

Virginia Bankers Association October 28th Conference Call Q & A Helping Banks Navigate the “Path Out of the Pandemic”

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*Be aware that as of today’s date, the OSHA ETS has been challenged as being unlawful in several jurisdictions. A federal appeals court has ordered an administrative stay of the OSHA ETS, which means the ETS will not go into effect until a court rules that it is lawful. It is possible the ETS could be permanently enjoined and never go into effect.

Questions & Answers:

Q: Are banks “federal contractors” under President Biden’s Executive Order 14042 on Ensuring Adequate COVID Safety Protocols for Federal Contractors, which requires federal contractors to follow the COVID-19 safeguards published by the Safer Federal Workforce Task Force (including requiring vaccination of all employees)?

A: It is unclear at this time, but it is unlikely that a bank is a “federal contractor” because it accepts deposit insurance, participated in the PPP loan program, or redeems savings bonds. The Executive Order defines “contract” pursuant to a U.S. Department of Labor proposed rule. Prior Department of Labor interpretations of “contract” focused on procurement and service contracts. A bank that provides one or more services to the federal government pursuant to a contract may be a “federal contractor”. Such bank will be notified of the status and any related requirements at the time of contract formation; new solicitation for a contract or contract-like instrument; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument.

Q: What does the OSHA ETS require?

A: Covered employers must develop, implement, and enforce a mandatory COVID-19 vaccination policy, unless they adopt a policy requiring employees to choose to either be vaccinated or undergo regular COVID-19 testing and wear a face covering at work.

Q: When must employees be fully vaccinated or begin weekly testing?

A: The ETS was effective immediately upon its publication in the Federal Register on November 5, 2021. Employers must comply with most requirements including, but not limited to, establishing a vaccination policy, determining and obtaining proof of employee vaccination status, and providing paid time off for vaccinations by December 6, 2021. Employee vaccination and/or weekly COVID-19 testing for unvaccinated employees must occur by January 4, 2022.

Q: Who is a covered employer under the ETS?

A: The ETS applies to all employers with 100 or more employees at any time. The count should be done at the employer level (firm- or corporate-wide), not the individual location level. Part-time employees do count towards the total number of employees but independent contractors do not. The ETS is anticipated to cover two-thirds of the nation's private-sector

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workforce. In the 26 states and two territories with [OSHA State Plans](#) (including Virginia), the ETS will also cover public sector workers employed by state and local governments, including educators and school staff.

The ETS does not apply to: (1) employees who do not report to a workplace where other coworkers or customers are present; (2) employees who work from home; (3) workplaces covered by either the CMS rule or the federal contractor vaccination requirement (Biden Executive Order 14042).

Q: What does a mandatory COVID-19 vaccination policy entail under the ETS?

A: A mandatory vaccination policy is an employer policy requiring each employee to be fully vaccinated. Such policy must require vaccination of all employees, other than those employees who fall into one of three categories: those for whom a vaccine is medically contraindicated, those for whom medical necessity requires a delay in vaccination, or those 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.

Q: Is there an alternative to an employer having a mandatory COVID-19 vaccination policy?

A: Yes. An alternative to the mandatory vaccination policy is for an employer to establish, implement and enforce a written policy that allows an employee to choose vaccination, or weekly testing for COVID-19 and wearing a face covering while indoors at work or riding in a vehicle with another person.

Q: Can an employer implement a partial mandatory vaccination policy that requires vaccination for employees that deal directly with the public but allows other employees the choice of vaccination or weekly testing?

A: Yes. OSHA recognizes there may be employers who develop and implement partial mandatory vaccination policies that apply to only a portion of their workforce. An example might be a retail corporation employer who has a mixture of staff working at the corporate headquarters, performing intermittent telework from home, and working in stores serving customers. The employer may choose to require vaccination of only some subset of its employees (e.g., those working in stores), and to treat vaccination as optional for others (e.g., those who work from headquarters or who perform intermittent telework). This approach would comply with the standard so long as the employer complies in full with paragraphs (d)(1) and (d)(2) of the ETS for the respective groups.

Q: What information must be included in the employer’s vaccination policy?

A: The policy should address all of the applicable requirements in paragraphs (e)-(j) of the ETS, including: requirements for COVID-19 vaccination; applicable exclusions from the written policy; information on determining an employee’s vaccination status and how this information will be collected (as described in paragraph (e)); paid time and sick leave for vaccination purposes (as described in paragraph (f)); notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace (as described in paragraph (h)); information to be provided to employees (pursuant to paragraph (j) – e.g., how the employer is making that

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information available to employees); and disciplinary action for employees who do not abide by the policy.

In addition to addressing the requirements of paragraphs (e)-(j) of this standard, the employer should include all relevant information regarding the policy’s effective date, who the policy applies to, deadlines (e.g., for submitting vaccination information, for getting vaccinated), and procedures for compliance and enforcement, all of which are necessary components of an effective plan. Having a comprehensive written policy will provide a solid foundation for an effective COVID-19 vaccination program, while making it easier for employers to inform employees about the program-related policies and procedures, as required under paragraph (j)(1).

An employer who has both vaccinated and unvaccinated employees will have to develop and include the relevant procedures for two sets of employees in the written policy. The procedures applicable to employees who are not fully vaccinated (i.e., those who are unable to receive vaccination as a result of a medical contraindication or medical necessity requiring delay, and those entitled to reasonable accommodations), must include COVID-19 testing and face covering use as required by paragraphs (g) and (i), respectively, unless the employees are removed from the scope of § 1910.501 (e.g., full time telework consistent with one of the exceptions in § 1910.501(b)(3)).

Q: Do employers have to collect the vaccination status of employees?

A: Yes. Employers must determine the vaccination status of each employee, must have acceptable proof of full vaccination, and keep a confidential record of that proof. Acceptable proof includes copies of an employee’s vaccine record from a physician, pharmacy, public health, or tribal immunization information system; CDC COVID-19 vaccination card; or medical record documenting the vaccine. The vaccination card or record should contain the employee’s name, type of vaccine received, dates administered, and the name of the physician or clinic that administered the vaccine. If an employer collected vaccination information from employees prior to November 5, 2021 (the effective date of the OSHA ETS) and retained records of the employees’ responses, the employer is not required to re-evaluate the vaccination status of vaccinated employees. The information previously collected does not have to comply with “acceptable proof” under the ETS.

Q: Do employers have to give paid time off for employees to be vaccinated?

A: Yes, employers must provide up to four (4) hours of paid time off for each primary vaccine series dose and must provide a reasonable amount of paid sick leave to recover from side effects. Employees can be required to use their regular PTO, but if they have no PTO the employer must provide paid time off. 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 non-work 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.

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Q: What are the weekly COVID-19 testing requirements?

A: Unvaccinated employees who report at least once in a seven (7) day period to a workplace where customers or coworkers are present must be tested once every seven (7) days and provide the results of the test to the employer. Employers must remove employees from the workplace who do not provide test results until such time as they provide a negative test result. Employees who report to a workplace less frequently than once in a seven (7) day period must obtain a COVID-19 test and provide the results to the employer within the seven (7) days prior to entering the workplace according to § 1910.501 (g). For 90 days after an employee tests positive for COVID-19 or has a positive COVID-19 diagnosis by a health care provider, an employer is prohibited from requiring regular COVID-19 testing of that employee. However, when the employee returns to work, they must continue to wear a face covering.

Q: What is the COVID-19 testing protocol?

A: Under the ETS, a “COVID-19 test” must be a test for SARS-CoV-2 that is:

- 1. cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the U.S. Food and Drug Administration (FDA) to detect current infection with the SARS-CoV-2 virus (e.g., a viral test);*
- 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 proctor.*

Examples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens), proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer. Antibody tests do not meet the definition of COVID-19 test for the purposes of the ETS.

Diagnostic tests for current infection fall into two categories: nucleic acid amplification tests (NAATs) and antigen tests. NAATs are a type of molecular test that detect genetic material (nucleic acids); NAATs for COVID-19 identify the ribonucleic acid (RNA) sequences that comprise the genetic material of the virus. Most NAATs need to be processed in a laboratory with variable time to receive results (approximately 1–2 days), but some NAATs are point-of-care tests with results available in about 15 - 45 minutes.

Antigen tests may also meet the definition of COVID-19 test under this standard. Antigen tests indicate current infection by detecting the presence of a specific viral antigen. Most can be processed at the point of care with results available in about 15 - 30 minutes. Antigen tests generally have similar specificity to, but are less sensitive than, NAATs.

Antigen tests are the only type of diagnostic tests that can be self-administered. To be a valid COVID-19 test under this standard, an antigen test may not be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. If an over-the-counter (OTC) test is being used, it must be used in accordance with the authorized instructions. The employer can validate the test through the use of a proctored test that is supervised by an authorized telehealth provider. Alternatively, the employer could proctor the OTC test itself.

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It should be noted that point-of-care (POC) testing must be performed in accordance with the Clinical Laboratory Improvement Amendments of 1988 (CLIA). The FDA has authorized POC tests that can be used at a place of employment when the facility is operating under a CLIA certificate of waiver. A CLIA certificate of waiver can be issued by the Centers for Medicare and Medicaid Services (CMS).

VBA Note: Anthem has partnered with Access Bio to have FDA Emergency Use Authorization COVID-19 rapid antigen testing available through a joint Bulk Ship Testing Availability Program. [This FAQ](#) includes pertinent information about the program, including an online order form. While all of the marketing materials only offer it to Anthem employers, the VBA has been informed that banks not covered under our plan may still apply to receive the test kits.

Q: Is the employer responsible for the cost of COVID-19 testing required by the OSHA ETS?

A: The OSHA ETS does not require employers to pay for the costs of COVID-19 testing. However, § 40.1-28 of the Code of Virginia makes it unlawful to require employees to pay for medical examinations required by the employer as a condition of employment. Virginia’s Dept. of Labor & Industry (DOLI) has expressly incorporated this provision of the Virginia Code into Virginia’s COVID-19 occupational safety standard where COVID-19 testing is used to determine whether an employee may return to work after testing positive for the disease. See below:

4. For purposes of this section, COVID-19 testing is considered a "medical examination" under § 40.1-28 of the Code of Virginia. Employers shall not require employees to pay for the cost of COVID-19 testing for return to work determinations. If an employer's health insurance covers the entire cost of COVID-19 testing, use of the insurance coverage would not be considered a violation of this subdivision C 4.

DOLI’s COVID-19 regulations only address an employer’s obligation to pay for COVID-19 testing where it is used to determine if an employee can return to work post-infection. However, the law may apply in the context required by the ETS.

Q: Will an employer be cited by OSHA if there are a lack of adequate COVID-19 testing supplies?

A: In the event that an individual employer is unable to comply with paragraph (g) of this ETS due to inadequate test supply or laboratory capacity, OSHA will look at efforts made by the employer to comply, as well as the pattern and practice of the employer’s testing program, and consider refraining from enforcement where the facts show good faith in attempting to comply with the standard.

Q: Can an unvaccinated employee come to the workplace if they didn’t obtain a COVID-19 test, but wear a mask and socially distance?

A: No. If an employee does not provide the result of a COVID-19 test as required by paragraph (g)(1) of the standard, the employer must keep the employee removed from the workplace until

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the employee provides a test result. In addition to being tested for COVID-19 on a weekly basis, unvaccinated employees must also wear a face covering at the workplace.

Q: Are there permitted exemptions to COVID-19 testing or vaccination requirements?

A: Employers can mandate vaccinations in their workplace as long as they provide accommodations for workers who say they can't receive a shot because of their religious beliefs or a disability. Those accommodations are required by the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964, which allow employers to refuse only if they have an “undue hardship” or if providing an accommodation would cause more than a de minimis cost to the employers.

An employer generally should assume that a request for religious accommodation is based on a sincerely held religious belief. However, if an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, the employer would be justified in making a limited factual inquiry and seeking additional supporting information. Factors that might undermine an employee's credibility include whether the employee has acted in a manner inconsistent with the professed belief; whether the accommodation sought is a particularly desirable benefit that is likely to be sought for nonreligious reasons; whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons. The Equal Employment Opportunity Commission (EEOC) stated that the definition of “religion” includes nontraditional religious beliefs, but does not include social, political or economic views, or personal preferences.

When an employee requests an accommodation, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. However, if an employer demonstrates that it is unable to reasonably accommodate an employee's religious belief without an “undue hardship” on its operations, then Title VII does not require the employer to provide the accommodation. The EEOC stated that an employer should rely on objective information—not speculative hardships—when assessing whether undue hardship would result from the employee's proposed accommodation. Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business—including, in this instance, the risk of the spread of COVID-19 to other employees or to the public. The EEOC further stated that certain common and relevant considerations during the COVID-19 pandemic include, for example, whether the employee requesting the religious accommodation works outdoors or indoors, works in a solitary or group work setting, or has close contact with other employees or members of the public (especially medically vulnerable individuals). Another relevant consideration is the number of employees who are seeking a similar accommodation (i.e., the cumulative cost or burden on the employer).

Q: If an employer adopts a mandatory vaccination policy, is the employer required to employ an unvaccinated person who refuses to get vaccinated?

A: No. The OSH Act does not prevent employers from taking disciplinary action against employees for engaging in activities that are not protected by the OSH Act. For example, an employee's refusal to comply with the employer's policy on vaccination would generally not be protected under the OSH Act. Be aware, however, that Section 11(c) of the OSH Act provides that an employer may not discharge or in any manner retaliate against an employee because the employee exercised any right under the OSH Act.

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Q: How long is the OSHA ETS in effect and will it change?

A: OSHA anticipates that the ETS will be in effect until May 4, 2022. The ETS serves as a proposal for normal rulemaking for a final federal COVID-19 standard. OSHA is seeking comment on all aspects of the ETS and whether the agency should adopt it as a final standard.

Helpful Resources:

- Federal Register OSHA ETS: <https://www.federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard>
- OSHA ETS FAQs: <https://www.osha.gov/coronavirus/ets2/faqs>
- Mandatory Vaccination Policy Template: <https://www.osha.gov/coronavirus/ets2>
- OSHA’s guidance regarding [Workers’ Rights under the COVID-19 Vaccination and Testing ETS](#)
- Equal Employment Opportunity Commission (EEOC), see “[What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.](#)”
- Virginia Administrative, Code Chapter 220. Standard for Infectious Disease Prevention of the SARS-CoV-2 Virus that Causes COVID-19: <https://law.lis.virginia.gov/admincode/title16/agency25/chapter220/>
- Biden EO 14042: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>