



# The Masonry Update

what's happening in the masonry industry in New Jersey

MANDATED COVID VACCINE UPDATE - NOVEMBER 5, 2021

## OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (“OSHA”) EMERGENCY TEMPORARY STANDARD (“ETS”)

As you may have heard, yesterday, OSHA issued an ETS for Covid-19 Vaccination, Testing, and Masking for employers with 100 or more employees. It is likely that one or more businesses (or business associations) will shortly challenge the ETS in Court. Nonetheless, below is a summary of some of the major provisions of the ETS.

### General Information

Embedded herein is a link to the [ETS](#) and a link to OSHA’s [Summary](#) of the ETS.

In implementing the ETS, OSHA found that unvaccinated workers are much more likely to contract and transmit COVID-19 in the workplace than vaccinated workers, and because of such, unvaccinated workers face grave danger from exposure to COVID-19 in the workplace. It further found that the ETS was necessary because workers are becoming ill and dying and that vaccination can largely prevent such. Finally, it found that limiting the ETS to employers with 100 or more employees was done to prevent hardships on smaller companies, but implied that at a later date, the ETS could be extended to smaller companies.

The ETS further states that it preempts state and local governmental laws and regulations that ban mandatory implementation of the requirements of the ETS, and States with their own OSHA must implement the requirements of this ETS into their own regulations within 30 days. It also states that the ETS is effective immediately, but it also serves as a proposed rule. For 30 days, the public, including employers, may submit comments to OSHA about the ETS, identified by Docket No. OSHA-2021-0007, electronically at <https://www.regulations.gov>.

### ETS Coverage

The ETS covers all employers who have 100 more employees on November 5, 2021 (or thereafter have 100 or more employees). Once an employer is subject to the ETS, it remains subject to the ETS regardless of the number of its employees. Exempted from the ETS are employers covered by the Safer Federal Workforce Task Force such as federal contractors and employers covered by the ETS for Healthcare. The ETS requirements for vaccination, testing, and masking do 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; however, these employees are counted in determining whether the employer has 100 or more employees.

### ETS Requirements

**Employer Policy on Vaccinations.** Similar to the ETS for Healthcare, the ETS does not actually mandate Covid-19 Vaccination Requirements. Instead, by December 5, 2021, the ETS requires covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy which requires employees who are not fully vaccinated to wear a face-covering at the workplace and beginning January 4, 2022, undergo weekly COVID-19 testing. The ETS also requires employers to determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each employee’s vaccination status, and maintain a roster of each employee’s vaccination status. In addition, the ETS requires employers to support vaccination by providing employees reasonable time, including up to four (4) hours of paid time, to receive each vaccination dose, and reasonable time and paid sick leave to recover from side effects experienced following each dose.

**Documentation.** The employer must maintain a roster of all employees and clearly indicate for each one whether they

are:

- fully vaccinated,
- partially (not fully) vaccinated,
- not fully vaccinated because of a medical or religious accommodation, or
- not fully vaccinated because they have not provided acceptable proof of their vaccination status.

Although unvaccinated employees will not have proof of vaccination status, the standard requires the employer to include all employees, regardless of vaccination status, on the roster.

The employer must require each vaccinated employee to provide acceptable proof of vaccination status, including whether they are fully or partially vaccinated, such as:

- the record of immunization from a health care provider or pharmacy;
- a copy of the U.S. COVID-19 Vaccination Record Card;
- a copy of medical records documenting the vaccination;
- a copy of immunization records from a public health, state, or tribal immunization information system; or
- 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).

To be acceptable as proof of vaccination, any documentation should generally include the employee's name, 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). In some cases, state immunization records may not include one or more of these data fields, such as clinic site; in those circumstances, an employer can still rely upon the State immunization record as acceptable proof of vaccination. An employee who does not possess their COVID-19 vaccination record (e.g., because it was lost or stolen) should contact their vaccination provider (e.g., local pharmacy, physician's office) to obtain a new copy or utilize their state health department's immunization information system. In instances where an employee is unable to produce acceptable proof of vaccination listed above, a signed and dated statement by the employee will be acceptable. The employee's statement must:

1. attest to their vaccination status (fully vaccinated or partially vaccinated);
2. attest that they have lost or are otherwise unable to produce proof required by this section; and
3. include 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."

Employees should include in their statement, to the best of their recollection, 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) to be acceptable. Employers must require employees to provide one of the listed acceptable documents for proof of vaccination or the employee statement as described above. These are the only acceptable forms of proof of vaccination status.

The records and roster required by the ETS are considered to be employee medical records and must be maintained as such records in accordance with 29 CFR 1910.1020 and must not be disclosed except as required or authorized by this ETS or other federal law, including the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq.

The employer must also make available, for examination and copying, the individual COVID-19 vaccine documentation for a particular employee to that employee and to anyone having written authorized consent of that employee. In addition, the ETS provides that by the end of the next business day after a request by an employee or an employee representative, the employer must make available to the requester the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

**Employees Who Previously Had Covid-19.** The ETS does not offer any exemptions to vaccination requirements based on "natural immunity" or the presence of antibodies from a previous infection. In general, "Fully Vaccinated" means:

- 2 weeks after their second dose in a 2-dose series, such as the Pfizer or Moderna vaccines, or
- 2 weeks after a single-dose vaccine, such as Johnson & Johnson's.

**Employees Who are Not Fully vaccinated.** Beginning on January 4, 2022, the ETS requires employers to ensure that each employee who is not fully vaccinated is tested for Covid-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer). The ETS does not require employers to pay for any costs associated with testing. However, employer payment for testing may be required by other laws, regulations, or collective bargaining agreements. The ETS further requires employers to: (1) require employees to promptly provide notice when they receive a positive Covid-19 test or are diagnosed with Covid-19; (2) immediately remove any employee from the workplace, regardless of vaccination status, who received a positive Covid-19 test or is diagnosed with Covid-19 by a licensed healthcare provider; (3) keep removed employees out of the

workplace until they meet criteria for returning to work. Finally, the ETS requires employers to ensure that each employee who is not fully vaccinated wears a face covering (below is the ETS' updated definition of what qualifies as a face covering) when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances. Employers must not prevent any employee, regardless of vaccination status, from voluntarily wearing a face-covering unless it creates a serious workplace hazard (e.g., interfering with the safe operation of equipment).

**Face Covering Definition.** Unlike previous guidance, which permitted a broad definition of face covering, the ETS defines “face covering” as a covering that:

- (1) completely covers the nose and mouth;
- (2) is made with two or more layers of a breathable fabric that is tightly woven (i.e., fabrics that do not let light pass through when held up to a light source);
- (3) is secured to the head with ties, ear loops, or elastic bands that go behind the head. If gaiters are worn, they should have two layers of fabric or be folded to make two layers;
- (4) fits snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and
- (5) is a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings.

This definition of face-covering allows various different types of masks, including clear face coverings or cloth face coverings with a clear plastic panel that, despite the non-cloth material allowing light to pass through, otherwise meet this definition and which may be used to facilitate communication with people who are hearing impaired or others who need to see a speaker's mouth or facial expressions to understand speech or sign language, respectively. Face coverings can be manufactured or homemade, and they can incorporate a variety of designs, structures, and materials. Face coverings provide variable levels of protection based on their design and construction.

**Multi-employer Worksites.** On a typical multi-employer worksite such as a construction site, *each* company would only need to count its *own* employees. However, the company has to count all of its employees regardless of where they report for work on a particular day in determining whether or not it has 100 or more employees. Thus, for example, if a contractor has more than 100 employees spread out over multiple construction sites, that employer is covered under this ETS even if it does not have 100 or more employees present at any one worksite.

**Unionized Companies.** For unionized companies covered by the ETS, it is unlikely that you would need to bargain with the union over implementing the ETS as written, which allows weekly testing and masking in lieu of vaccination. However, you would likely need to bargain with the union if you imposed mandatory vaccination requirements. Moreover, even if you did not have to bargain with the union over mandatory vaccination requirements, it is highly likely that you would need to bargain over the effect of the compulsory vaccination policy, such as disciplinary actions associated therewith.

**Penalties.** OSHA may fine a covered employer that does not comply with the ETS up to \$13,653 for each violation (each employee could be considered to be a separate violation) of the standard. Employers that willfully or repeatedly violate the standard can be fined up to \$136,532. However, the Build Back Better Act, if enacted, would raise the maximum fine to \$700,000.

## **FEDERAL CONTRACTORS.**

As previously mentioned, President Biden issued an Executive Order (“EO”) that federal agencies are required to add a requirement that the contractor or subcontractor “provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract” into “any new contract; new contract-like instrument; 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”. I am hearing of cases where this requirement is being interpreted by some federal agencies to mean any work on a federal contract after October 1, 2021 (the beginning of the federal fiscal year). At least some agencies are requiring federal contractors and subcontractors to sign an amendment to their contract in order to work on that contract after October 1, 2021. The Task Force's Guidance for Federal Contractors can be found at this [Link](#).

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