

NALP update on OSHA COVID vaccine Emergency Temporary Standard (November 5, 2021)

From Andrew Bray, Vice President of Government Relations,

Thursday morning the U.S. Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) announced an [Emergency Temporary Standard \(ETS\)](#) to minimize the risk of COVID-19 transmission in the workplace. The ETS establishes binding requirements to protect employees of large employers (100 or more employees) from the risk of contracting COVID-19 in the workplace. The date that employers must come into compliance is January 4, 2022.

Details:

- Employers with 100 or more workers must implement a mandatory vaccination program and/or mandate weekly testing and masks for those who refuse the vaccine. Two doses of either Pfizer or the Moderna shots or one dose of Johnson & Johnson's vaccine will be acceptable.
- OSHA will largely rely on complaints to investigate violations.
- Fines for violating the vaccination rules could start at \$13,653 each and go as high as \$136,532 per violation if employers are found to be willfully non-compliant or repeat offenses. The amounts are in line with violations for other rules the agency enforces.
- The 21 states with their own health and safety oversight will have 30 days to adopt OSHA's ETS or align with their own similar standards.

Questions Answered in Webinar:

Thursday afternoon, DOL and OSHA hosted a webinar to discuss the ETS and answer a few questions. It was stated that employers must provide paid time and paid leave to employees to get the vaccine and to recover from any potential side effects.

- Up to 4 hours of paid time (paid time not sick time) for each primary vaccination series dose – includes travel time
- Reasonable amount of paid sick leave to recover from any side effects experienced following each primary vaccination series dose (Employee may use sick leave if they have accrued any, if not then the employer must provide additional leave).
- Employers are not required to pay for any costs associated with testing; however, employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements.
- Employers are not prohibited from paying for costs associated with testing.
- Seasonal and temporary workers are accounted if the employer has reached 100 employees and if the employee is employed during the time that the ETS is in effect.

Regarding sick leave and providing sick leave in the document it is stated, "Although employee access to paid sick leave is less of a concern for employers with 100 or more employees, approximately 12% of employees in these situations do not have paid sick leave (BLS,

September 2021) and in some cases, employees may have already exhausted paid sick leave they have received and would need additional time from their employers to recover from vaccine side effects.”

The ETS does not apply to employees who do not report to a workplace where other individuals such as coworkers or customers are present, employees while they are working from home, or employees who work exclusively outdoors. The words “exclusively outdoors” are explained below.

Exclusively Outdoors

The rule published states that employees who work exclusively outdoors are exempt from the ETS. According to the document the Landscaping and Groundskeeping Workers 90% work outdoors constantly and 9% work outdoors exclusively.

Table IV.B.1-Occupations with workers who work outdoors

SOC Code	Occupation	Percent outdoors constantly	Percent outdoors exclusively
373011	Landscaping and Groundskeeping Workers	90%	9%
472061	Construction Laborers	79%	8%
474051	Highway Maintenance Workers	48%	5%
339092	Lifeguards, Ski Patrol, and Other Recreational Protective Service	45%	5%
470000	Construction and Extraction Occupations	42%	4%
471011	First-Line Supervisors of Construction Trades and Extraction	39%	4%
472073	Operating Engineers and Other Construction Equipment Operators	36%	4%
370000	Building and Grounds Cleaning and Maintenance Occupations	26%	3%
272022	Coaches and Scouts	14%	1%
530000	Transportation and Material Moving Occupations	8%	1%
390000	Personal Care and Service Occupations	5%	0.5%
270000	Arts, Design, Entertainment, Sports, and Media Occupations	2%	0.2%

Source: BLS Occupational Requirement Survey (BLS, 2020), OSHA calculations.

The rule gives two different perspectives regarding the landscaping industry in one single example:

- As a practical matter, determining the applicability of paragraph (b)(3)(iii) depends on the working conditions of individual employees. For example, if a landscaping contractor has at least 100 employees and is not covered by the exemptions in paragraph (b)(2), the standard applies to that employer even if a majority of the company’s employees work exclusively outdoors.
- Going back to the example of the large landscaping contractor, if all indoor workers either work from home or in locations where no other individuals are present, and all outdoors workers work exclusively outdoors and do not drive to worksites together in a company vehicle, the employer would be covered by the ETS but not required to comply with its provisions.

If you have workers that work exclusively outdoors they will not need to be vaccinated but this likely means the worker does not travel in a work vehicle with any other worker and never enters

an indoor facility like a workshop or office. NALP will be submitting question to gain further clarification prior to January implementation date.