

## **OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard**

### *Determining If Your Organization Meets the Minimum 100 Employee Threshold*

On November 5, 2021, the Occupational Safety and Health Administration (OSHA) released a new [Emergency Temporary Standard \(ETS\) on COVID-19 Vaccinations and Testing](#). The ETS covers employers with 100 or more employees firm or corporate-wide.

It appears assisted living is not included in this ETS as OSHA specifically excludes settings that were the subject of requirements in the Healthcare [ETS OSHA](#) released in July 2021, which included AL. This was likely an oversight by OSHA that will be corrected to include health care settings not covered in the recently released CMS Vaccine Interim Final Rule. The OSHA ETS does not apply to the SNF, NF, and ICF-IID providers that are covered under the CMS vaccine IFR but could apply to some SNFs, NFs, and ICF-IID provider's corporate offices. For now, AHCA/NCAL recommends AL providers with 100 or more employees (or providers who are part of a multi-facility organization with 100 or more employees) start preparing to be in compliance with the ETS.

### **How to count employees across your organization including centers and communities**

- For a single corporate entity with multiple locations, all employees at all locations are counted for purposes of the 100-employee coverage threshold.
  - For example, if an organization has multiple SNFs or ALs, if all of the SNFs/ALs and corporate office are the same corporate entity then for purposes of the 100-employee threshold all employees at all locations are counted.
- If the example above doesn't apply, OSHA has indicated that two or more related entities also may be regarded as a single employer for coverage purposes if they handle safety matters as one company. In this case, the employees of all entities making up the integrated single employer must be counted for purposes of the 100-employee coverage threshold. This would mean that the employees at the corporate office, if they are not included in the CMS IFR's mandate, would be subject to the OSHA vaccine mandate ETS.
  - For example, if a company has multiple SNFs or ALs, if each SNF or AL and the corporate office are all distinct legal entities, then they may still be considered a single integrated employer for purposes of the 100-employee

threshold if health and safety matters are handled as one company/entity or safety policy is set at the corporate level.

- If each SNF/AL and corporate office operates as its own company with sole responsibility for health and safety matters within each entity, then they can be distinguished, and the employees not counted across locations for the 100-employee threshold.

### **Which employees are included in the count to meet the 100-employee threshold?**

- For purposes of counting the 100-employee coverage threshold for the OSHA Vaccine/Testing ETS all employees are counted, including those covered by the [OSHA Healthcare ETS](#) even though those employees are not subject to the OSHA Vaccine/Testing ETS requirements.
- The OSHA Vaccine/Testing ETS requirements do not apply to employees who are 100% remote workers, but those employees still count for purposes of calculating the 100-employee coverage threshold.
- Definition of “employee” - OSHA has indicated that for the OSHA Vaccine/Testing ETS, “employee” includes all full-time, part-time, and seasonal/temporary employees directly employed by the employer. The ETS does not include independent contractors or staffing agency employees.

### **Changes in number of current or future employees**

- Once an employer hits the 100-employee coverage threshold it continues to be covered even if it falls below that threshold later.
- A company becomes covered if as of the effective date is below the threshold but later hits the threshold while the ETS is in effect).

\*Currently, there are legal challenges to the ETS and may be more over the coming weeks. AHCA/NCAL will update this document if there are changes but recommends providers still plan for implementation of the ETS.