OSHA ETS on Vaccination and Testing: Readiness Guide for Pennsylvania Employers

1 Executive summary

What is the Emergency Temporary Standard (ETS)?
The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has issued an Emergency Temporary Standard (ETS) providing all employers with 100 or more employees with two compliance options:
1. Develop, implement, and enforce a mandatory COVID-19 vaccination policy
2. Adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination

The ETS was published in the Federal Register on November 5, 2021. The text of the rule can be found on the [Federal Register website](#), and OSHA's website contains [additional information,](#) including [FAQs](#).

On November 6, 2021, the Fifth Circuit Court of Appeals granted an emergency motion to stay enforcement of the ETS, temporarily suspending the ETS pending further judicial review. On November 15, 2021, the U.S. Department of Labor acknowledged the Fifth Circuit's Order and announced that OSHA is suspending its implementation and enforcement of the ETS pending further litigation. On December 17, 2021, the Sixth Circuit Court dissolved the Fifth Circuit Court's stay of the ETS. On December 18, 2021, OSHA released [guidance](#) that it will resume implementation of the ETS.

Per [OSHA](#): "OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard." Litigation may be ongoing. Employers should refer to the OSHA website for updated guidance.

Employers must choose how to ensure compliance. Federal guidance states that employers can mandate vaccinations for staff. To support vaccinations, the Pennsylvania Department of Health (PADOH) will continue to oversee a Commonwealth-wide vaccination program, and employers are invited to refer any staff seeking vaccination to one of hundreds of clinics in the Commonwealth providing vaccines. To find the closest vaccine provider, please follow [this link](#). PADOH will not provide any customized support to private employers seeking to operationalize a testing program.

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2 Vaccinating employees

This section focuses on employer considerations when encouraging employees to get vaccinated to avoid weekly testing.

Under the ETS, "fully vaccinated" means:
> "a person's status 2 weeks after completing primary vaccination with a COVID-19 vaccine with, if applicable, at least the minimum recommended interval between doses in accordance with the approval, authorization, or listing that is: (A) approved or authorized for emergency use by the FDA; (B) listed for emergency use by the World Health Organization (WHO); or (C) administered as part of a clinical trial at a U.S. site."

Qualifying vaccines are, as of November 5, 2021:
> A) FDA-approved or authorized: Pfizer, Moderna, Janssen
> B) Listed for emergency use by WHO: AstraZeneca, Sinovac Biotech, Sinopharm, and Bharat Biotech

2.1 Federal guidance on vaccine mandates

The U.S. federal government has provided the guidance below to enable employers to mandate vaccinations under most circumstances:

Centers for Disease Control and Prevention
From the CDC workplace vaccination program guidelines:

> "**An employer may require that its employees be vaccinated**. The U.S. Department of Health and Human Services has established that employers— including healthcare providers when acting solely in their role as employers—may ask an employee about vaccination status without violating the Health Insurance Portability and Accountability Act (HIPAA). There may be exceptions to this: an employee health clinic may, for instance, become an entity covered by HIPAA if engaged in certain transactions. Facilities should consult with legal professionals about adherence to HIPAA rules.
>
> If an employer requires its employees to provide proof that they have been fully vaccinated against COVID-19, the employer cannot mandate that the employee provide any medical information as part of the proof. However, employees can choose to provide medical information to their employer."

Equal Opportunity Employment Commission
From the EEOC's What You Should Know About COVID-19:

> "**Federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be fully vaccinated against COVID-19.**"

2.2 Advantages of vaccine mandates vs. "vaccinate or test"

The CDC has outlined the benefits of a workplace vaccination program:

Potential benefits to employers:
- Keep the workforce healthy by preventing employees from getting COVID-19
- Help protect clients, customers, and visitors from COVID-19 illness
- Reduce absences due to COVID-19 illness
- Improve productivity
- Improve morale, build trust, and be responsive of your employees' needs and cultural norms

Potential benefits to employees:
- Prevent COVID-19 illness and long-term complications
- Reduce absences and doctor visits due to COVID-19 illness
- Help protect family and household members from COVID-19 illness
- Improve morale

Another important benefit of the vaccine to employee health is reducing severity of COVID-19 symptoms and likelihood of hospitalization, even among symptomatic cases.

In addition to maintaining a healthy workforce, as stated in the OSHA ETS, employers with fully vaccinated staff can avoid operating a testing program.

2.3 List of companies in Pennsylvania mandating vaccination

Many Pennsylvania employers have already announced or implemented vaccine mandates for their staff. The table below contains several examples:

Employer	Month effective	# employees
Drexel University[1]	Aug '21	10k
La Salle University[1]	Aug '21	1k
Villanova University[1]	Aug '21	3k
BNY Mellon[2]	Sep '21	7k
Trinity Health Mid-Atlantic[1]	Sep '21	9k
Doylestown Health[1]	Oct '21	3k
Geisinger[1]	Oct '21	24k
Hershey (corporate)[1]	Oct '21	16k
Penn State University[1]	Dec '21	20k
Tower Health[1]	Jan '22	14k
WellSpan Health[1]	Jan '22	20k

In addition, many U.S.-wide employers have also announced vaccine mandates, including United Airlines, Adobe, Tyson Foods, and Kohler. See Appendix 5.1 for a non-exhaustive list.

2.4 Resources supporting staff vaccination

The following resources may be useful in planning your efforts to vaccinate your staff:
- CDC: Workplace Vaccination Program
- CDC: Post-vaccination Considerations for Workplaces

Pennsylvania has a robust network of vaccination sites across the Commonwealth that will allow employees to easily access vaccines of their choosing. To help find the nearest facility offering vaccines, see the following:
- Pennsylvania: Getting the COVID Vaccine
- CDC: Find COVID-19 Vaccines

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[1] Employees must be vaccinated as a term of employment
[2] Employees must be vaccinated to return to the office; not required as a term of employment

2.5 Verifying and tracking employee vaccination status

The [ETS](#) lays out the following acceptable methods for employers to verify and keep records of their employees' vaccination statuses.

> "Paragraph (e) of the ETS requires employers to determine the vaccination status of each employee. Employers must require employees to provide an acceptable proof of vaccination status, including whether they are fully or partially vaccinated… acceptable proof of vaccination status is: (i) the record of immunization from a health care provider or pharmacy; (ii) a copy of the COVID-19 Vaccination Record Card; (iii) a copy of medical records documenting the vaccination; (iv) a copy of immunization records from a public health, state, or tribal immunization information system; or a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s). A signed and dated employee attestation is acceptable in instances when an employee is unable to produce proof of vaccination. Given the attestation option, there are no technological barriers to the provision for proof of vaccination status. As discussed below, many employers requiring proof of vaccination have successfully implemented such policies even without allowing the flexibility of the attestation option."

2.6 Handling vaccine exemptions and exemption requests

Employees subject to vaccine mandates may request exemptions, which if approved, allow them to continue to work while unvaccinated. However, vaccine-exempt employees must still comply with weekly testing requirements.

The [ETS](#) allows employer vaccination policies that permit lack of vaccination among employees:

> "(1) for whom a vaccine is medically contraindicated, (2) for whom medical necessity requires a delay in vaccination, or (3) those legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely-held religious beliefs, practices, or observances that conflict with the vaccination requirement."

To learn more about medical and religious "reasonable accommodations," see the CDC's [Vaccine Requirements and Exemptions](#) and the EEOC's [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#), sections K.6 (disability exemptions) and K.12 (religious exemptions).

3 Testing employees

Employers who have unvaccinated staff covered by this OSHA ETS are required to record a weekly test result for all on-site, unvaccinated staff. Employers can either establish employer-administered testing programs or make employees responsible for procuring and submitting a valid test result every 7 days.

In addition, employers must report work-related COVID-19 fatalities and inpatient hospitalizations to OSHA; for full details on reporting requirements to OSHA, please consult the ETS.

If an employer chooses to establish a testing program for unvaccinated staff, factors to consider include the following:
1. Options for administering tests
    a. Whether to offer testing through a vendor
    b. Whether to offer testing on-site or off-site
    c. Whether to allow testing at home
2. What types of tests to offer
3. How to pay for tests
4. How to communicate results
5. How to report results and handle noncompliant employees
6. Policies for employees who have had contact with a COVID-positive individual

3.1 Options for administrating tests

When designing the administration of an employer testing plan, an employer could consider:
1. Whether to partner with a vendor or conduct the test with in-house staff
2. Whether to provide tests on-site or off-site
3. Whether employees are allowed to use unsupervised home testing

3.1.1   Testing with a vendor

When designing an employer testing plan, an employer will need to decide whether to partner with a vendor or use in-house resources to administer the program. The decision will be unique to each employer.

If an employer decides to pursue an in-house testing operation, any entity utilizing Point-of-Care (POC) tests for COVID-19 must have a Pennsylvania laboratory permit and a Clinical Laboratory Improvement Amendments (CLIA) Certificate. Information regarding this can be found in HAN 605.

If an employer decides to partner with a vendor, the employer should ensure the vendor is using an FDA-authorized test and the vendor is approved to test Pennsylvanian residents. A list of FDA-authorized tests can be found in 3.2, Types of tests to offer.

There are many vendors that contract with employers to run testing programs and conduct tests. A sample of some potential vendors is included in the final section of this document. Please note that vendors should be aware of and prepared to implement reporting of all negative and positive test results to the Pennsylvania National Electronic Disease Surveillance System (PA-NEDSS).

3.1.2 On-site vs. off-site testing

Employers can choose between offering testing service at the place of work ("on-site") or at a location other than the place of work ("off-site"). The logistical implications of both should be considered when selecting which model to adopt.

On-site testing is most convenient for employees. However, it requires the place of work to have an appropriate setup, including dedicated space with proper ventilation and privacy. This may disrupt the normal operations of a facility.

Off-site testing is typically easier to set up because it does not require adjusting existing workspace. However, it is inconvenient for staff, and an employer would need to consider how staff would access the testing location and the work time required to travel to and from the testing site.

3.1.3 Home testing

The [ETS](#) stipulates that "COVID-19 OTC [over-the-counter] **tests that are both self-administered and self-read by employees do not satisfy the testing requirement** unless observed by the employer or an authorized telehealth proctor." [Staff can use over-the-counter tests to satisfy the testing requirement](#), but the "test may not be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor."

3.2 Types of tests to offer

There are two types of diagnostic tests for COVID-19: molecular tests and antigen tests. Polymerase chain reaction (PCR) tests are a type of molecular diagnostic test for SARS-CoV-2 that falls under the nucleic acid amplification test (NAAT) method.

Here is an overview of FDA-approved tests:
- [In Vitro Diagnostics EUAs – Molecular Diagnostic Tests for SARS-CoV-2](#)
- [In Vitro Diagnostics EUAs – Antigen Diagnostic Tests for SARS-CoV-2](#)

A comparison of the two types of tests is provided in Appendix 5.2.

Pooled testing is a technique to decrease the financial cost and administrative burden associated with PCR testing. To learn more about pooled testing, please discuss the matter with a trusted vendor or see the [CDC's guidance for pooled testing](#). The [OSHA Vaccination and Testing ETS FAQs indicate](#) that pooled testing, if administered with individual retesting in case of positive results, satisfies the ETS's testing requirements.

In addition, there is a greater supply of PCR tests in the Commonwealth than antigen tests, so employers selecting to use PCR tests will be less vulnerable to supply shortages than employers who select to use antigen tests.

3.3 Paying for tests

According to the [ETS](#), in most cases, employers can impose the cost of regular testing on employees:
> "Where an employee chooses to remain unvaccinated, the **ETS does not require employers to pay for the costs associated with regular COVID-19 testing** or the use of face coverings. In some cases, employers may be required to pay testing and/or face covering costs under other federal or state laws or collective bargaining obligations, and some may choose to do so even without such a mandate, but otherwise employees will be required to bear the costs if they choose to be regularly tested and wear a face covering in lieu of vaccination."

For employees with health insurance from private group health plans, [guidance](#) from the Centers for Medicare & Medicaid Services (CMS) states that insurance plans are not required to provide coverage of testing for employment purposes. The original text from the [guidance appears here](#):
> "Plans and issuers must provide coverage without imposing any cost-sharing requirements (including deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements for COVID-19 diagnostic testing of asymptomatic individuals when the purpose of the testing is for individualized diagnosis or treatment of COVID-19. **However, plans and issuers are not required to provide coverage of testing such as for public health surveillance or employment purposes**. But there is also no prohibition or limitation on plans and issuers providing coverage for such tests. Plans and issuers are encouraged to ensure communications about the circumstances in which testing is covered are clear."

3.4 Communicating results

Employers operating their own testing programs must develop a confidential mechanism by which results can be shared with employees. Employers must also develop and communicate protocols for how to respond to positive test results, including rules governing employee isolation, quarantine, and conditions for return to office.

On responding to positive cases, the [ETS](#) states:
> "The employer must require each employee to promptly notify the employer if they receive a positive COVID-19 test or are diagnosed with COVID-19 by a licensed healthcare provider and must immediately remove any employee from the workplace who receives a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider."

The CDC offers the following guidance for employers responding to employees who are COVID-19 positive:
- [Guidance for Businesses and Employers Responding to COVID-19](#) (see "Actively encourage sick employees to stay home")
- [What to Do If You Are Sick](#)
- [If You Are Sick or Caring for Someone](#)
- [Quarantine and Isolation](#)

3.5 Data reporting and noncompliance

The [ETS](#) requires that employers "maintain a record of each test result provided by each employee. These records must be maintained as confidential medical records and must not be disclosed except as required or authorized by this ETS or other federal law," and that employers report "each work-related COVID-19 fatality within 8 hours of the employer learning about the fatality" and "each work-related COVID-19 in-patient hospitalization within 24 hours of the employer learning about the in-patient hospitalization." For complete information on OSHA reporting requirements, please consult the original ETS text.

If an employer decides to operate its own testing program, Pennsylvania requires all test results to be reported to PA-NEDSS. Guidance on reporting can be found in [HAN 534](#). Implementation of the process for reporting results can take weeks for new reporters.

Employers must also design policies for employee noncompliance with testing requirements. As examples, employees who fail to test weekly may be barred from coming to work, and employees who repeatedly refuse to undergo testing or falsify or conceal test results may be terminated.

The [OSHA penalty](#) *to employers* for "serious" or "other-than-serious" violations of requirements is a fine of $13,653 per violation, or $136,532 per repeat violation.

4 Support from the Pennsylvania Department of Health

PADOH will continue to oversee a robust network of public vaccination sites to ensure every Pennsylvanian who wants to be vaccinated can be vaccinated. Private employers are welcome to refer their employees to these public vaccination sites.

For testing programs, PADOH will not provide material support, either financial or in-kind, to private employers. PADOH will support private employers operating a testing program by providing guidance, such as the guidance listed in this document, and instructions on how to report test results.

If an employer requires support to comply with the OSHA ETS, the employer may identify an appropriate vendor to partner with. A non-exhaustive list of vendors operating in the Commonwealth is provided in the table below, although employers are responsible for performing due diligence before selecting any potential provider.

#	Entity	Website
1	Labcorp	https://www.labcorp.com/
2	BioReference Laboratories	https://www.bioreference.com/
3	Quest Diagnostics	https://www.questdiagnostics.com/
4	GENETWORx	https://genetworx.com/
5	Helix	https://www.helix.com/
6	Vault Medical Services	https://www.vaulthealth.com/

Additional guidance documents provided by PADOH:

- **HAN 533** Additional Factors to Determine Close Contacts of Persons with COVID-19
- **HAN 534** Guidance for Reporting Point of Care SARS-CoV-2 Test Results
- **HAN 605** Point of Care Antigen Test Use and Interpretation
- **HAN 607** Public Health Recommendations Given New Evidence on the SARS-CoV2 Delta Variant

5 Appendix

5.1 List of U.S. employers with vaccine mandates (non-exhaustive)

Employer	No. employees in U.S.	Employer	No. employees in U.S.
Adobe[1]	23k	**Kohler[1]**	40k
Amgen[1]	22k	**Kraft Heinz[2]**	38k
Asana[2]	1k	**MGM Resorts[1]**	83k
Bank of Montreal[1]	14k	**Microsoft[2]**	100k
Boeing[1]	125k	**MillerKnol[1]**	3k
Capital One[1]	52k	**Morgan Stanley[2]**	68k
Chicago Transit Auth.[1]	10k	**NBCUniversal[2]**	62k
Deloitte[2]	>100k	**Netflix[1]**	9k
Disney[1]	>200k	**Nike[2]**	73k
Eli Lilly[1]	33k	**Novant Health[1]**	29k
Equinox/Soul Cycle[1]	18k	**Procter & Gamble[1]**	101k
Frontier Airlines[1]	3k	**Raytheon[1]**	70k
Gap Inc[2]	117k	**Redfin[2]**	4k
General Electric[1]	56k	**Rolls-Royce[1]**	50k
Goldman Sachs[2]	40k	**SAS[1]**	14k
Google[2]	>100k	**Southwest Airlines[1]**	55k
Haworth[1]	8k	**State Street Corp.[1]**	40k
HP[2]	53k	**Texas Instruments[1]**	30k
Humana[1]	49k	**Tyson Foods[1]**	120k
IBM[1]	>100k	**Uber[2]**	27k
JetBlue Airlines[1]	22k	**United Airlines[1]**	67k
Kaiser Permanente[1]	304k	**Viacom CBS[2]**	22k
Kirkland & Ellis[1]	6k	**Washington Post[1]**	3k

[1] Employees must be vaccinated as a term of employment
[2] Employees must be vaccinated to return to the office; not required as a term of employment

5.2 NAAT and Antigen Test Differences to Consider When Planning for Diagnostic or Screening Use

Source: CDC Overview of Testing for SARS-CoV-2 (COVID-19)

	NAATs (PCR)	Antigen Tests
Intended Use	Detect *current* infection	Detect *current* infection
Analyte Detected	Viral ribonucleic acid (RNA)	Viral antigens
Specimen Type(s)	Nasal, nasopharyngeal, oropharyngeal, sputum, saliva	Nasal, nasopharyngeal
Sensitivity	Varies by test, but generally high for laboratory-based tests and moderate to high for point-of-care (POC) tests	Varies depending on the course of infection, but generally moderate to high at times of peak viral load[1]
Specificity	High	High
Test Complexity	Varies by test	Relatively easy to use
Authorized for Use at the Point of Care	Most are not, some are	Most are, some are not
Turnaround Time	Most 1–3 days. Some could be rapid, in 15 minutes	Ranges from 15 minutes to 30 minutes
Cost/Test	Moderate (~$75–100/test)	Low (~$5–50/test)
Advantages	Most sensitive test method available Short turnaround time for NAAT POC tests, but few available Usually does not need to be repeated to confirm results	Short turnaround time (approximately 15 minutes) When performed at or near POC, allows for rapid identification of infected people, thus preventing further virus transmission in the community, workplace, etc. Comparable performance to NAATs in symptomatic persons and/or if culturable virus present, when the person is presumed to be infectious
Disadvantages	Longer turnaround time for lab-based tests (1–3 days) Higher cost per test A positive NAAT diagnostic test should not be repeated within 90 days because people may continue to have detectable RNA after risk of transmission has passed	May need confirmatory testing Less sensitive (more false negative results) compared to NAATs, especially among asymptomatic people

[1] The decreased sensitivity of antigen tests might be offset if the POC antigen tests are repeated more frequently (i.e., serial testing at least weekly).