

COMPLIANCE BULLETIN

OSHA COVID-19 ETS Recordkeeping 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 Occupational Safety and Health Act (OSH Act) requires employers to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents that are required to be monitored or measured. The requirements under the ETS for recordkeeping were developed in accordance with the OSH Act.

This compliance bulletin covers recordkeeping requirements imposed by the ETS.

Action Steps

Employers should review, understand and implement these ETS recordkeeping requirements. Employers should also include these recordkeeping requirements in their written policies.

Important Definitions:

“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 Food and Drug Administration (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.





Access to Records, Privacy and Confidentiality

The ETS considers proof of vaccination, rosters and COVID-19 testing results as medical records and protects the privacy and confidentiality of this information. This is particularly important in circumstances where employers or employees choose to have the employee's COVID-19 test results go directly to the employer. Prompt access to these records can also assist employees in making personal medical decisions and seeking care from a licensed healthcare provider if necessary. The ETS limits employee access to their own vaccination records or COVID-19 test results. Individuals may also access this information for another employee if they have that employee's written permission.

Requesters are entitled to **one free copy of each requested record**, which is consistent with OSHA's recordkeeping regulation at [29 CFR 1904.35](#). The cost of providing one free copy to employees, former employees, and/or their representatives is minimal, and these individuals are more likely to access the records if it is without cost. Allowing the employer to charge for a copy of the record would only delay the production of the information.

After receiving an initial, free copy of a requested record or document, an employee, former employee or representative may be charged a reasonable fee for copying duplicative records. However, no fee may be charged for an update to a previously requested record. It should be noted that each COVID-19 test is a separate record, and the employee or the representative is entitled to one free copy of each COVID-19 test record.

Aggregate Information

Even though access to individual employee records is restricted, employers are required to make the following information available to an employee or an employee representative by the end of the next business day upon request:

- The aggregate number of fully vaccinated employees at a workplace; and
- The total number of employees at that workplace.

Employers may use the information collected and maintained in their rosters to respond to these requests. Since the aggregate totals of fully vaccinated employees and total employees made available by request do not contain any personally identifiable information or personal medical information, access to these records does not raise any serious confidentiality or privacy concerns if disclosed to employees or their representatives.

Prompt employee access to this aggregate information can help employees take an active role in their employers' efforts to prevent COVID-19 transmission in the workplace. Specifically, access to this information may allow employees and employee representatives to:

- Calculate a percentage of fully vaccinated employees at the workplace;
- Evaluate the efficacy of the employer's vaccination policy;
- Raise any identified concerns to OSHA; and
- Actively participate in the employer's vaccination efforts.

OSHA believes that making this information available to employees and their representatives will help ensure compliance with the requirements of the ETS and thereby protect workers. Without access to this aggregate information, the only potential check on whether employers are complying with the requirements of the ETS would be OSHA inspections.

ETS Recordkeeping Definitions

Consistent with [29 CFR 1904.35\(a\)\(3\)](#), the term **"employee"** includes former employees.



In addition, the term “**representative**” is intended to have the same meanings as in 29 CFR 1904.35(b)(2), which encompasses two types of employee representatives:

- A personal representative of the employee. This is a person the employee designates, in writing, as his or her personal representative or is a legal representative of a deceased or legally incapacitated employee.
- An authorized representative. This is an authorized collective bargaining agent of one or more employees working at the employer’s worksite.

In accordance with these interpretations, the phrase “employee representative” includes the personal and authorized representatives of former employees. **These interpretations are limited to the recordkeeping section of the ETS.**

OSHA Access to Records

Employers must provide the written policy and the aggregate numbers of fully vaccinated employees (both the aggregate number of fully vaccinated employees at a workplace and the total number of employees at that workplace) to OSHA’s Assistant Secretary for examination and copying within **four business hours** of a request.

Consistent with the requirements in [29 CFR 1904.40\(b\)\(2\)](#), if the records are maintained at a location in a different time zone, the employer may use the business hours of the establishment at which the records are located when calculating the deadline. Providing OSHA with prompt access to the written policy and the aggregate numbers allows the agency to more rapidly focus inspections on employers that may not be in compliance with the requirements of this ETS.

In addition, this information will help OSHA determine the focus of any investigation. For example, if an employer has established, implemented and is enforcing a written mandatory vaccination policy and their aggregate numbers indicate that their entire workforce is fully vaccinated against COVID-19, OSHA might approach the investigation differently than in a workplace where the employer’s written policy requires employees to provide proof of regular testing for COVID-19 and wear a face covering instead of being fully vaccinated.

This information also provides OSHA representatives with the ability to quickly check any vaccination claims made by an employer without undertaking an employee-by-employee assessment and assists OSHA representatives in their evaluation of the effectiveness of the employer’s written policy. Having this information within four business hours of the request helps the agency act more quickly to protect employees and preserve agency resources. In addition, the four-hour response time is consistent with similar obligations under other OSHA recordkeeping requirements, such as the recordkeeping requirement in [29 CFR 1904.40\(a\)](#).

Employers are required to provide all other records and other documents that are required to be maintained by recordkeeping requirements under the ETS to the assistant secretary of OSHA for examination and copying by the end of the next business day after a request. This means that employers must allow OSHA representatives to examine and copy each employee’s COVID-19 vaccine documentation, the roster of employee vaccination and each employee’s COVID-19 test results upon request.

Finally, [Section 8 of the OSH Act](#) recognizes OSHA’s right of access to records relating to employer compliance with occupational safety and health standards and regulations, including access to relevant employee medical records. OSHA states it does not believe that its inspectors need to obtain employee permission to access and review personally identifiable information. Gaining this permission would essentially make it impossible to obtain full access to the records in a timely manner, which is needed by OSHA to perform a meaningful workplace investigation.

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OSHA also has policies and procedures in place to ensure the privacy and confidentiality of employee records it accesses during inspections. Without complete and timely access to the vaccine and testing records, agency efforts to conduct immediate interventions to ensure employees are protected from COVID-19 at a specific workplace would be limited. **OSHA does not prescribe specific methods for requests for records in this ETS.** Employees, employee representatives, and OSHA's Assistant Secretary and designees can submit requests in any manner that provides adequate notice of the request to the employer. This may include requests in writing, by phone or in person.

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