

OSHA ETS 2021-0007

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Disclaimer

- These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations
- Future information and legal developments may affect these topics



Timeline

- **06/21/2021 - OSHA ETS Healthcare**
- **09/09/2021 - Biden Announces Directive: “Path out of the Pandemic”**
 - Federal employees,
 - Head Start employees,
 - Federal contractors,
 - 100+ employers,
 - *Encourage* school employees
- **11/04/2021 - OSHA ETS on Employer Vaccine Mandate**
- **11/08/2021 - Federal Employee vaccine mandate deadline**
- **12/05/2021 - MIOSHA deadline for issuing Michigan mandate (30 days)**
- **12/05/2021 - OSHA ETS employer requirements (part 1) (30 days)**
- ~~**12/08/2021 - Federal contractors vaccine mandate deadline**~~
- **01/04/2021 - OSHA ETS employer vaccine mandate deadline (60 days)**
- **01/04/2021 - Federal contractors vaccine mandate deadline**
- **01/04/2021 - Head Start employees vaccine mandate deadline**

Duration

- Expect through May 5, 2022
- OSHA may alter or repeal the ETS at any time
- Potential permanent rule-making in the works



Immediate Status

FLUID!!!



Immediate Status

- OSHA order effective November 5
- States must amend plans to be *at least* as compliant by December 5
 - MIOSHA Director Bart Pickelman states “The intent is to adopt the identical rules and requirements contained within the federal OSHA ETS.” [11/05/2021](#)
 - Can start planning based on original OSHA ETS language
- Numerous states and organizations filed complaints
 - 5th Circuit (Louisiana, Mississippi, Texas) [ordered a stay](#) on 11/06/2021, confirmed 11/12/2021
 - Big News?: [OSHA halts implementation/enforcement of ETS](#) on 11/17/2021 [statement](#)
 - 5th Circuit’s not the only one:
 - 34 challenges: Circuits (1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 11th, D.C.)
 - Using lottery method, various challenges are consolidated into a single appeals court
 - 5th Cir = most conservative, 1st/9th most liberal ([map based on 1st Amendment](#))

Immediate Status Lottery

- Michigan won! Sort of...
- 6th Circuit - MI, OH, TN, KY
 - “Conservative Leaning”
 - 5 appointed by Clinton, Obama
 - 11 appointed by Bush, Trump
 - 3 decide, selected randomly
- Court may:
 - Continue 5th Circuit’s stay
 - Alter or issue its own stay
 - Eliminate the stay
- Stay is only temporary until a real legal decision has been made
- November 30, OSHA response to petitions due
- Ultimately, this will likely be appealed to SCOTUS
 - Persuasive *en banc* notwithstanding
 - All 16 active judges hear case
 - Highly unusual and unlikely

Immediate Status

- Success

Outcomes of Challenges to OSHA Emergency Temporary Standards

Year	Emergency Temporary Standard	Outcome
1973	Organophosphorous Pesticides	Challenge successful
1973	14 Carcinogens	Challenge successful
1976	Diving Operations	Challenge successful
1977	Benzene	Challenge successful
1978	Acrylonitrile	Challenge unsuccessful
1983	Asbestos	Challenge successful

Source: Bloomberg Law

Bloomberg Law

- Incalculable burdens -- including mass resignations
- ETS conflicts with 1st Amendment and Religious Freedom Restoration Act



Anticipatory Set

- Does OSHA ETS Apply to Michigan Schools
 - Not yet...technically MIOSHA's updated plan (in compliance with OSHA ETS) will apply to Michigan Schools.
- ETS does **not** cover boosters
 - No provisions apply to boosters
 - Boosters not required for "fully vaccinated."
- ETS Duration - up to 6 months (May 5, 2022)
- Three vaccines
 - Moderna (2 doses)
 - Pfizer (2 doses)
 - Johnson & Johnson (1 dose)

Covered Employers

- All employers with a total of at least 100 *employees* firm-or-corporate wide
 - Regardless of location
 - Not volunteers, visitors, contractors
 - BOE members???
- Includes part-time employees
- Includes temporary employees when employed **at any time** the ETS is in effect
- Two or more related entities may be regarded as a single one for OSHA purposes if they handle safety matters as one company
- Staffing agency employees are counted for purposes of the staffing agency only
- **Once covered, either as of the effective date or thereafter, the employer stays covered**
- Coaches: winter & spring...but think about fall too...

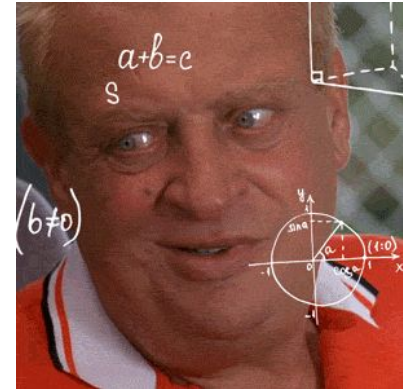
Independent Contractors

- Consider each contractor relationship
 - Contracted Transportation, Custodial, Food Service
 - Contracted substitutes
 - Contracted administrators
 - Contracted office staff
 - Contracted coaches
- If below, but near 100 employees
 - Consider contacting legal counsel to review contractors to include or not include certain contractors
- Also, MIOSHA may
 - Private employers 100+, all public employers
- Highly political, if opting out based on size
 - Potentially subject to MIOSHA or OSHA audit



Independent Contractors

- Remember: *true* independent contractors are not employees
 - [IRS Publication 15-A](#)
 - Common Law Rules: Degree of Control Tests
 - Behavioral Control
 - Financial Control
 - Type of Relationship
 - [IRS 20-Factor Test](#)
 - [ORS Standard](#)
 - Who prescribes hours
 - Who provides office or premises
 - Who provides tools and equipment
 - Who reimburses expenses
 - Paid hourly/salary or per job
 - Who covers fringe benefits (e.g., time off)
 - Who carries liability insurance
 - Who determines how many are needed for the job
 - [Mantei v MPSERS](#), 256 Mich App 64 (2003): Economic Reality Test
 - Control over workers' duties;
 - Payment of wages;
 - Right to hire, fire, and discipline; and
 - Performance of duties as an integral part of the employer's business toward the accomplishment of common goal



Exempt *Employees*

- Employer Policy not applicable to exempt employees:
 - Employees who work *exclusively* from home
 - Employees who work *exclusively* outdoors on all days and who do not routinely drive with other employees for work
 - Employees who work at a worksite without others present
- Even though exempt from policy, these employees still *likely* count toward the 100+ in determining whether the scope of OSHA ETS applies to employer

Exempt *Employees*

- Employees who work *exclusively* from home
- Employees who work *exclusively* outdoors on all days and who do not routinely drive with other employees for work
- Employees who work at a worksite without others present
- **Remember:** Independent contractors are not employees
 - If truly independent contractors
 - ESS Coaches? Substitutes? Outsourced Services?
 - Be honest about who is really an independent contractor (would Martha agree?)

ETS Requirements

- Determine vaccination status for each employee
- Mandatory Policy Options
 - Mandatory vaccination policy; or
 - Allow non fully vaccinated employees to elect to undergo weekly COVID-19 testing **and** wear a face covering at the workplace
- Paid leave to receive each dose of vaccination
- Paid leave to recover from each vaccination dose side effects
- Protocols surrounding employees with COVID
- OSHA reporting
- Recordkeeping and provision of certain employee information



Deadlines

Requirement	December 5	January 4
Establish vaccination or test policy	X	
Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status	X	
Provide paid leave for employee vaccination	X	
Ensure employees who have not received all doses required for primary vaccination are tested for COVID-19 at least weekly		X
Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis and remove any employee who received positive COVID-19 test or COVID-19 diagnosis	X	
Require employees who are not fully vaccinated to wear face coverings when indoors or when occupying a vehicle with another person for work purposes	X	
Provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation	X	
Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours	X	
Make certain records available	X	

Deadlines

- Nov 30 - OSHA briefs due to 6th Circuit
- Dec 5 - *most* OSHA Rules
- Dec 5 - MIOSHA rules deadline

- Best Practice: Prepare without implementing
 - Collect vaccination cards
 - Discuss policy
 - Work logistics of testing
- Advice shared by Thrun, Clark-Hill, SHRM, and many business journals
- Think about not calling it a “vaccine mandate”
 - Scary to some employees - highly political
 - There is a test-out option under policy choices

Determine Vaccination Status

Employer “must require each vaccinated employee to provide acceptable proof of vaccination status.”

Employees who do not provide acceptable proof must be treated as not fully vaccinated.

Acceptable proof:

1. Record of immunization from healthcare provider or pharmacy;
2. Copy of COVID-19 Vaccination Record Card;
3. Copy of medical records documenting the vaccination;
4. Copy of immunization records from a public health, state, or tribal immunization information system; or
5. Copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the healthcare professional(s) or clinic site(s) administering the vaccine(s).

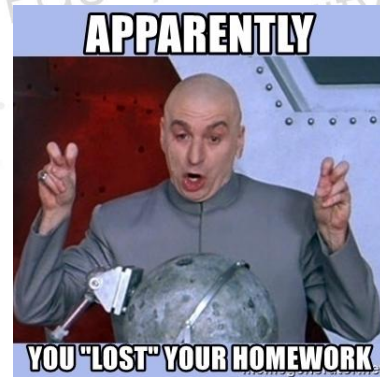
Determine Vaccination Status Attestation

[CDC Guidance for employee to obtain proof of vaccination](#)

If an employee is unable to provide proof of vaccination

The employee may submit a signed and dated statement

- Attesting to their vaccination status (fully or partially);
- Attesting that they have lost and are otherwise unable to produce proof required by this section; and
- Include: *"I declare (certify, verify, or state) 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."*
- Type of vaccine administered; date(s) of administration; and the name of the healthcare professional(s) or clinic site(s) administering the vaccine(s).



Determine Vaccination Status Attestation

- Think about *not* sending this to every employee
- Should be for only those who have exhausted other options
- 99.9999% of employees should be able to provide acceptable proof, without using the attestation
- [CDC Guidance for employee to obtain proof of vaccination](#)



Determine Vaccination Status Info Management

- Preserve acceptable documentation as **medical record**
- Create a roster of each employee's vaccination status (medical record)
- Maintain records for duration of ETS (confidential)
- Upon request by an employee (or their representative), the employer must make available the total number of fully vaccinated employees at the workplace and total number of employees by the end of the next business day.
- Within 4 hours of receiving request from the Assistant Secretary of Labor for OSHA, employers must provide for copying and inspection all documents required to be maintained by the ETS.

Determine Vaccination Status

Best Practices

- Communicate that this is not a vaccination requirement, it is a data collection requirement.
- Designate individual(s) appropriately trained on medical records to facilitate the process
- Provide employees with [CDC guidance on how to obtain proof of vaccination](#)
- Provide an internal deadline appropriate to meet OSHA's deadline (Dec 5)
- Create attestation form for those employees who cannot locate proof of vaccination, but only make it available upon request
- Assure employees that all information will be kept confidential as required by law
- Process will need to be shared with employees in a written document
- Process must be ongoing to ensure accuracy of aggregate data

Mandatory Policy

2 Options

- All employees must be fully vaccinated
- All employees not fully vaccinated must be test weekly



Mandatory Policy Board Approval?

- Note: MIOSHA “Policy” is not necessarily equivalent of “BOE Policy”
- From Thrun (11/17/2020): “Must the policy be board approved” regarding MIOSHA emergency rules on remote work
 - Unclear, but we recommend that the Board adopt the policy. Emergency Rule 5(8) requires “the employer” to create a policy, the Board is the employer, and under Michigan law, a Board speak only through its minutes and resolutions. Moreover, the term “policy” in a public school setting typically references a policy approved by the Board. That said, the Rule does not expressly require that a Board approve the policy.
- Most Board Policy requires policy have 2 readings by the BOE
 - “Periodically, it may be deemed necessary to make technical corrections to policies that have already been adopted through normal procedures. These technical corrections may include statutory references, scrivener’s errors, renumbering that does not change the order of the sections or subsections, grammatical corrections or additions including punctuation or typographical errors, as well as alterations and omissions not affecting the construction or meaning of any sections, subsections, chapters, titles, or policies as a whole. Technical corrections may also include the updating of the named individuals in these policies where the originally named individual no longer works for the District or no longer works in the applicable position. Should the Board choose to make such technical corrections, it may be accomplished by resolution without going through the normal policy adoption procedures.” Common NEOLA language

Mandatory Policy Board Approval?

- Consider your BOE, community, politics
- Is this really an option for the BOE?
 - An option between policy 1 and policy 2
 - But, not an option to say “no” or alter any of the requirements in the policy
- What if the BOE fails to adopt
 - Do you implement against BOE decision; or
 - Do you violate OSHA ETS (MIOSHA) to support BOE decision
- Some situations, it may be better to treat “policy” under OSHA ETS as a regulation/compliance issue, not as BOE “policy”
 - Not the same as MDE or SCM requiring “policy”

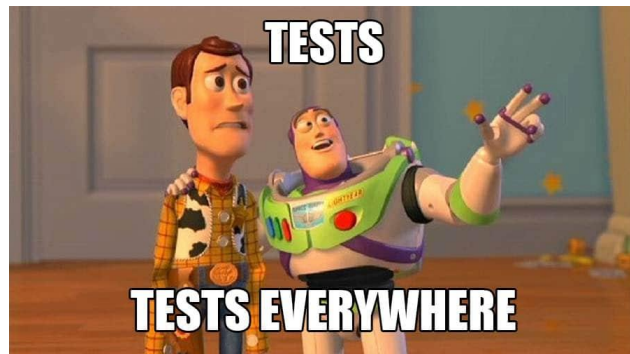
Mandatory Policy

Fully Vaccinated Path

- “Fully Vaccinated”
 - 2 weeks after completing vaccination with at least the minimum recommended interval between doses (where applicable).
 - Note: 01/04/2022 deadline only requires completion of full course of vaccination, not necessarily the 2 additional weeks
 - Boosters not included
- Vaccination of new employees as soon as practicable
- Exceptions for those:
 - For whom a vaccine is **medically contradicted**;
 - For whom **medical necessity requires a delay** in vaccination; or
 - Who are legally entitled to **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.

Mandatory Policy Testing Option

- Those not fully vaccinated
 - If in workplace at least once a week
 - Weekly testing
 - Documentation of negative test no more than 7 days from last result
 - If in workplace less than once per week
 - Testing no more than 7 days prior to entering workplace
- Employees not providing documentation must be excluded from workplace
 - Does this mean terminate? Discussion...



Mandatory Policy Testing Option

- COVID-19 Test means a test that is:
 - Cleared, approved, or authorized by the FDA;
 - Administered in accordance with the authorized instructions; and
 - Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.”
- Examples
 - Lab processed test (even if collected at home)
 - Proctored OTC tests
 - Point of care tests
 - Tests where specimen collection and processing is done or observed by the employer

Mandatory Policy Testing Option

- Must maintain copies of test results as medical records for duration of ETS
- Employees with COVID cannot be required to test for 90 days following positive test or diagnosis
- Employers are not required to pay for testing by ETS
 - But may be by other laws, regulations, CBAs, or as a reasonable accommodation
- Pay for time to go get tested?
 - ETS mentions that if during the work shift, FLSA may require it, but ETS defers as that issue is beyond OSHA's scope.
 - Analogies: prepping for shift, donning protective gear, security & temperature screening
 - Integral and indispensable to work?
 - Testing during work: likely, yes
 - Testing before/after work or on off days: maybe
 - Assess case-by-case

Mandatory Policy Testing Option

- Testing at work to minimize delays, costs, paperwork, wait time, administrative burden
- Testing at work will require privacy concerns (similar to taking temps)
- Choosing a consistent testing day will help administrative burden
- Availability of tests?
- Insurance Provider covered???



Mandatory Policy Testing Option

- Non-vaccinated mask requirement
- Each worker who is not fully vaccinated must wear a face covering while indoors or in a shared vehicle for work purposes except:
 - When alone in a closed room
 - While eating or drinking
 - When being identified for security
 - When wearing a respirator or facemask
 - When infeasible or creates a greater hazard
- Face Shield is insufficient as “face covering” under ETS
- Employer not required to pay for masks by ETS
 - But may be by other laws, regulations, CBAs, or as a reasonable accommodation



Mandatory Policy Testing Option

- Employer not required to pay for masks by ETS
 - But may be by other laws, regulations, CBAs, or as a reasonable accommodation
- Mask:
 - Completely cover the employee's nose and mouth
 - Is made with at least two layers of breathable fabric that is tightly woven
 - Is secured to the head with ties, ear loops, or elastic bands that go behind the head
 - Fits snugly over the nose, mouth, and chin with no large gaps on the outside of the face
 - Is a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings.
- Note: face shields are insufficient
 - A face covering also includes a covering with a clear plastic panel that, despite the non-fabric material, otherwise meets the above requirements and which may be used to facilitate communication with people who are deaf or hard-of-hearing or others who need to see a speaker's mouth or facial expressions to understand speech or sign language.

Mandatory Policy Choosing an Option

- Can have differing policies based on division/department (i.e., customer facing)
- Labor shortage, employee morale
- Vaccine Mandate easier to administer, more religious exemptions to vet
- Testing more administration, more flexibility for staff



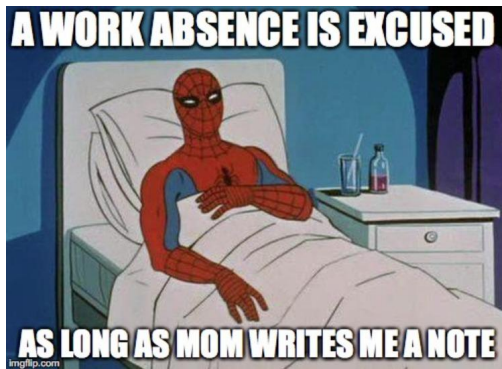
Paid Leave for Each Vaccination Dose

- Up to 4 hours (including travel time) at regular pay rate to obtain vaccination doses when completed during work hours
 - Not concurrent with other leave!
 - New bucket of leave employers must provide
 - It cannot be offset by any other leave the employee has accrued
 - Any reasonable time needed beyond 4 hours is protected, but not paid
- No tax credit
- Boosters don't count



Paid Leave for Each Vaccination Dose Side Effects

- A “reasonable” amount of time to recover from the side effects following each dose (even if vaccinated outside of work hours)
 - Can have employees use existing accrued paid sick time, but not vacation
 - If employee has already exhausted PTO, employer still must pay
 - Can set a cap for “reasonable” of 2 days paid leave for recovery after each dose
- No tax credit
- Booster don't count



Required Protocols for Employees with COVID

- Employees must be required to promptly provide notice when they have tested positive for COVID-19 or diagnosed with COVID-19 by a licensed healthcare provider (vaccinated or not)
 - If not at work, as soon as practicable before the employee is scheduled to start their shift or return to work
 - If at work, as soon as safely possible while avoiding exposing any other individuals in the workplace
- Employers are required to immediately remove any employee from the workplace who has tested positive for COVID-19 or has been diagnosed with COVID-19, regardless of their vaccination status or symptoms.

Required Protocols for Employees with COVID

- Employees may return to work after they have tested positive for COVID-19 or diagnosed with COVID-19 if they meet one of the following requirements:
 - Receive a negative NAAT COVID-19 test result;
 - Meet the return to work criteria in the [CDC's Isolation Guidance](#); or
 - Receive a recommendation to return to work from a licensed healthcare provider



OSHA Reporting

Work Related COVID-19 Cases:

- Employers must report each employee COVID-19 fatality to OSHA **within 8 hours** of learning about the fatality
- Employers must also report each employee COVID-19 in-patient hospitalization to OSHA **within 24 hours** of learning about the in-patient hospitalization.
- [OSHA Fact Sheet on How to Report](#)

Recordkeeping

- Maintain records of vaccinations
- Maintain roster of vaccinations
- Maintain weekly testing records



Info to Employees

“...in a language and at a literacy language the employee understands.”

1. The employer's vaccination policy (mandatory or test/mask)
2. The process that will be used to determine employee vaccination status
3. Time and pay/leave they are entitled to for vaccinations and any side effects experienced following vaccinations
4. The procedures they need to follow to provide notice of a positive COVID-19 test or diagnosis
5. The procedures to be used for requesting records

Info to Employees

6. [“Key Things to Know About COVID-19 Vaccines”](#)

7. OSHA’s prohibition against retaliation for reporting workplace illnesses or injuries and OSHA’s whistleblower protections.

8. The criminal penalties associated with knowingly supplying false statements or documentation.

9. OSHA has incorporated into the ETS [CDC’s Isolation Guidance](#) (02/18/2021).

10. Other details: effective date of the policy, who is covered, how it applies to new hires, deadlines, procedures for compliance and enforcement (including disciplinary action).

“Employers have flexibility to communicate this information to employees using any effective methods that are typically used in their workplaces.”



Legal Preemption

- OSHA ETS preempts all state/local regulation on vaccines, mandates, testing, and face-covering, **even if applying to employers w/less than 100 workers**, including prohibitions on mandates in those subject areas
- States with their own OSH agencies/state plans applying to private employers (**including** state/local governments in those jurisdictions) have 30 days to adapt the federal standard or develop their own (not lesser) mandate
- States trying to stymie or block: may lose OSH autonomy and enforcement assumed by OSHA.

Medical and Religious Exemptions

- Americans with Disabilities Act (ADA)
- Title VII: Sincerely Held Religious Belief
- May need for either policy
 - Vaccine mandate
 - Testing Option
 - Testing
 - Masks
- Evaluate exemptions separately
 - What religious belief or disability could apply to vaccine, testing, **and** masks (likely no single disability or belief).



Medical and Religious Exemptions Interactive Process

- Americans with Disabilities Act (ADA)
 - Check BOE policy or other procedures for admin requirements
 - Interactive Process
 - Determine disability
 - Determine *reasonable* accommodation
 - Unpaid leave is a reasonable accommodation
- Title VII: Sincerely Held Religious Belief
 - Check BOE policy or other procedures for admin requirements
 - Interactive Process
 - Determine sincerely held religious belief
 - Difference between religious belief (protected) and personal, political, or philosophical beliefs (not protected)
 - Examples
 - [NPR Example](#)
 - [Miami Herald](#)
 - Determine *reasonable* accommodation
 - Unpaid leave is a reasonable accommodation

Medical and Religious Exemptions

Think it through

- Scenario, Policy #2 (vax or testing)
 - Example 1: disability/religious exemption to vaccine
 - Reasonable accommodation: test weekly
 - Example 2: disability/religious exemption to testing
 - Reasonable accommodation: get vaccinated
 - Example 3: disability/religious exemption to masking
 - Reasonable accommodation: get vaccinated
 - Example 4: disability/religious exemption to antigen test used by school
 - Reasonable accommodation: test at home with PCR or other approved test
 - Note: district may have to pay for reasonable accommodation
 - Example 5: disability/religious exemption to vaccine **and** all testing
 - Reasonable accommodation: unpaid leave

Resources

- [OSHA ETS FAQ](#)
- [OSHA ETS Summary](#)
- [OSHA ETS Order](#)
- OSHA Policy Sample
 - [Mandatory Vaccination](#)
 - [Vaccination or Testing and Face Covering](#)
- [“What You Should know About COVID-19 and the ADA, Rehabilitation Act, and Other EEO Laws” from the EEOC](#)
- [Key Things to Know About COVID-19 Vaccines](#)
- Forms:
 - COVID-19 Vaccine Attestation
 - Religious Accommodation Form
 - Disability Accommodation
 - Sample Employee Memo - (note: does not cover all notification requirements, best-practice)

Resources

- [OSHA 1910.501 Vaccination, Testing, and Face Coverings](#)
- OSHA Fact Sheets:
 - [COVID-19 Vaccination and Testing ETS \(About\)](#)
 - [COVID-19 Vaccination and Testing ETS \(Summary\)](#)
 - [OSHA's Vaccination and Testing ETS: How You Can Participate](#)
 - [Workers' Rights under the COVID-19 Vaccination and Testing ETS](#)
 - [Information for Employees on Penalties for False Statements and Records](#)
 - [Reporting COVID-19 Fatalities and In-Patient Hospitalizations to OSHA](#)
- [OSHA The COVID-19 Log](#)
- [OSHA Webinar](#)
- [OSHA Social Media Toolkit](#)
- [Article: NLRB General Counsel Memo on Bargaining Obligations under ETS](#)
 - [NLRB GC Memo](#)
- [MIOSHA Publications, Posters, Forms & Media](#)
- Clark Hill - [OSHA's Emergency Temporary Standard: What Schools Should Know](#)

Questions & Roundtable Discussion

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