

# COMPLIANCE BULLETIN



## OSHA COVID-19 ETS Determination of Employee Vaccination Status

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 be aware of each employee's vaccination status. Effective implementation and enforcement of a written vaccination policy also require employers to know the vaccination status of all their employees. Knowing each employee's vaccination status is necessary in order to ensure that the vaccination, testing and face-covering requirements of the standard are met. As such, the ETS includes provisions for determining each employee's vaccination status.

### Action Steps

Employers should review, understand and implement the ETS requirements for determining employee vaccination status. Employers should also include these requirements in their mandatory COVID-19 vaccination policies.

### Fully Vaccinated Status

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 World Health Organization (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.





## Employee Vaccination Status Provisions

Employers must know each employee's vaccination status in order to ensure that the vaccination, testing and face-covering requirements of the standard are met. The standard requires employers to determine the vaccination status of each employee and to also:

- Maintain records of each employee's vaccination status,
- Preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated, and
- Maintain a roster of each employee's vaccination status.

Maintenance of records in accordance with this ETS are subject to applicable legal requirements for confidentiality of medical information. Acceptable proof of vaccination status for vaccinated employees is required. Any employee who does not submit an acceptable form of proof of vaccination status must be treated as not fully vaccinated. This information must be updated continually through the vaccination process.

Acceptable proof of vaccination status under the ETS includes:

- The record of immunization from a health care provider or pharmacy;
- A copy of the U.S. Centers for Disease Control and Prevention (CDC) COVID-19 Vaccination Record Card;
- A copy of medical records documenting the vaccination;
- 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).

In some cases, state immunization records may not include one or more of these data fields, such as clinic site; in those circumstances, an employer can still rely upon the state immunization record as acceptable proof of vaccination. OSHA states that clinic sites can include temporary vaccination facilities used during large vaccine distribution campaigns, such as schools, churches or sports stadiums.

Copies, including digital copies, of the listed forms of proof are acceptable means of documentation so long as they clearly and legibly display the necessary information. Digital copies can include, for example:

- A digital photograph or scanned image; or
- PDF of an acceptable form of proof.

Employers must take care to comply with any applicable federal laws, including requirements under the Privacy Act, 5 U.S.C. 552a, and the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq.

Employees do not need to provide any documentation regarding vaccination status under this ETS. However, failing to provide acceptable proof of vaccination status will signal the employer to consider the employee as not fully vaccinated and note that as their status in the roster. For employers that include COVID-19 testing in their written policies, employees without acceptable proof of vaccination status must submit to weekly tests and face covering.

## Use of QR Codes

Some state governments are utilizing digital COVID-19 vaccine records showing the same information as the U.S. CDC COVID-19 Vaccination Record Card and providing quick response (QR) codes that will provide the same information when scanned. In certain states, the QR code confirms the vaccine record as an official record of the state and, therefore, would



provide acceptable proof of vaccination under the ETS. However, the employer must retain a copy of the vaccination information retrieved when the QR code is scanned, not just the QR code itself, to comply.

## Vaccine Attestation

Employees who do not possess their COVID-19 vaccination record should contact their vaccination provider to obtain a new copy or utilize their state health department's immunization information system. OSHA recognizes that securing vaccination documentation may be challenging for some members of the workforce, such as migrant workers, employees who do not have access to a computer or employees who may not recall who administered their vaccines.

In instances where an employee is unable to produce acceptable proof of vaccination, a signed and dated statement by the employee will be acceptable. However, in order for an employee's statement to be acceptable for proof of vaccination, the employee must have attempted to secure alternate forms of documentation via other means (e.g., from the vaccine administrator or their state health department) and been unsuccessful in doing so.

An employee's statement must:

- Attest to their vaccination status (fully vaccinated or partially vaccinated);
- Attest that they have lost or are otherwise unable to produce proof required by the standard; and
- Include the following language: "I declare (or 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."

An employee who attests to their vaccination status should, to the best of their recollection, include the following information in their attestation:

- 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).

For example, some of the information may be easier to recall, such as receiving a vaccine at a mass vaccination site or local pharmacy, while the dates of administration might only be remembered as falling within a particular month or months. Employees may not be able to recall certain information, such as the type of vaccine received. Employees providing attestations should include as much of this information as they can remember to the best of their ability. Any statement provided must include an attestation that the employee is unable to produce another type of proof of vaccination.

Once an employee has provided a signed and dated attestation, the employer no longer needs to seek out one of the other forms of vaccination proof for that employee. Depending on the content of the attestation, the employer may consider that employee either fully or partially vaccinated for purposes of the ETS.

## Fraud Through Attestation

While employers may not invite or facilitate fraud, the ETS does not require employers to monitor for or detect fraud. However, [section 17\(g\)](#) of the Occupational Safety and Health Act (OSH Act) subjects anyone who "knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter" to criminal penalties, punishable by fines or imprisonment (up to



five years) for any person who “in any matter within the jurisdiction” of the U.S. government executive branch “knowingly and willfully” engages in any of the following:

- Falsifies, conceals or covers up by any trick, scheme or device a material fact;
- Makes any materially false, fictitious or fraudulent statement or representation; or
- Makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry.

OSHA holds employees who are unable to provide any means of proof other than their own attestation to the same standard of truthfulness as any other record presented for proof of vaccination. OSHA also holds employers liable for false statements and documentation. An employer that knows proof submitted by an employee is fraudulent and, with knowledge, accepts and maintains fraudulent documentation as proof of compliance with this ETS may be subject to the penalties in [18 U.S.C. § 1001](#) and [17\(g\)](#) of the OSH Act.

## Proof of Vaccination Recordkeeping

Employers are required under the ETS to maintain a record of each employee’s vaccination status and preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated. This means that employers must retain a copy of each employee’s proof of vaccination. Employees cannot satisfy this requirement if they only verify an employee’s vaccination status verbally or visually.

## Vaccination Rosters

In addition to maintaining a record of employee vaccination status, employers must maintain a roster of each employee’s vaccination status, subject to applicable confidentiality requirements. The roster must list all employees and clearly indicate for each one whether they are fully, partially or not vaccinated. Individuals not fully vaccinated must be considered not vaccinated, regardless of whether there is a medical or religious accommodation or because they have not provided acceptable proof of their vaccination status. The roster allows the employer to easily access the vaccination status for any employee quickly and easily. Employers must be ready to use the roster if they need to respond to a request from an employee or employee representative for the aggregate number of fully vaccinated employees at a workplace (along with the total number of employees at that workplace). Similarly, employers must be ready to provide the roster to OSHA inspectors upon request.

## Record Confidentiality

OSHA considers ETS vaccination records, rosters and COVID-19 testing records as employee medical records under [29 CFR 1910.1020](#) and must be maintained as such. Information from these records must not be disclosed, except as required or authorized by this ETS or other federal law, including the ADA.

Employers should note that ETS vaccination and testing records are not subject to the retention requirements of [29 CFR 1910.1020\(d\)\(1\)\(i\)](#). Rather, the ETS requires employers to maintain and preserve these records only while this ETS remains in effect. In contrast, [29 CFR 1910.1020\(d\)](#) requires employers to preserve and maintain employee medical records for at least the duration of employment plus 30 years. However, the provisions of [29 CFR 1910.1020\(h\)](#) regarding the requirements for the transfer of employee medical records when an employer ceases to do business may still apply.

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## Access to Records

Even though [29 CFR 1910.1020](#) includes requirements for employee access to medical records, the ETS includes specific timeframes within which employers must make vaccination and testing records available to employees (or their representatives), OSHA and other authorized individuals. Employers should note that OSHA's regular timeframes for providing access to employee medical records in [29 CFR 1910.1020\(e\)](#) do not apply to ETS records. Instead, employers must follow the specific timeframes outlined in the ETS.

The ETS requires employers to provide an aggregate number of fully vaccinated employees at a workplace and the total number of employees at the workplace to employees or their representatives upon request by the end of the next business day. Some employers may have collected information about their employees' vaccination status and may even have collected proof of vaccination prior to the effective date of this ETS.

The ETS accounts for this scenario by providing a limited exception for employers that have already collected proof of vaccination from their employees. Under the ETS, employers are exempt from determining vaccine status and acceptable proof of vaccination status requirements if they have ascertained employee vaccination status prior to the effective date of the ETS through another form of attestation or proof and retained records of that ascertainment. The exemption applies only for each employee whose fully vaccinated status has been documented prior to the effective date of the standard.

For example, an employer may have asked each employee to self-report their vaccination status without requiring the employee to provide any form of proof. If that self-reporting was through oral conversation only, and not documented in some way, the employer **is not considered** to have retained records of that ascertainment for the purposes of this ETS.

However, the employer is considered to have retained records of ascertainment for the purposes of this ETS if, prior to the effective date of the ETS, the employer:

- Had the employees provide their vaccination information on a dated form or through individual emails retained by the employer or on an employer portal specifically created for employees to provide documentation status, or
- Created and retained some other means of documentation.

This limited exception applies even if the record does not have all the elements the ETS requires for acceptable forms of proof.

However, employers are still required to develop and maintain a roster of each employee's vaccination status and include on that roster the employees for whom it had previously determined and retained records of vaccination status, regardless of whether their vaccination status was previously provided. Similarly, proof of vaccination requirements will apply with respect to employees for whom the employer ascertained only partial vaccination status prior to the effective date of the ETS.

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