

# COMPLIANCE BULLETIN



## COVID-19 Vaccine and Testing ETS Paid Time Requirements

On Nov. 4, 2021, OSHA [announced](#) a [COVID-19 vaccination and testing emergency temporary standard](#) (ETS) to address the grave danger of COVID-19 infection in the workplace. The ETS affects private sector employers with **100 or more employees**.

On Dec. 17, 2021, the 6th Circuit Court of Appeals [reversed](#) the stay the 5th Circuit ordered on Nov. 12, 2021 to block the ETS. As a result, OSHA has resumed ETS implementation and enforcement nationwide. OSHA will not issue citations before Jan. 10, 2022 (Feb. 9 for testing requirement) to employers that make reasonable, good faith efforts to comply. ETS opponents have already filed an appeal with the U.S. Supreme Court challenging the 6th Circuit decision. Employers subject to the ETS should monitor legal developments closely and consider what measures they would need to adopt if the Supreme Court upholds the ETS.

The ETS requires employers to support vaccination by providing employees reasonable time, including **up to four hours of paid time**, to receive each primary vaccination dose and reasonable time and paid sick leave to recover from side effects following each primary vaccination dose.

OSHA has stated that removing logistical barriers to obtaining vaccination is essential to increasing workforce vaccination rates. One such barrier for many employees is their lack of time off of work to receive the vaccine and recover from any potential side effects. This compliance bulletin will cover the requirements for employer support for employee vaccinations.

### Action Steps

Employers should review, implement and enforce the requirements for helping employees with receiving the vaccination.

### Important Definition

Fully vaccinated means:

- A person's status two 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; or
- A person's status two weeks after receiving the second dose of any combination of two doses of a COVID-19 vaccine that is approved or authorized by the FDA, or listed as a two-dose series by the WHO.

### Important Dates

#### Dec. 17, 2021

The 6th Circuit reinstates the ETS.

#### Jan. 10, 2022

Planned enforcement deadline for most ETS requirements.

#### Feb. 9, 2022

Planned enforcement deadline for ETS testing requirements.





## Support for Employee Vaccinations Overview

OSHA has indicated that employee concerns about missing work to obtain and recover from a COVID-19 vaccination dose are well-documented. This reflects the fact that many workers do not have access to paid time off to receive the vaccination or recover from side effects.

To address this barrier to vaccination, the ETS requires employers to support COVID-19 vaccination by providing each employee with reasonable time, **including up to four hours of paid time**, to receive each primary vaccination dose. Employers are also required to provide reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination dose. Providing this time is essential for all unvaccinated employees who are covered by this ETS to ensure that they can receive primary vaccination dose(s) and recover from side effects without sacrificing pay or their jobs.

In workplaces where employers implement a mandatory vaccination policy, the requirements ensure that employees are able to comply with the mandatory vaccination policy without concern about missing work to do so. In workplaces where the employer opts out of implementing a mandatory vaccination policy and instead implements the policy where employees can choose vaccination or weekly testing and face coverings, employees are encouraged to choose vaccination. Employers must ensure that employees who choose to obtain a vaccination, rather than be regularly tested for COVID-19 and wear a face covering in most situations when they work near others, are not penalized for making that choice.

## Reasonable Time Offered

Employers are required to support COVID-19 vaccination for each employee by providing reasonable time to each employee during work hours for each of their primary vaccination dose(s), including up to four hours of paid time at the employee's regular rate of pay, for the purposes of vaccination. Reasonable time may include, but is not limited to:

- Time spent during work hours related to the vaccination appointment(s), such as registering, completing required paperwork, all time spent at the vaccination site (e.g., receiving the vaccination dose, post-vaccination monitoring by the vaccine provider), and
- Time spent traveling to and from the location for vaccination including travel to an off-site location (e.g., a pharmacy); or
- Situations in which an employee working remotely (e.g., telework) or in an alternate location must travel to the workplace to receive the vaccine).

However, employers are not obligated by this ETS to reimburse employees for transportation costs (e.g., gas money, train/bus fare, etc.) incurred to receive the vaccination. This could include the costs of travel to an off-site vaccination location (e.g., a pharmacy) or travel from an alternate work location (e.g., telework) to the workplace to receive a vaccination dose. Since employers are required to provide reasonable time for vaccination during work hours, if an employee chooses to receive a primary vaccination dose outside of work hours, employers are not required to grant paid time to the employee for the time spent receiving the vaccine during nonwork hours. However, even if employees receive a primary vaccination dose outside of work hours, employers must still afford them reasonable time and paid sick leave to recover from side effects that they experience during scheduled work time.

An employer may make other efforts to facilitate vaccination of its employees by hosting a vaccine clinic at the workplace (e.g., mobile trailer) or partnering with another entity, such as a pharmacy or health care provider, so employees can be vaccinated at the workplace or an off-site location. If an employer chooses to make the vaccine



available to its employees, it must support full vaccination (i.e., provide all doses in a primary vaccination, as applicable) and assure the availability of reasonable time and paid time to each employee to receive the full primary vaccination and reasonable time and paid sick leave to recover from side effects they may experience. Any additional costs incurred by the employer to bring vaccination on-site would be covered by the employer, though such an approach would likely reduce the amount of paid time needed for vaccine administration (but not side effects) because of reduced employee travel time.

## **Paid Time for Vaccination**

The ETS specifies that the amount of paid time an employer is required to provide each employee to receive each primary vaccination dose is capped at four hours. OSHA states it has determined that four hours would provide reasonable time for most employees to get each vaccination dose. Providing four hours of paid time to receive each primary vaccination dose is consistent with OSHA's presumption of the amount of time needed to receive a vaccination dose in the June 2021 health care ETS and with the U.S. Office of Personnel Management's guidance to federal government agencies on the use of the emergency paid leave created for federal employees in the American Rescue Plan Act of 2021 (ARPA). The ARPA encouraged agencies to offer up to four hours of administrative leave per dose to cover time spent getting a vaccine dose, plus additional time if reasonably necessary, instead of having employees use emergency paid leave. OSHA states it expects that most employees will need less than four hours to receive a vaccination dose.

The maximum of four hours of paid time that employers must provide for the administration of each primary vaccination dose cannot be offset by any other leave that the employee has accrued, such as sick leave or vacation leave. OSHA states it is concerned that employees forced to use their sick leave or vacation leave for vaccination would have a disincentive to gaining the health protection of vaccination. Employers must pay employees for up to four hours of time at the employee's regular rate of pay. This may be achieved by paying for the time to be vaccinated as work hours for up to four hours. Requiring employers to pay for vaccine administration is consistent with OSHA's normal approach of requiring employers to bear the costs of compliance with safety and health standards.

Employees may need much less than four hours to receive a primary vaccination dose, for example, if vaccinations are offered on-site. However, in some circumstances, an employee may need more than four hours to receive a primary vaccination dose, in which case the additional time, as long as it is reasonable, would be considered unpaid but protected leave. The employer cannot terminate the employee if they use a reasonable amount of time to receive their primary vaccination doses. The employee may use other leave time they have available (e.g., sick leave or vacation time) to cover the additional time needed to receive a vaccination dose that would otherwise be unpaid.

## **Paid Sick Leave**

This ETS requires employers to support COVID-19 vaccination for each employee by providing reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination dose to each employee for each dose. The paid sick leave can be in the form of an employee's accrued sick leave, if available. If the employee does not have available sick leave, leave must be provided for this purpose.

If an employee already has accrued paid sick leave, an employer may require the employee to use that paid sick leave when recovering from side effects experienced following a primary vaccination dose. Additionally, if an employer does not specify between different types of leave (i.e., employees are granted only one type of leave), the employer may require employees to use that leave when recovering from vaccination side effects. If an employer provides employees with multiple types of leave, such as sick leave and vacation leave, the employer can only require employees to use the sick

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leave when recovering from vaccination side effects. Employers cannot require employees to use advanced sick leave to cover reasonable time needed to recover from vaccination side effects. An employer may not require an employee to accrue negative paid sick leave or borrow against future paid sick leave to recover from vaccination side effects. In other words, the employer cannot require an employee to go into the negative for paid sick leave if the employee does not have accrued paid sick leave when they need to recover from side effects experienced following a primary vaccination dose. Neither the paid time required to receive any vaccine dose(s) nor the paid sick leave required to recover from side effects experienced following any vaccination dose is a retroactive requirement for vaccine dose(s) received prior to the promulgation of the ETS.

The ETS does not specify the amount of paid sick leave that the employer is required to provide for that purpose. Employers may set a cap on the amount of paid sick leave available to employees to recover from any side effects, but the cap must be reasonable.

Source: [Occupational Safety and Health Administration](#)