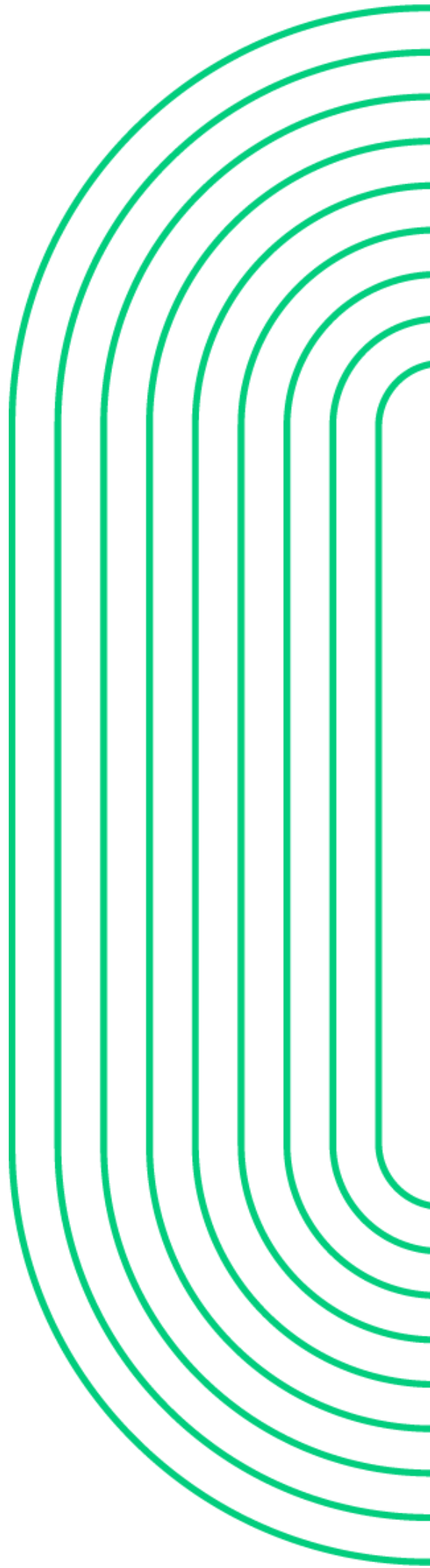


OSHA Issues Emergency COVID Vaccine Rule

*Requirements, Implications, and Best Practices for
Employers*

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Ground Rules

- Questions can be posed in the chat
- There will be time for Q&A
- We will send a link with the recording and slides
- <https://www.clarkhill.com/products/covid-19-resources/>

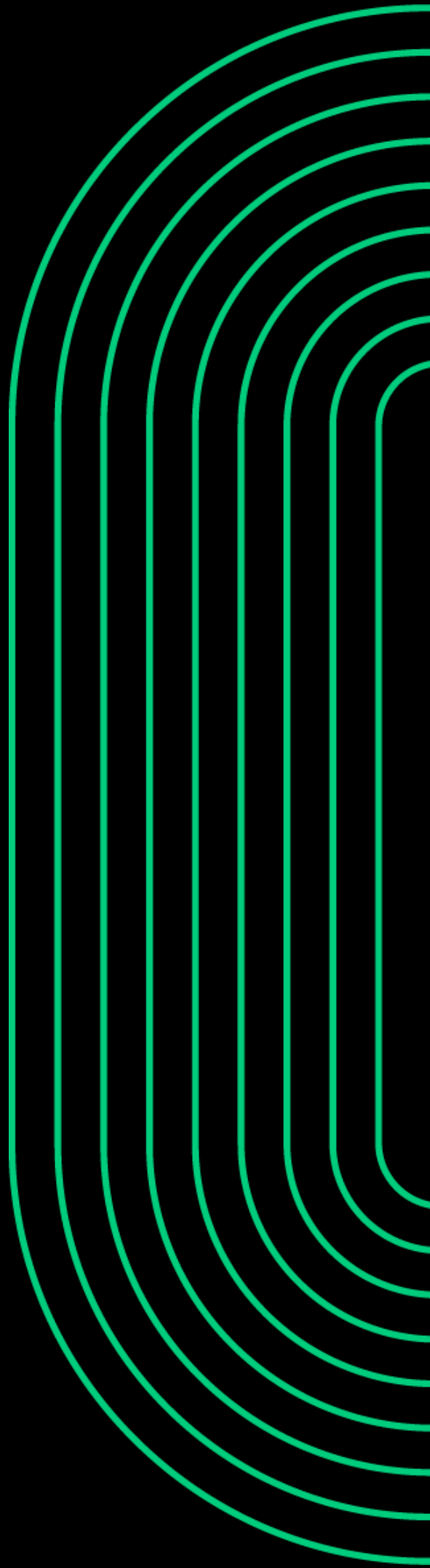


Topics of Conversation

- Where are we and how did we get here?
 - Background and Legal
- ETS Requirements
 - Coverage
 - Vaccination Status
 - Vaccine & Testing Rules
 - Positive COVID cases
 - Policy & Reporting Requirements
 - Pre-emption
- Best Practices for Implementation and Administration (throughout)



WHERE ARE WE AND HOW DID OSHA GET US HERE?



BACKGROUND

- Directive from Biden on 9-9-21 (“Path out of the Pandemic”)
- OSHA can issue an ETS (w/o prior notice/comment) if it determines employees are subject to a **grave danger** from exposure to substances or agents determined to be toxic or physically harmful (or from new hazards), and an ETS is **necessary** to protect employees from the danger (29 USC 655(c)(1))
- OSHA felt these 2 standards applied only to unvaccinated workers – 38% of all workers covered by the Rule – and that all of their existing regulations, guidance, & General Duty clause were insufficient to sufficiently protect them
- According to OSHA, the determination of “grave danger” is a policy consideration up to them, even while acknowledging findings must be based on evidence of “actual, prevailing industrial conditions”
- ETS estimates that, of all COVID-related U.S. deaths, 18% were those in prime working age (18-64), & that this Rule will save 6,500 worker lives while still leaving 11% unvaccinated and costing employers nearly **\$3,000,000,000** to comply

LEGAL CHALLENGES

OSHA has issued 10 Emergency Temporary Standards previously, and none in the last 35+ years (since 1983)

6 have been challenged legally; only 1 has survived



LEGAL CHALLENGES

Legal challenges to Rule filed by Petition for Review directly to Federal Courts of Appeals.

ALREADY, in addition to the multiple challenges to the federal contractor mandate, SIX challenges have been filed to the ETS, most with additional requests for an emergency stay:

- 5th Circuit: Texas, Louisiana, Mississippi, South Carolina, Utah, private employers, and trade groups: **STAY ALREADY ORDERED; EXPEDITED BRIEFING SET**
- 6th Circuit: Private employer
- 6th Circuit: Kentucky, Kansas, Ohio, Oklahoma, Tennessee, Idaho and West Virginia
- 7th Circuit: 2 private employers
- 8th Circuit: Missouri, Arizona, Nebraska, Montana, Arkansas, Iowa, North Dakota, South Dakota, Alaska, New Hampshire, Wyoming, private employers, trade associations, religious schools
- 11th Circuit: Florida, Alabama, Georgia, private employers, trade associations, religious schools



LEGAL CHALLENGES

Arguments:

- 1) COVID isn't the type of "substance," "agent," or "hazard" supporting an ETS, as it is not a direct result of conditions uniquely caused by the workplace (for example, OSHA doesn't regulate influenza)
- 2) COVID doesn't present a "grave danger" nor is it "necessary" to protect workers (in the case of the latter, it doesn't take into account other alternatives)
- 3) The ETS is an improper delegation of Congress' legislative power (exceeds authority)
- 4) Regulation of health and safety is the purview of the states, and the ETS is a "workaround"
- 5) The rule creates incalculable burdens, there was no time for notice and comment, and there will be irreparable harm – including resignations (supported by affidavits).
- 6) The ETS conflicts with the First Amendment and Religious Freedom Restoration Act



LEGAL CHALLENGES

WHAT HAPPENS NEXT?

Forum: Lottery process determines where appeal ends up when multiple Petitions filed challenging same rule in different federal Circuits

Timing: Watch for possible other rapid briefing schedules/arguments, & decisions on stays/injunctions

Process: First heard by appellate panel, then maybe *en banc* (full court) and/or then a petition to SCOTUS





COVID-19 EMERGENCY TEMPORARY STANDARD REQUIREMENTS

WHAT'S THE BIG DEAL?

Each “serious” violation of the standard could = \$13,653

Repeat or willful violations cap out at \$136,532

&

If/when the Build Back Better Act is enacted, the maximum individual fine may be \$70,000 and the repeat or willful violation cap may be:

\$700,000



EMPLOYERS COVERED

- All employers with a total of at least 100 employees firm-or-corporate wide (regardless of location)
- **Includes part-time employees, and includes temporary employees when employed at ANY TIME the ETS is in effect**
- Franchises are separate entities for coverage purposes
- 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 effective date, or after effective date, you stay covered**



EMPLOYERS COVERED

Workplaces not covered:

- Those with **less than 100 employees** during the pendency of the ETS
- Those covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for **Federal Contractors or Subcontractors**
- Those covered under the **Healthcare ETS**



EMPLOYEES NOT COVERED

- 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
 - *very brief use of an indoor office bathroom or an administrative office is ok
 - *employers cannot cheat by tearing down a wall or cutting out part of the ceiling
- Employees who work at a worksite without others present
- **Remember:** independent contractors (who are truly independent contractors) are not employees



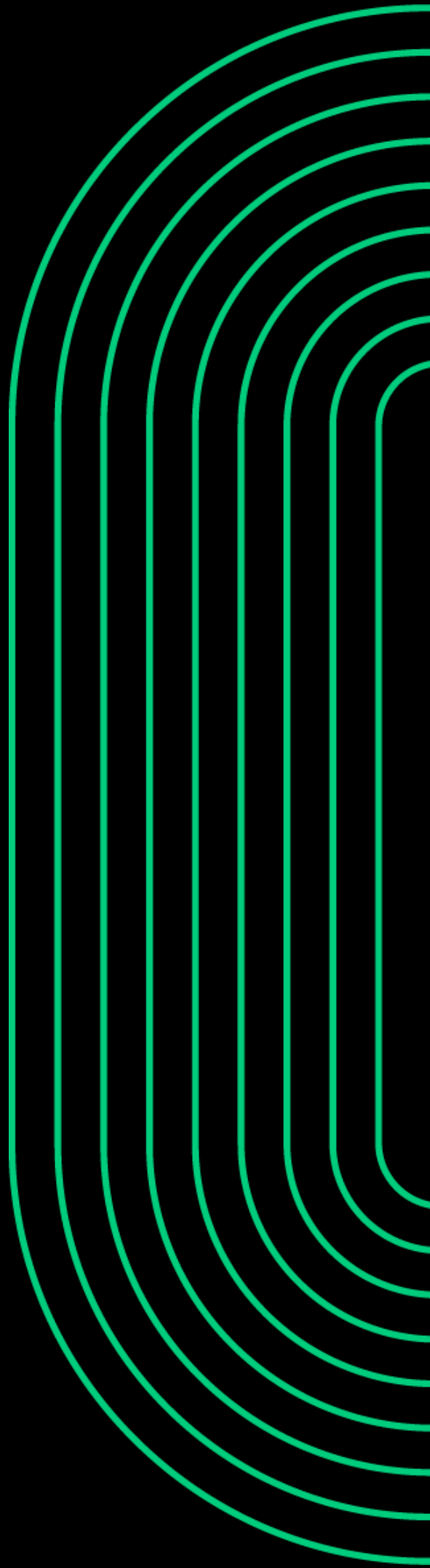
MINIMUM REQUIREMENTS OF ETS

- Determination of the vaccination status for each employee
- Mandatory vaccination policy OR a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing AND wear a face covering at the workplace (EMPLOYER'S CHOICE!)
- Paid leave to receive each vaccination dose and to recover from any side effects
- Protocols surrounding employees with COVID
- OSHA reporting
- Recordkeeping and provision of certain information to employees

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	

VACCINATION STATUS

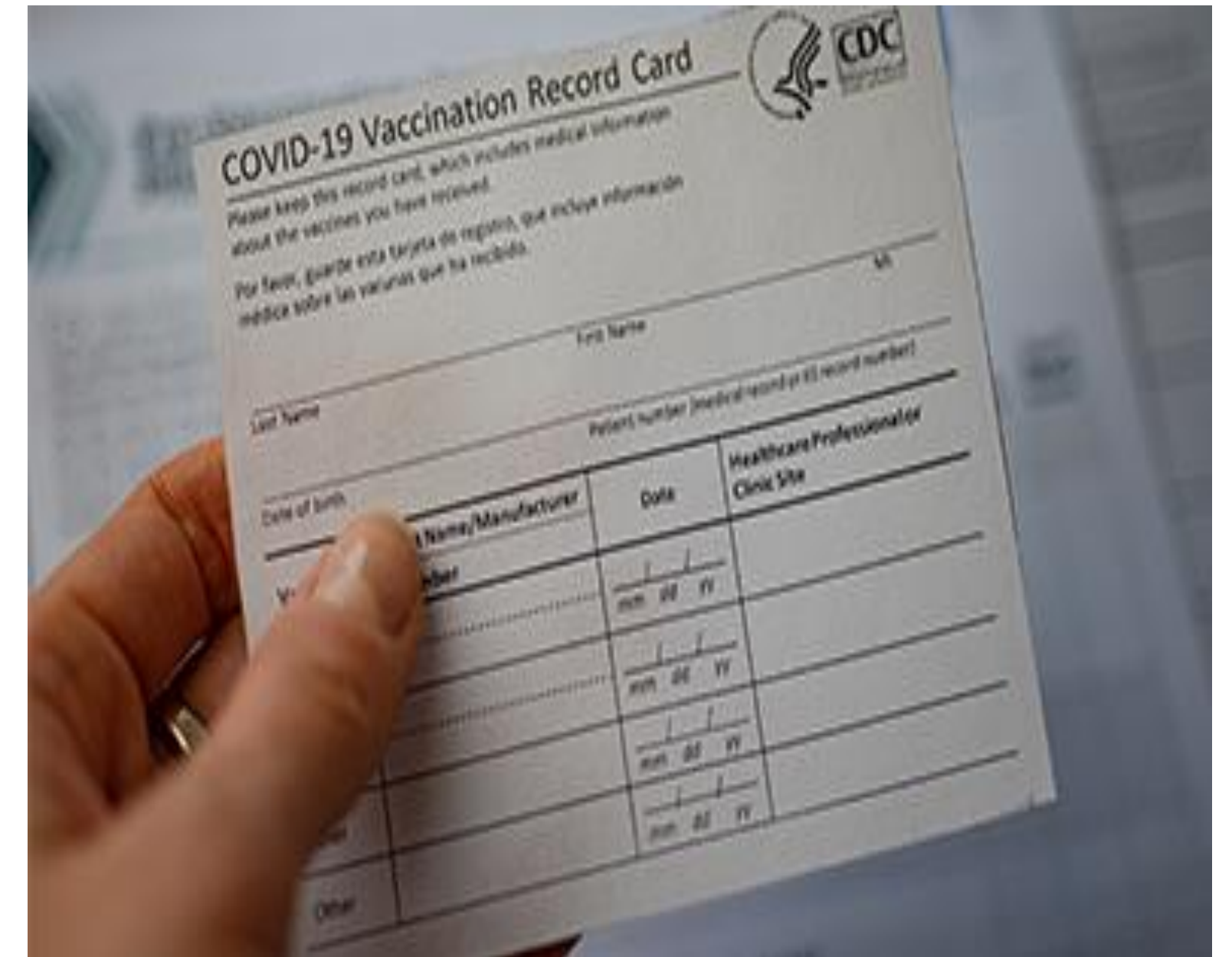


DETERMINATION OF VACCINATION STATUS

Employers “must require each vaccinated employee to provide acceptable proof of vaccination status.”
Employees who not provide acceptable proof must be treated as not fully vaccinated.

Acceptable proof is:

1. The record of immunization from a healthcare provider or pharmacy;
2. A copy of the COVID-19 Vaccination Record Card;
3. A copy of medical records documenting the vaccination;
4. A copy of immunization records from a public health, state, or tribal immunization information system; or
5. 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).



WHAT IF MY EMPLOYEE IS UNABLE TO PROVIDE PROOF OF VACCINATION?

CDC guidance on how to obtain proof of vaccination:

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccination-card.html>

The employee must submit a signed and dated statement:

- ✓ Attesting to their vaccination status (fully vaccinated or partially vaccinated);
- ✓ Attesting that they have lost and are otherwise unable to produce proof required by this section; and
- ✓ Including 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, to the best of their recollection, should 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).



What about proof for boosters?

“Booster shots and additional doses are not included in the definition of fully vaccinated under the ETS. Therefore, the employer is not required to obtain vaccination-related information beyond what is considered necessary to demonstrate that the employee is fully vaccinated as defined by the ETS.”



EMPLOYERS NEED NOT POLICE FOR FRAUD, BUT....

- Employers must provide each employee with information regarding criminal penalties associated with knowingly supplying false statements or documentation.
- An employer may be subject to criminal penalties and OSHA fines if an employer knows that proof submitted by an employee is fraudulent and accepts and maintains the fraudulent proof as a record of compliance with this ETS.

WHAT MUST EMPLOYERS DO WITH THE PROOF OF VACCINATION?

- Preserve acceptable documentary proof of vaccination as a **medical record**
- Create a roster of each employee's vaccination status, which is also a **medical record**
- These records must be maintained (**as confidential and not in a personnel file**) throughout the duration of the ETS
- If an employee or anyone who has written authorized consent from the employee **requests the employee's vaccination proof**, the employer must provide the proof for examination and copying, **by the end of the next business day**.
- Upon request by an employee or their representative, **the employer must make available by the end of the next business day the total number of fully vaccinated employees** at a workplace, along with the total number of employees.
- **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, including information pertaining to the aggregate number of vaccinated employees.



WHAT IF WE ALREADY WENT THROUGH THIS
EXERCISE BEFORE THE #@!%#@#! ETS CAME OUT?!?!

Employers who already obtained vaccination status prior to the effective date through another form of attestation or proof, and retained records of that ascertainment, are exempt from the requirement only for each employee whose fully vaccinated status is already documented.

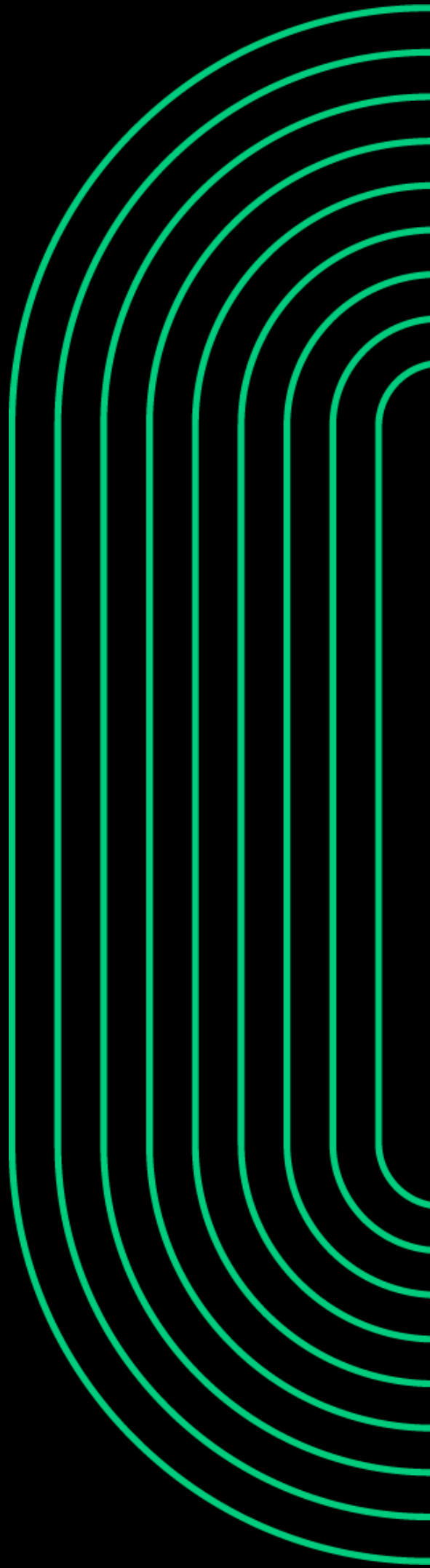
Examples: emails, dated form, internal portal, or some other means of documentation

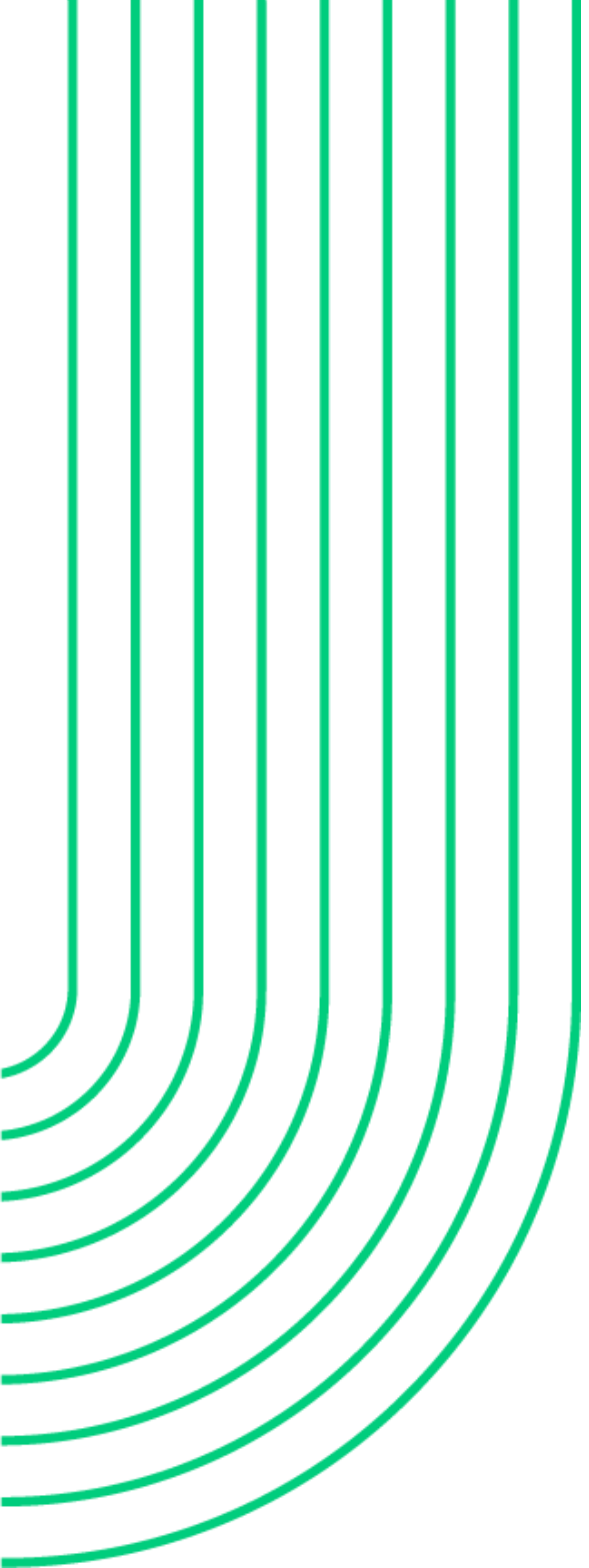
BEST PRACTICES FOR PROOF OF VACCINATION

- 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:
<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccination-card.html>
- Provide an internal deadline appropriate to meet OSHA's deadline (e.g. if you give until Nov. 19th, you will have time to follow up as necessary if deadline of December 5 stays)
- 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
- Remember: process will need to be ongoing to ensure accuracy of aggregate data
- HRIS or payroll provider may have valid tool to help collect and maintain information

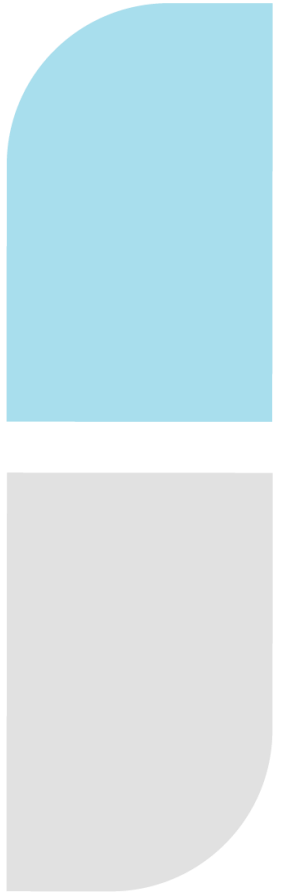


VACCINATIONS AND TESTING RULES





“[A] Mandatory Vaccination Policy is an employer policy requiring each employee to be **fully** vaccinated. To meet this definition, the policy must require: vaccination of all employees, including vaccination of all new employees as soon as practicable . . .

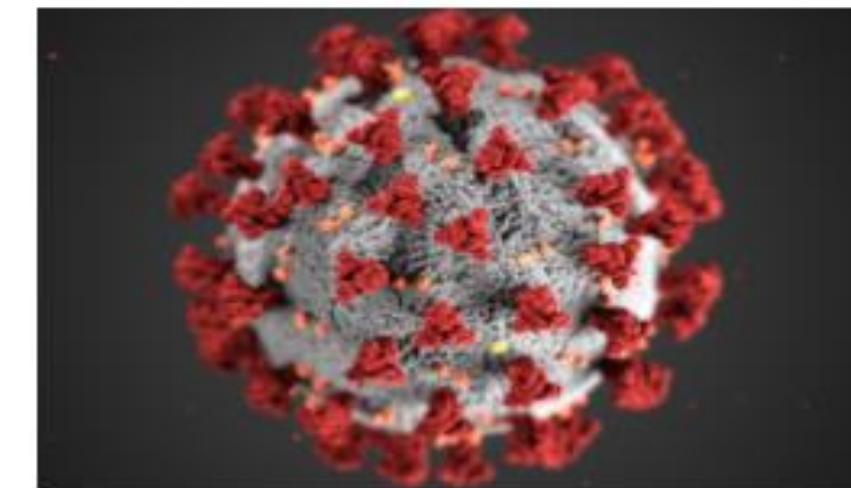


.... [O]ther than those employees:

- (i) For whom a vaccine is **medically contradicted**;
- (ii) For whom **medical necessity requires a delay** in vaccination; or
- (iii) Who are 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."

EEOC GUIDANCE AVAILABLE AT:

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilit>



**COVID-19 and the ADA,
the Rehabilitation Act,
and Other EEO Laws**

Technical assistance related to the COVID-19 pandemic, updated to address frequently asked questions concerning vaccinations in the employment context.

**CLARK HILL WEBINAR DISCUSSING
ACCOMODATIONS AVAILABLE AT:**

<https://vimeo.com/569843469>



WHEN IS AN EMPLOYEE “FULLY VACCINATED?”

- ETS defines “fully vaccinated” as 2 weeks after completing vaccination with, if applicable, at least the minimum recommended interval between doses
- NOTE, HOWEVER: 1-4-22 deadline only requires completion of full course of vaccination (rather than the additional 2 weeks to meet the “fully vaccinated” definition)
- **BOOSTERS DO NOT COME INTO PLAY**



PAID LEAVE REQUIREMENT

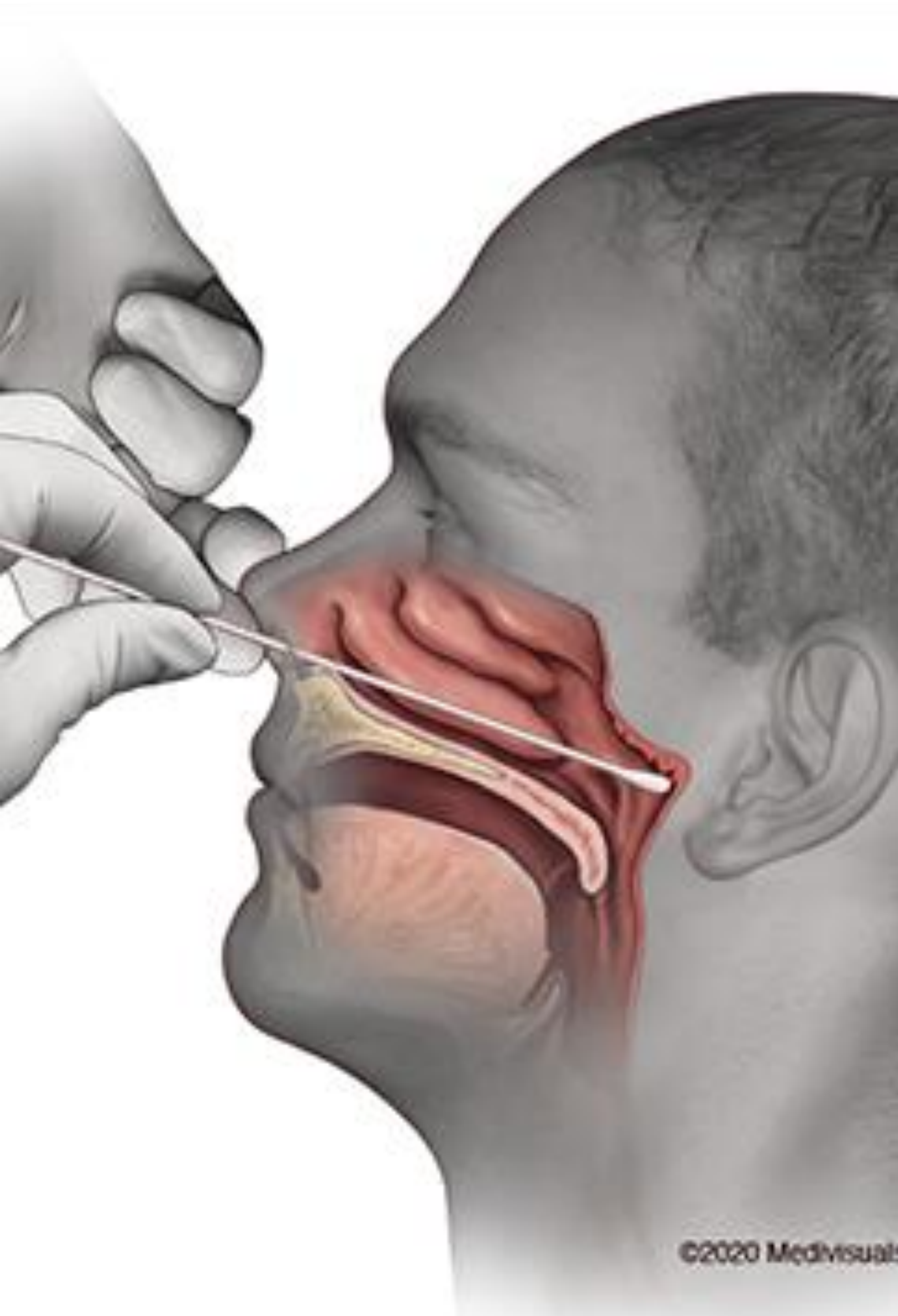
- Up to 4 hours (including travel time) at regular rate of pay to obtain vaccination doses when completed during work hours and cannot run concurrent with other leave.
 - THIS IS A NEW BUCKET OF LEAVE EMPLOYERS MUST PROVIDE
 - It cannot be offset by any other leave the employee has accrued
 - Any reasonable needed time beyond 4 hrs is protected leave, just not paid
 - 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 THEIR PTO, BUT NOT VACATION. IF EMPLOYEES DON'T HAVE PTO, EMPLOYERS MUST STILL PAY.
 - CAN SET A **CAP OF UP TO 2 DAYS PAID LEAVE FOR RECOVERY AFTER EACH DOSE, presumed by OSHA to be reasonable and in compliance with the ETS**
 - There is no tax credit at this time
- * Remember, booster shots don't count**



PRACTICAL CONSIDERATIONS FOR PAID LEAVE

- Only have to pay for **vaccination** time spent during work hours, per ETS. If requiring vaccination, may be required to pay under FLSA for time spent outside of work hours getting vaccinated.
- Onsite vaccination clinics may lessen the cost associated with the ETS' paid leave requirement:
 - Ensure appropriate logistical measures are in place to minimize waiting time
- For unionized employers, concurrent application of PTO/sick may be subject to bargaining
- Consider employee relation issues associated with forcing employees to utilize PTO for recovery (vs. trying to dissuade employees from abusing leave to recover)





TESTING IN LIEU OF VACCINATION

- This is your other policy/choice if you don't wish to mandate vaccination
- Weekly testing (if in the workplace at least once a week) so documentation of result is provided no more than 7 days from last test result, or in the case of a person who is away from the workplace a week or longer, within 7 days before returning to work
- Employees who do not provide documentation of result must be removed from workplace until they do so

A COVID-19 test means a test that is:

- “(i) Cleared, approved, or authorized [including EUA]. . .by the FDA . . .
- (ii) Administered in accordance with the authorized instructions; and
- (iii) Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.”**

Examples: lab processed tests (even if collected at home), proctored OTC tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer



Other Testing Rules

- 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 required by other laws, regulations, CBAs, OR required as a reasonable accommodation**

What about pay for time spent going to and getting **tested**?

- ETS Analysis mentions that if during work shift, FLSA may require it, but ETS defers as that issue being beyond OSHA's authority (*see also requirement to pay up to 4 hours for vaccination during work hours...*)
- Analogies: Donning/doffing protective gear; security & temperature screenings
- Integral and indispensable to work (can worker perform job without the preliminary activity?)
 - Testing during work: Likely Yes
 - Testing before/after work, or on off days: Authority mixed

Assess case-by-case, consider your risk, remember state law, & consult with us!



PRACTICAL CONSIDERATIONS FOR TESTING

- Testing at work would minimize potential costs associated with travel and waiting time and the administrative burden of tracking/paying for time outside of normal working hours
- Testing at work would require careful consideration of privacy concerns, similar to when employers were taking temperatures at work
- Testing at home would still require employer or lab oversight
- Could require employees to go a testing facility within a certain proximity to work or home and agree to pay a set fee based on the location
- Choosing a consistent testing day will help with monitoring employees' ability to be onsite. Employees who aren't onsite regularly will need to coordinate their visits with HR to ensure compliance with the testing requirement.
- Current Treasury guidance requires most COVID-19 testing to be covered by employer-sponsored health plans (but is it medically necessary? Check with your insurance agent)



TESTING IN LIEU OF VACCINATION –MASKING REQUIREMENT

- Each worker who isn't 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
 - ✓ When wearing a respirator or facemask
 - ✓ When infeasible or creates a greater hazard
- The standard does NOT require employers to pay for “any costs associated with face coverings” BUT may be required by other laws, CBA, or if required as a reasonable accommodation

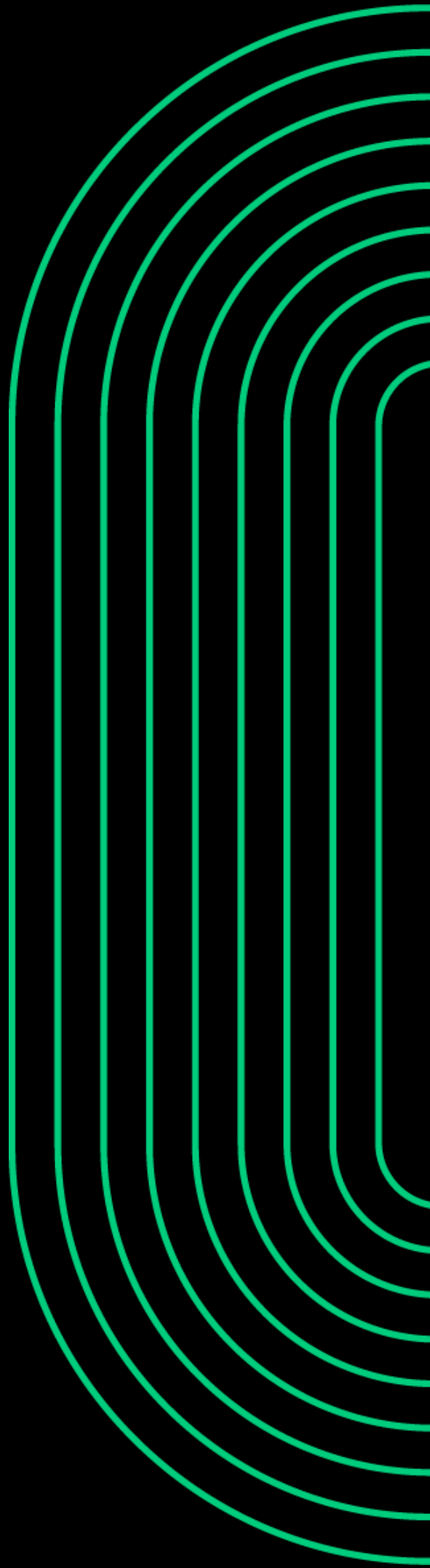


CONSIDERATIONS FOR DECISION ON WHICH APPROACH TO ADOPT

- Labor shortage/"the Great Resignation"/employee morale
- Can have differing policies based on division/department, etc. (i.e. customer facing)
- Temperature of labor management relationship
- Availability (and potentially cost) of testing
- Administrative burden associated with testing
- Paid leave expenses associated with mandatory vaccination (presuming, most employees who wanted to be vaccinated have already been vaccinated)
- Need a religious/medical exemption (accommodation) protocol either way



POSITIVE COVID CASES



REQUIRED PROTOCOLS WHEN AN EMPLOYEE IS DIAGNOSED WITH COVID

- Employees (vaccinated or not) must be required to promptly provide notice when they have tested positive for COVID-19 or diagnosed with by a licensed health care provider
 - 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 whether they are symptomatic.

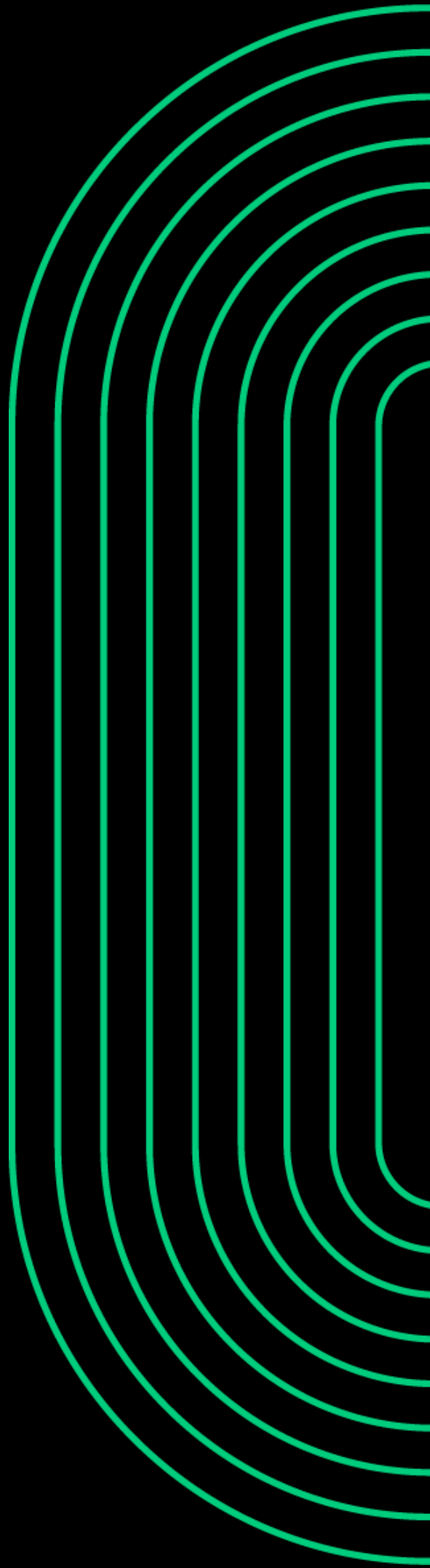


When Can Employees with COVID-19 Return to Work?

WHEN THEY COMPLETE ONE OF THE FOLLOWING REQUIREMENTS:

- (1) receive a negative NAAT COVID-19 test result;
- (2) meet the return to work criteria in the CDC's Isolation Guidance; or
- (3) receive a recommendation to return to work from a licensed healthcare provider

WRITTEN POLICY REQUIREMENTS



POLICY REQUIREMENTS

***in a language and at a literacy language the employee understands**

1. The Employer's vaccination policy (either mandatory or vaccination or test/mask)
 - including information about the employer's policies and procedures for COVID-19 testing and face coverings (if option, or if used for exemptions)
 - Upon request by OSHA, the policy must be produced within **4 hours**
2. The process that will be used to determine employee vaccination status
3. The 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 of COVID-19 by a licensed healthcare provider
5. The procedures to be used for requesting records



Information Employers are Required to Provide Employees

Continued

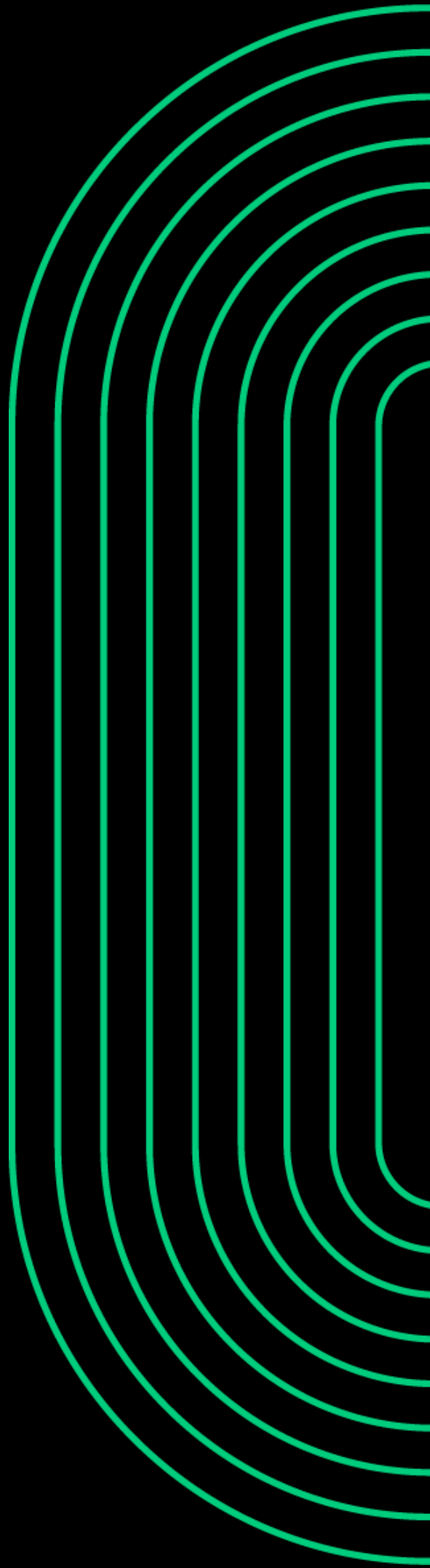
6. “Key Things to Know About COVID-19 Vaccines,” available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>;
7. OSHA’s prohibition against retaliation for reporting workplace illnesses or injuries and OSHA’s whistleblower protections
8. The criminal penalties associated with knowingly supplying false statements or documentation
9. OSHA has incorporated into the ETS CDC’s Isolation Guidance (2-18-21) & can cite employers who do not follow it: https://www.osha.gov/sites/default/files/CDC's_Isolation_Guidance.pdf

Granular details: the 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”



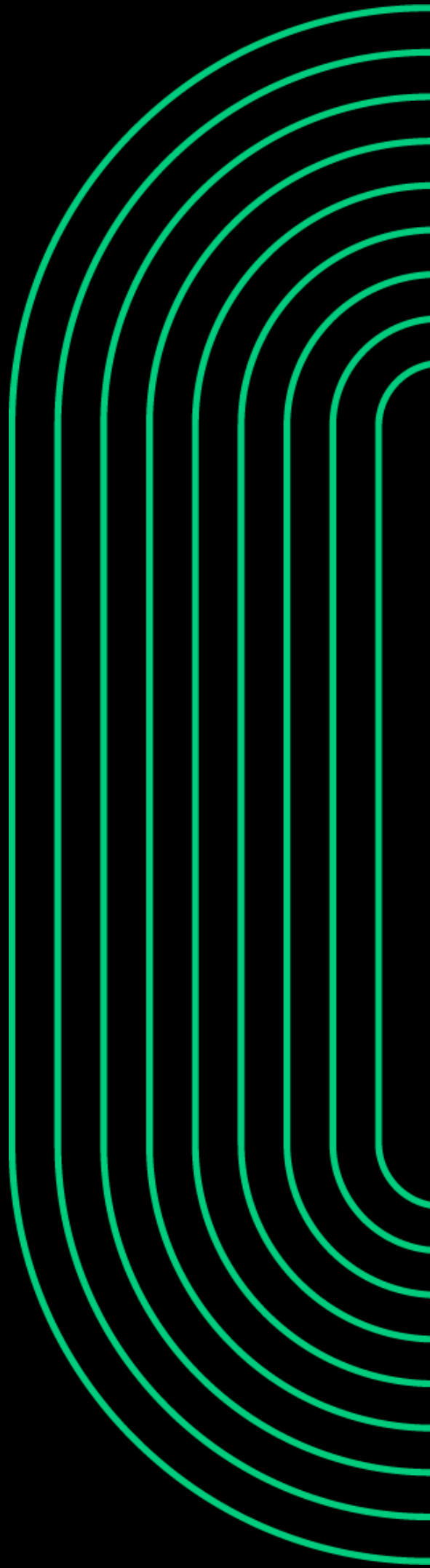
EMPLOYER REPORTING REQUIREMENTS



Employers Must Report Work Related COVID-19 Fatalities and Hospitalizations

- 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:
<https://www.osha.gov/sites/default/files/publications/OSHA4129.pdf>

PRE-EMPTION



STATE/LOCAL REGULATION & PRE-EMPTION

OSHA's ETS pre-empts 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 [TX, MT, AR] (29 USC 667(b))

States with their own OSH agencies/state plans applying to private employers (INCLUDING state/local governments in those jurisdictions) have 30 days to adopt the federal standard or develop their own (not lesser) mandate

Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Tennessee, South Carolina, Utah, Vermont, Virginia, Washington, Wyoming, and Puerto Rico



WHERE SOME STATES MAY STYMIE ENFORCEMENT OF THE ETS

Overlap between some suing states and those with OSH state plans

If they don't adopt, OSHA may move to decertify those state OSH plans and take over responsibility of OSH in those jurisdictions entirely

HOWEVER, that's a process (formal notices, a hearing, review by the Secretary of Labor, and even possible court involvement)

3 States did not promptly develop their own plans for the Healthcare ETS, and it wasn't until months after the deadline to do so when OSHA first contacted them about it

WATCH for possible resulting coverage/enforcement gaps in these states!



QUESTIONS?

<https://www.osha.gov/coronavirus/ets2/faqs>

<https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf>



<https://www.hr-aa.com/vaccine-mandates/>

- Assistance with developing a comprehensive policy and procedures for administering a mandated vaccinations.
- Development of a communication strategy, vaccination education and incentive program for your entire workforce to assist in increasing vaccination rates or to address morale issues that may result from mandatory programs.
- Religious and disability exemption request review and administration management, including tracking and reporting, and recommendations for approval/disapproval and managing any change in employee status.
- Assistance with sourcing and developing an alternative weekly testing program.
- Assistance in disciplining or terminating employees who fail to comply with your vaccination program.
- Assistance with leave programs for employees impacted by exemptions from vaccines that keep them out of the physical work site.





Thank You!

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Legal Disclaimer

This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.