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## Community Bank Summary of the COVID-19 Vaccination and Testing Emergency Temporary Standard

On Nov. 5, 2021, the Occupational Health and Safety Administration (OSHA) published in the Federal Register its [COVID-19 Vaccination and Testing Emergency Temporary Standard](#) (ETS), which covers all employers, including community banks, with at least 100 employees. As explained in the OSHA news release, the accompanying [Fact Sheet](#), [FAQs](#), and [Summary](#), this ETS requires covered employers to have a written vaccination policy that either requires (1) all employees to be fully vaccinated or (2) employees be vaccinated with an option to be tested weekly if they don't want to be vaccinated.

### Note Regarding Lawsuits Challenging the ETS.

As soon as the ETS was published on Nov. 5, numerous lawsuits were filed regarding the vaccine requirements. On Nov. 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay the ETS. The court ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order." OSHA issued a statement saying that "while OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation." ICBA will keep community bankers posted through NewsWatch Today regarding any litigation developments concerning the ETS.

## Below are some questions and answers that summarize the new standard:

### Which employers are covered by the ETS?

Any employer, including a community bank, with at least 100 employees is covered, except for those that are considered federal contractors or those that are subject to the [Health Care ETS](#) published earlier this year.

### Are banks considered federal contractors because they are FDIC-insured?

So far, there are no indications from OSHA or the Department of Labor that, because they are FDIC-insured, banks are federal contractors for purposes of Executive Order 14042 and the implementing [Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors](#). However, banks that have business relationships with the government should review their government contracts with their attorneys to determine if they are considered federal contractors.

### How is the 100-employee threshold determined?

Employers should count their employees at the corporate-wide level and not at an individual location level. Therefore, a bank would need to count the total number of employees working at all their branch offices, including their home office, as well as any loan processing, data processing, or customer service center. All employees—whether working remotely, full-time, part-time, or seasonal—must be counted.

Employers with 100 or more employees on Nov. 5, 2021, must comply with the ETS and will have to continue doing so for the duration of the ETS, even if their employee count subsequently drops below 100. If an employer has fewer than 100 employees on Nov. 5 but the total employee account subsequently increases to 100, then the employer must comply with the ETS. For example, if an employer that has 103 employees on Nov. 5 but then loses four within the next month, the employer would continue to be covered by the ETS above and below 100.

### What does the ETS require covered employers to do?

The ETS requires that covered employers adopt either a mandatory vaccination policy or a policy that requires full vaccination or regular COVID-19 testing. The policy must be written and must be provided to OSHA if requested. Regarding the vaccination requirement, employees may be entitled to a reasonable accommodation under the Americans with Disabilities Act because they have a disability or Title VII of the Civil Rights Act because of a sincerely held religious belief or practice if the employee cannot be vaccinated.

### What employees are exempt from the mandate?

Remote employees (i.e., those who work exclusively from home) and employees who work exclusively outdoors are not covered by the ETS. However, if remote employees enter the workplace during times when other employees or customers are present, then they become subject to the ETS and either must be vaccinated or be able to present a negative test result obtained within seven days of entering the workplace.

### Are covered employers required to determine the vaccination status of each employee?

Yes. Every covered employer is required to determine the vaccination status of each employee and must maintain a roster of each employee's vaccination status. These records are considered medical records and should be maintained accordingly. Employers who ascertained employee vaccination status prior to Nov. 5 may be exempt.

## What documentation is required to determine the vaccination status of each employee?

The ETS outlines the types of acceptable proof of vaccination status that an employer may accept as follows:

1. The record of immunization from a health care 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).

If the employee is unable to produce acceptable proof of vaccination, the ETS provides a way that an employee can sign and date a statement attesting to vaccination status.

## How does the testing option work?

Employees who are not fully vaccinated must be tested for COVID-19 at least once every seven days if they report at least once every seven days to a workplace where other individuals are present.

Employees who telework or do not regularly report to a workplace at least every seven days must be tested within seven days prior to returning to the workplace. Employers are not required to pay for any costs associated with testing.

Under the ETS, employers must keep an employee who fails to provide test results out of the workplace. An exception does exist for employees who have received a positive COVID-19 test or have been diagnosed with COVID-19 by a licensed health care provider. In those situations, an employee may be relieved of testing requirements for up to 90 days after the date of the positive test or diagnosis. Testing records are considered employee medical records and must be maintained accordingly. Under the ETS, the COVID-19 test must be:

1. cleared, approved, or authorized, including Emergency Use Authorization, by the FDA to detect COVID-19;
2. administered in accordance with the authorized instructions; and
3. not both self-administered and self-read, unless observed by the employer or an authorized telehealth provider.

### Are covered employers required to provide paid time off for vaccinations?

Yes. Covered employers must provide reasonable paid time off for each employee to obtain their vaccinations. Actual working time spent obtaining the vaccination up to four hours, including travel time, must be paid by the employer for each dose of the vaccine. The four hours of paid working time that employers must provide for the administration of each primary vaccination dose cannot be offset by sick leave or vacation leave. Employers are not required to pay employees who obtain their vaccination doses outside of working hours. Covered employers must provide reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination dose to each employee for each dose.

### Do employees have any responsibilities under the ETS?

Yes. Employees are required to promptly notify employers whenever they receive a positive COVID-19 test result or are diagnosed with COVID-19 by a licensed health care provider. Once notified, the employer must immediately remove the employee from the workplace until the employee receives a negative result from a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test, meets the return-to-work criteria outlined in the CDC's Isolation Guidance, or receives a recommendation to return to work from a licensed health care provider.

### What are the requirements regarding face coverings?

Any employee who is not fully vaccinated must wear a face covering indoors unless they are alone in a room with floor to ceiling walls and a closed door, or for a limited time while eating or drinking, or for identification purposes in compliance with safety and security requirements.

The ETS requires the employer to provide any policies and procedures related to the ETS in a language and at a literacy level the employee understands. Additionally, employers must provide each employee with a copy of the [Key Things to Know About COVID-19 Vaccines](#) document available on the CDC website.

### What are the OSHA reporting requirements under the ETS?

Employers must report each work-related COVID-19 fatality within eight hours of the employer learning about it. Each work-related COVID-19 in-patient hospitalization should be reported within 24 hours of the employer learning about the hospitalization. Employees may request information regarding the total number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.



### What are the OSHA penalties for violating the ETS?

Fines for OSHA violations can range from \$13,653 per violation to up to 10 times that for willful or repeated violations.

### What is the effective date of the ETS?

The effective compliance date for providing time off for vaccination and face coverings for employees who are not fully vaccinated is Dec. 6, 2021. Covered employers must also adopt a written vaccination policy by that date. On its [website](#), OSHA provides a sample mandatory vaccination policy template that employers can use. Compliance with any vaccination portion of the ETS (or testing in lieu of vaccination portion) must occur on or before Jan. 4, 2021.