts, lockdowns, etc.) were developed by one entity to be

used by several entities and what enforcement of those policies has looked like in terms of entity involvement.

- Second, consider whether you are considered a joint employer for purposes of other employment laws. We do not yet have enough information to gauge whether OSHA enforcement will look to such other employment laws to find coverage when several related entities would otherwise be below the 100-employee threshold.

Schools should also be cautious about making operational changes now in an attempt to avoid coverage as the federal ETS went into effect as of November 5, 2021.

### *Staffing Agencies or Similar Relationships*

Some schools may use staffing agencies for certain positions, such as for dining or janitorial services. The ETS states that “in scenarios in which employees of a staffing agency are placed at a host employer location, only the staffing agency would count these jointly employed workers for purposes of the 100-employee threshold for coverage under this ETS.” This is the case even if the staffing agency and host employer would normally share responsibility for the workers under the OSH Act for other purposes.

If you have 100 or more employees on the effective date (November 5, 2021), the ETS will apply for the duration of the standard. If you have fewer than 100 employees on the effective date, you do not have to comply. If you subsequently hire more workers and hit the 100-employee threshold for coverage, however, then you would then be expected to come into compliance. Once an employer falls 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. So, once you are in, you are in.

OSHA explained that the decision to cover employers despite fluctuation above and below the 100-employee threshold during the term of the ETS was made because those employers will typically have already developed systems and capabilities in place for compliance, such that a decrease in the number of employees is unlikely to make them less capable of compliance.

### **Does the ETS apply to remote employees?**

The ETS requirements (such as showing proof of vaccination or weekly testing) do not apply to employees who never work in an office and never meet with co-workers or customers (which would include students and parents). However, you must still include those employees in your count to determine if you meet the 100-employee threshold.

OSHA also provides additional guidance for remote employees. Employees who work remotely some of the time, but not all of the time, will still need to show proof of vaccination or testing based on when they are at the workplace rather than at home. Specifically, OSHA has said that employers

must ensure that employees who enter the workplace or interact with others as part of their job are tested for COVID-19 within seven days prior to returning to the workplace and provide documentation of that test result to the employer upon return. OSHA provided the following example:

If an unvaccinated office employee has been teleworking for two weeks but must report to the office, where other employees will be present (e.g., coworkers, security officers, mailroom workers), on a specific Monday to copy and fax documents, 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.

**In a school setting, unvaccinated employees need not be tested during extended school breaks or holidays but will need to be tested seven days prior to returning to campus.**

A "workplace" is defined as a physical location (e.g., fixed, mobile) where the employer's work or operations are performed. It does not include an employee's residence, even if the employee is teleworking from their residence. A workplace includes the entire site (including outdoor and indoor areas, a structure or a group of structures) or an area within a site where work or any work-related activity occurs (e.g., taking breaks, going to the restroom, eating, entering or exiting work). The workplace includes the entirety of any space associated with the site (e.g., workstations, hallways, stairwells, breakrooms, bathrooms, elevators) and any other space that an employee might occupy in arriving, working, or leaving. Examples of employees who have mobile workplaces include maintenance and repair technicians who go to homes or businesses to provide repair services, or those who provide delivery services. For a school, this might include persons primarily engaged to assist with tutoring or assistance to children who are distance learning or other similar situations.

**For further information, including whether you have a change in the number of employees above or below 100, the application of the ETS to employees who work outside, and a listing of examples of employers that fall above or below the 100-employee threshold, please see the "Coverage" subsection of our Comprehensive FAQs for Employers on the OSHA Vaccine Emergency Temporary Standard (ETS).**

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## **Medical and Religious Accommodations**

**If we mandate the vaccine as the government requires, do we have to provide exceptions for any employees?**

Federal law generally requires that you would still need to consider and possibly accommodate valid medical and religious accommodation requests if an employee requests to be exempted from the vaccination requirement. For this reason, you may need to have your vaccination policies include provisions explaining how employees can request exemptions in the form of accommodations on the basis of medical or religious reasons.

- The Americans with Disabilities Act (ADA) establishes the federal framework applicable to evaluating accommodation requests based on medical reasons.
- Title VII of Civil Rights Act of 1964 (Title VII), as amended, provides the basis for requests for reasonable accommodation based on religion.
- State or local laws may provide similar protections.

Whether you are required to allow for exemptions may be affected by factors specific to your school, such as whether you are a religious school and may be able to claim that employees are ministerial employees for which your school may claim that no exemption needs to be recognized. Similarly, some but not all states, provide exemptions for religious schools that may indicate that a school does not need to recognize certain exemption requests. This is an area where consulting with counsel is important.

### **What should we do if someone presents us with a religious accommodation request?**

If you have determined that your school should recognize religious accommodation requests, as a best practice, you should confirm whether the employee's accommodation request is indeed based upon a sincerely held religious belief or practice (as opposed to a more secular or non-spiritual reason for not wanting to get vaccinated); how receiving the vaccine would violate the employee's beliefs; and what accommodation the employee is requesting. As explained in a previous *Insight*, you must confer with the employee interactively to determine what, if any, reasonable accommodation options exist. Accommodations may take the form of those described in the previous section. Again, you are not required to grant a request that would constitute an undue hardship. Although this process is also detailed and requires consideration, the legal standard applicable to evaluating requests for accommodation based on religious beliefs or practices is less demanding for employers than the undue hardship standard applicable to requests presented under the ADA. Nevertheless, you should evaluate these requests individually and carefully, recognizing that these issues could be the subject of considerable future litigation.

**For further information, including whether employees exempt from the vaccine due to a reasonable accommodation need to be tested weekly and what you should do if an employee presents you with a medical accommodation request, please see the "Medical and Religious Accommodations" subsection of our Comprehensive FAQs for Employers on the OSHA Vaccine Emergency Temporary Standard (ETS).**

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## Testing Option

### **What do we need to generally know if we are considering the testing option?**

Generally, employees who report to a workplace where there are other individuals (or who interact with coworkers or students or parents outside of the home, collectively “Workplace”) and who are not vaccinated must be tested once weekly. Weekly testing applies to employees who report to the Workplace at least once every seven days and employees must provide documentation of the most recent COVID-19 test result no later than the seventh day following the date the employee last provided a COVID-19 test result.

If an employee reports to the Workplace less than once every seven days, the employer must ensure that the employee is tested for COVID-19 within seven days of returning to the Workplace and the employee must provide documentation of that test to its employer. Employees who work exclusively outdoors are not subject to the ETS.

### **What about remote workers?**

Workers who are completely remote do not need to be tested provided that the employee does not report to a workplace where other individuals such as coworkers and students or parents are present (the “Workplace”). In other words, if you have an employee who comes into work once a month, the employee is not required to be tested every seven days when not appearing at the Workplace. Schools, however, must ensure that the employee is tested within seven days prior to returning to the Workplace and provides documentation of that test result to the school.

What is key about the timing is that the employee’s test must occur within seven days prior to the day that the employee is scheduled to return in person but must happen early enough that will allow appropriate time for the result to be received by the school.

### **What if an employee says they need a medical or religious accommodation preventing them from being tested weekly?**

OSHA directs employers to the EEOC’s guidance relating to COVID-19. If vaccination and/or weekly testing and/or wearing a face covering conflicts with an employee’s sincerely held religious belief or practice, the employee may be entitled to a reasonable accommodation under Title VII, so long as such accommodation does not cause an undue hardship for the employer. As above, schools may need to consider which exemptions they must provide and whether an undue hardship is implicated in allowing the exemption.

For employees who have a disability or medical contraindication to weekly testing, you should comply with the ADA to determine what reasonable accommodations are available that would not cause a direct threat or create an undue hardship.

**For further information, including whether you can test more often than seven days, how to handle unvaccinated employee who have had a prior COVID-19 infection, the date by when you will need to comply with the weekly testing requirement, what kind of tests will suffice, the limitations to at-home tests, the ins and outs of Pool Testing, whether you can administer OTC tests, how long unvaccinated employees must submit to weekly COVID-19 testing, who pays for testing and the time employees spent getting tested, and what to do if there is a shortage of testing supplies or the lab you use is backed up, please see the “Testing Option” subsection of our Comprehensive FAQs for Employers on the OSHA Vaccine Emergency Temporary Standard (ETS).**

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## **Looking Ahead**

### **What’s next?**

As noted above, a federal appeals court issued an order on November 6 blocking the ETS from taking effect. We will probably see further rulings in the coming days and weeks from other federal appeals courts as well, some following in the Fifth Circuit’s footsteps and blocking the ETS, others ruling that the ETS stands on solid legal footing. With a patchwork of various legal rulings expected, there will ultimately be a unifying judicial order having the final say on this matter. Whether that ruling comes from the multidistrict litigation panel (an assembly of federal judges that manages certain kinds of national litigation spanning several jurisdictions) or the U.S. Supreme Court remains to be seen.

### **What should we do now?**

While OSHA must refrain from enforcing the ETS until the Fifth Circuit says otherwise, this could change in the blink of an eye if a full panel of appeals court judges removes the stay. And again, with several separate lawsuits filed in different courts challenging the ETS, it is likely that a final binding and unifying determination will not be made for weeks or even months. A school’s best course of action is to familiarize yourself with the requirements of the OSHA ETS and prepare to implement those requirements if the stay is lifted and the emergency rule is revived. After all, OSHA will most likely have little patience with non-compliant employers who claim they held off implementing the mandate-or-test rule while awaiting a final court ruling – and the agency has significant weapons at its disposal in the form of citations and penalties for those not following the ETS edicts.

We advise schools to spend the coming weeks preparing for the ETS as if it will take effect but waiting to implement its measures until the final judicial outcome is certain. The earliest effective date for any of the ETS requirements is December 5, which includes the need for you to have a vaccination policy and various other technical standards in place. You will be hard pressed to develop these materials overnight, so spend this interim limbo time efficiently and be prepared to comply should the ETS ultimately be upheld.

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We have developed a five-step action plan you can implement immediately to put yourself in the best position to comply with the ETS. [You can find the plan here.](#)

## **What else do we need to know?**

For further information about the [timing/state-by-state impact](#) of the ETS, the [certification/recordkeeping](#) requirements, and [legal challenges to the ETS](#), please see our [Comprehensive FAQs for Employers on the OSHA Vaccine Emergency Temporary Standard \(ETS\)](#).

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## **Conclusion**

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While the effective date may still be weeks away, you should begin preparing now by establishing policies for determining employees' vaccination status and procedures for tracking weekly test results. You should also prepare for the possibility that employees may refuse to comply with the requirements of the ETS and begin planning an appropriate response – which would include terminating their employment.

We will monitor these developments and provide updates as events warrant. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in [our Education Law Team](#).

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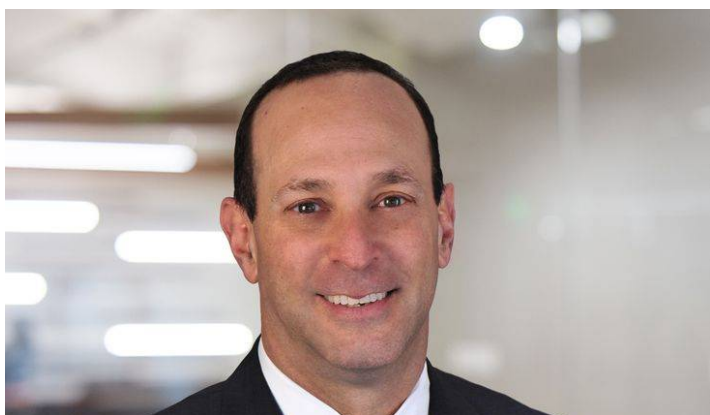
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