

COVID-19 Vaccination Emergency Temporary Standard: Are You Prepared?

While the world continues to get back to its new normal, one thing is certain: “new normal” includes continuing to deal with COVID-19-related changes. To this end, on Nov. 4, the Occupational Safety and Health Administration (OSHA) issued an Emergency Temporary Standard (ETS) regarding COVID-19 vaccination policies, which affects businesses nationwide, including fitness facility operators.

As always, it is highly recommended to stay ahead of all regulatory mandates and, to the extent possible, have a plan in place because the speed with which many of the new mandates are impacting your business are at an all-time high as it relates to the pandemic. This article will give an overview of the ETS, but you are encouraged to stay educated on its impact on your business as this mandate is continuing to evolve. There is also a lot to unpack here, so buckle up.

The ETS mandates that all employers with 100-plus employees ensure:

- 1) All employees be vaccinated unless the employee qualifies for medical or religious exemptions; or
- 2) Have a COVID test at least once per week and wear a face covering in the workplace.

The ETS requires all covered employees (addressed here) to either be vaccinated or commence weekly testing by Jan. 4. All other requirements of the ETS, such as mask mandates for unvaccinated employees, must be implemented by Dec. 5. The “temporary standard” means it will expire within six months of its implementation, or May 5, 2022; however, it may become permanent. Notably, and even though there are expedited court challenges underway, covered employers should be preparing for the chance of a complete execution and application of OSHA’s Emergency Vaccine Mandate.

The ETS thoroughly explains the duties of covered employers (outlined here), including:

- Two different options for vaccine policies.
- Multiple methods for checking vaccination status.
- Testing requirements for unvaccinated employees.
- Workplace face-covering regulation.
- Vaccine reporting requirements.
- Paid time off to provide support for employees to get the vaccine.

Covered Employers

The ETS applies only to those employers with 100-plus employees while the ETS is in effect. Employee counts include full-time employees as well as temporary employees, seasonal employees and minors. Independent contractors are excluded from

the employee count. Certain businesses are exempt, but those exemptions are extremely limited and generally subject to other federal safety mandates.

Covered Employees

Employees under a covered employer are all subject to the requirements of the ETS, but there are certain exemptions:

- Those employees who do not report to a workplace where any other people are present.
- Those employees who solely work from home; those who work from home on a partial basis are not excluded.
- Those employees who work solely outdoors.

Vaccination Policy Options

Option one: Covered employers may impose a requirement that all employees be fully vaccinated.

Option two: Alternatively, covered employers may impose a policy that allows the choice of vaccination or weekly testing and face-covering in the workplace.

The testing and mask requirement included in the second option is not required until Jan. 4, 2022. The vaccination requirement, however, must be imposed by the Dec. 5 deadline.

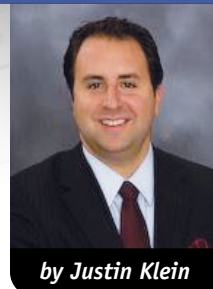
Employees may be excluded from the vaccine requirement by medical reasoning or religious belief, practice or observance and may be entitled to reasonable accommodation. Such reasonable accommodations may also apply to the face-covering requirement.

Checking Vaccination Status

Covered employers are required to determine employees’ vaccination status and keep vaccination records. All vaccine records must be kept confidential. Acceptable forms of record include:

- A copy of the employee’s CDC COVID-19 vaccination card.
- A copy of the employee’s medical records indicating vaccination.
- A copy of vaccination records issued by a public health authority.
- Other official documents that include the date, place and health care provider who administered the vaccine.

In the absence of one of these forms of record, an employee must submit a statement certifying vaccination status and the fact that proof of vaccination has been lost. Following specific language within the ETS, the statement must include the following declaration by the employee: “I declare that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.”



by Justin Klein

Supporting Vaccination Requirements

Covered employers must provide up to four hours of paid time at the employee's regular rate of pay to receive the vaccine, including travel time to and from the vaccination site, AND provide reasonable paid sick leave to employees so they can recover from side effects of the vaccine.

Unvaccinated Testing Requirements

Unvaccinated employees are required to be tested for COVID-19 at least once during every seven-day period. If an employee does not report to the workplace within any seven-day period, the employee must be tested for COVID-19 within seven days of returning. Employers are not required to pay for testing costs unless payment is required by another federal, state or local law, or collective bargaining agreement.

Over-the-counter "rapid" tests are allowable, but the testing process with such tests must be observed by an employer's representative or an authorized telehealth provider. Employers must keep records of every test result provided by employees. Test results are considered to be employee medical records that must remain confidential. Upon an employee's refusal to be tested or submit a test result, the covered employer is required to exclude the employee from reporting to the workplace until the employee provides a negative test result.

Positive Test Result Notification

Employees are required to immediately notify their employer in the instance of a positive COVID-19 test result or diagnosis. This is required of both vaccinated and unvaccinated employees. Upon a positive test result or diagnosis, the employee must be removed from the workplace until a negative COVID-19 test is obtained and CDC isolation guidance in effect at the time is followed. If such exclusion occurs, the ETS does not provide for paid leave; however, paid leave may be required by applicable law, collective bargaining agreement or employer policy.

Face Coverings

Unvaccinated employees must also wear a face covering in an indoor workplace (including when an employee is in a vehicle with another individual). Employees are not required to wear a face covering when:

- An employee is alone in a completely enclosed room.
- An employee is temporarily eating or drinking.
- Removing said face covering is necessary for identification purposes.
- Wearing said face covering is not feasible or would create a greater hazard than not wearing a face covering due to circumstances.

Employers are not required to pay for employee's face coverings or respirators if they choose to wear a respiration mask.

Duty to Report Fatalities and Hospitalizations to OSHA

The ETS requires employers with 100-plus employees to report any employee-related COVID-19 fatalities within eight hours and/or hospitalizations within 24 hours to OSHA.

Duty to Provide Records and Information to Employees and OSHA

Upon request by employees or employee representatives authorized in writing, employers are required to provide the following

information/documents by the next business day:

- An employee's vaccination record or test result for the employee making the request (or his/her authorized representative).
- The total number of fully vaccinated employees and total number of employees at the workplace.

Employers must also provide their written policies regarding vaccination and testing/face-covering requirements in conjunction with the total number of fully vaccinated employees within four business hours of a request by OSHA. Employers must provide any other records required by the ETS to OSHA by the next business day.

Information and Posting Requirements

To inform employees of ETS requirements, covered employers must:

- Inform of the requirements contained in the ETS.
- Inform of the employer's policies established in order to implement the requirements in the ETS.
- Inform of the benefits of vaccination, specifically through providing a CDC document titled "Key Things to Know About COVID-19 Vaccines."
- Inform of the protections for employees or the OSH Act and OSHA regulations (including 29 CFR 1904.35(b)(1)(iv) and Section 11(c) of the OSH Act, which describe employee rights and prohibit employer retaliation.)
- Inform of the prohibitions of federal law (including Section 17(g) of the OSH Act), which deal with criminal penalties for giving false statements.

Legal Preemption and State Plans

The ETS takes legal supremacy over any contrary state or local law that allows for inconsistent standards or disallows mandatory vaccination (if such law is less restrictive). The ETS does not necessarily take legal supremacy over federal labor law and the requirements of the ETS may be subject to bargaining with unions.

Any state with "state plans" authorized by OSHA are free to adopt different requirements, as long as they are just as effective as the requirements of the ETS.

Conclusion

If you have read this whole article, or even skimmed it, your head is likely spinning. It is critical to be aware of your obligations to not only keep yourself, your employees and your customers safe, but also to avoid issues with any regulators, avoid lawsuits and to avoid business interruption as a result of any confusion surrounding the ETS. Most critically, business owners need to stay ahead of the curve and not only plan but be aware of what is coming down the pike as this and other mandates are rapidly evolving. Indeed, by the time you read this article, there will likely be additional guidance or changes to how the ETS is handled. 🧠

Justin M. Klein is a franchise and business attorney and a partner with the nationally recognized franchise law firm of Marks & Klein LLP, which represents Planet Fitness® franchise operators throughout the United States. You can contact Klein at justin@marksklein.com.