

MDS Alert

Reader Questions: Note This Exception to OSHA COVID-19 ETS

Question: The recent emergency temporary standard (ETS) released by the Occupational Safety and Health Administration (OSHA) talks about employer responsibilities for vaccination education and paid time to recover from vaccination side effects, but is there any mandate included saying that healthcare workers must be vaccinated?

Michigan Subscriber

Answer: OSHA has given healthcare providers a list as long as their arms of new requirements in the COVID-19 emergency temporary standard final rule. But the items left out of the rule are also important.

"Though COVID-19 vaccinations have been the primary focus for many healthcare employers, the COVID ETS does not include a vaccination mandate," point out attorneys **Sarah Carlins, David Lindsay, and Erinn Rigney** with law firm K&L Gates.

Instead, "the COVID ETS does exempt certain healthcare workplaces from some requirements if their workforce is fully vaccinated," Carlins, Lindsay, and Rigney highlight.

This exemption brings up the tricky topic of how to determine whether your employees are indeed vaccinated.



"Employers intending to rely on an employee's vaccination status to be exempt from certain requirements must include vaccination verification procedures in the COVID-19 plan and ensure that such procedures are compliant with applicable anti-discrimination laws and current agency guidelines," Carlins, Lindsay and Rigney advise.

OSHA offers this guidance on the topic in its 916-page preamble: "In order to make the determination of which workers are fully vaccinated, employers could, for example, vaccinate their workforce themselves; review CDC vaccination cards or similar verification issued by a pharmacy, healthcare provider, or other vaccinator; if available, review state-issued passes; or simply ask workers to attest whether they have been fully vaccinated."

That part about just asking "workers to attest whether they have been fully vaccinated" is important to note, stress attorneys **Dean Kelley** and **John Martin** with law firm Ogletree, Deakins, Nash, Smoak & Stewart. That will likely be the easiest, explicitly allowed path to proving full vaccination.

"If the employer is not able to determine that an employee is fully vaccinated, the employer must treat that employee as not fully vaccinated," OSHA instructs in the rule.

Note: The ETS is at www.federalregister.gov/documents/2021/06/21/2021-12428/occupational-exposure-to-covid-19-emergency-temporary-standard.