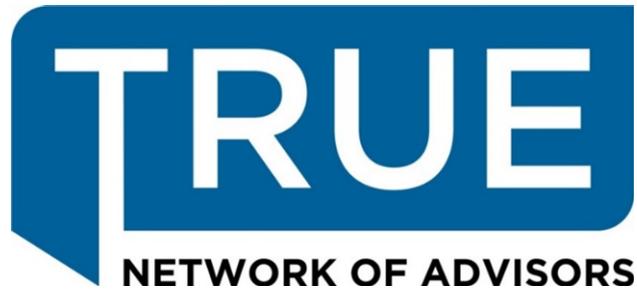


# New Year, New Updates: Status of the OSHA ETS & ACA Reporting



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# Agenda

- ▼ **EEO-1 Reporting Update**
- ▼ **OSHA ETS & the U.S. Supreme Court**
- ▼ **Coverage of OTC Covid Tests**
- ▼ **ACA Reporting Update**

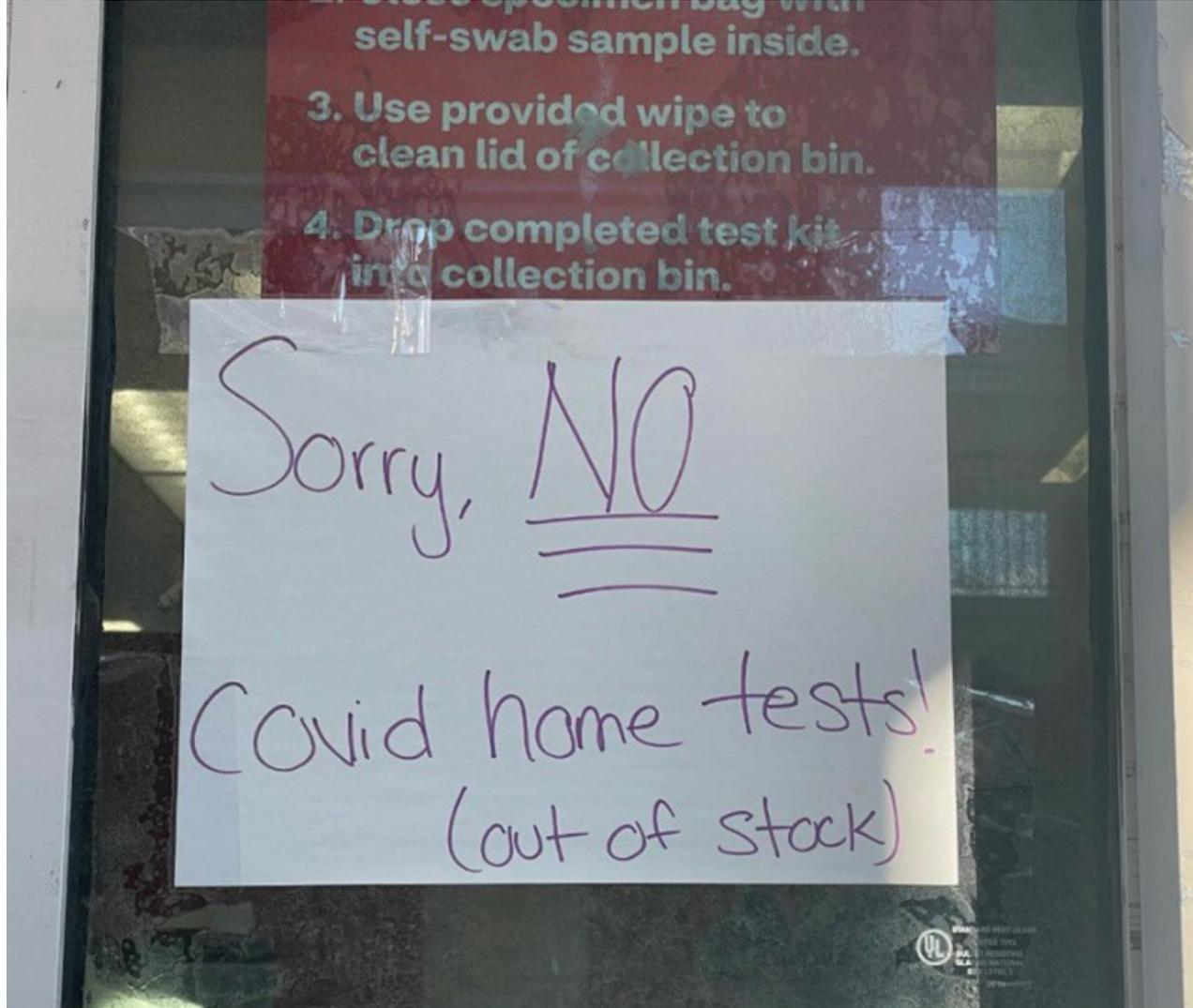
# EEO-1 Reporting Is Back

## ▼ **Component 1 Data for Calendar Year 2021**

- ▼ Filing opens on April 12, 2022
- ▼ Deadline to file by May 17, 2022
- ▼ Covered employers will have to provide demographic data by EEO job group for all locations, including those with fewer than 50 (EEOC eliminating “Type 6” reports that did not require demographic data for locations with fewer than 50)

## ▼ **EEOC said it will not collect “Component 2” Data in 2022**

# 2022: Reading the Signs – Sign #1



## 2022: Reading the Signs – Sign #2



## 2022: Reading the Signs – Sign #3



# Vaccine Mandate Update

## ▼ OSHA ETS Halted by US Supreme Court

- ▼ On January 13, 2022, in a 6-3 decision in the case of *NFIB v. OSHA*, the U.S. Supreme Court issued a **nationwide injunction barring further implementation or enforcement of the federal OSHA ETS**, which would have required employers with 100+ employees to implement a vaccine or test mandate
- ▼ The Court's decision **should not be read as hostile to employer vaccine mandates** or even vaccine mandates generally
  - ▼ Employers **may still implement their own** vaccine mandates
- ▼ Rather, specific to the OSHA ETS, the Court held that **OSHA exceeded its authority** granted by Congress under the Occupational Safety and Health Act
- ▼ For states without their own OSHA agency (i.e. states where employers follow federal OSHA), this ruling **forecloses further OSHA efforts to mandate vaccines**
- ▼ Although the Court's ruling should also have a chilling effect on any vaccine mandates contemplated by **state OSHA plans** (22 states including west coast states, most of the mid-Atlantic and the Midwest), employers in those states will need to monitor what measures the state OSHA agencies may implement in the wake of this ruling

# Vaccine Mandate Update

## ▼ SCOTUS Allows CMS Vaccine Mandate

- ▼ In a 5-4 ruling the same day as the OSHA ETS decision, the Supreme Court **lifted injunctions on the vaccine mandate\*** implemented by the Centers for Medicare and Medicaid Services (“CMS”)
- ▼ The CMS vaccine mandate applies to virtually all employees in any healthcare facility that is an approved provider for CMS, regardless of whether they are involved in any direct patient care

\*An injunction against implementation/enforcement of the CMS vaccine mandate remains in effect in Texas, for now

# Vaccine Mandate Update

## ▼ Federal Contractor Vaccine Mandate

- ▼ On December 7, 2021, a federal district court in Georgia issued a nationwide injunction against any federal agency enforcing the vaccine mandate obligations issued by the Safer Federal Workforce Task Force pursuant to President Biden's Executive Order 14042
- ▼ On December 17, 2021, the 11<sup>th</sup> Circuit Court of Appeals declined to set aside that injunction, keeping it in place as the litigation continues
- ▼ The Safer Federal Workforce Task Force has updated its guidance: "The Government will take no action to enforce the clause implementing requirements of Executive Order 14042..." See: <https://www.saferfederalworkforce.gov/contractors/>
- ▼ So long as the injunction remains in effect, federal contractors and subcontractors nationwide have no federal legal obligation to require employee vaccinations
- ▼ Federal agency installations still have relatively unfettered discretion to impose tight controls over who may have access to their facilities and under what conditions, including by imposing strict rules around COVID-19 safety and vaccination status

# Covering At Home Covid Tests

- ▼ Prior guidance\* required coverage only when test ordered by health care provider who has determined that the test is medically appropriate
  - ▼ At the time of prior FAQs, the FDA had not yet authorized any COVID-19 diagnostic tests to be completely used and processed at home
  - ▼ DOL left the door open to address in future guidance

\* See [\*\*DOL FAQs Part 51\*\*](#), Footnote 5.

# Covering At Home Covid Tests

- ▼ **DOL FAQs Part 51** generally requires coverage of OTC COVID-19 tests with or without an order or individualized clinical assessment by an attending health care provider
- ▼ Coverage must be provided without imposing any cost-sharing requirements (including out-of-pocket expense), prior authorization, or other medical management requirements
- ▼ Provides two safe harbors that provide flexibility for direct coverage through network coverage and reasonable quantity limits
- ▼ FAQs Part 51 does NOT modify previous guidance specifying that coverage is not required for testing for purposes not primarily intended for individualized diagnosis or treatment of COVID-19, including the guidance that states that plans and issuers are not required to provide coverage of testing (including an OTC COVID-19 test) that is for employment purposes
- ▼ Requirements effective January 15, 2022

# Covering At Home Covid Tests

- ▼ If plan provides *direct coverage*, may it limit coverage to only tests that are provided through preferred pharmacies or other retailers?
  - ▼ No, but coverage may differ for direct coverage if plan satisfies *direct coverage safe harbor*
  - ▼ Direct Coverage vs. Participant Reimbursements
    - ▼ Direct Coverage – Plan reimburses sellers of OTC COVID-19 tests directly
    - ▼ Participant Reimbursements – Participant pays and submits for reimbursement

# Covering At Home Covid Tests

- ▼ Safe Harbor One: Different Rates for Direct Coverage through Preferred Network Pharmacies
  - ▼ Plans may arrange for **direct coverage** of OTC COVID-19 tests through **both its pharmacy network and a direct-to-consumer shipping program**
  - ▼ And otherwise limit reimbursement for OTC COVID-19 tests from **nonpreferred pharmacies** or other retailers **to no less than the actual price, or \$12 per test (whichever is lower)**
- ▼ Conditions:
  - ▼ Requires notice of relevant information and adequate access
  - ▼ Safe harbor only applies with respect to tests administered without a provider's involvement or prescription

# Covering At Home Covid Tests

- ▼ **If a plan or issuer otherwise provides coverage without cost sharing for COVID-19 diagnostic tests, may a plan or issuer set limits on the number or frequency of OTC COVID-19 tests covered without cost sharing under a plan or coverage?**
  - ▼ Yes, if the plan meets the *reasonable quantity limits safe harbor*
- ▼ **Safe Harbor Two: Reasonable Limits on Quantity**
  - ▼ Plan may limit the number of OTC COVID-19 tests covered for each participant, beneficiary, or enrollee to no less than 8 tests per 30-day period (or per calendar month)
- ▼ **Conditions:**
  - ▼ In applying the quantity limit of 8, plans and issuers may count each test separately, even if multiple tests are sold in one package
  - ▼ Safe harbor only applies with respect to tests administered without a provider's involvement or prescription

# Covering At Home Covid Tests

- ▼ **Q4: When providing coverage of OTC COVID-19 tests, are plans and issuers permitted to address suspected fraud and abuse?**
  - ▼ Yes, although the FFCRA prohibits medical management of coverage of COVID-19 diagnostic testing, plans and issuers may act to prevent, detect, and address fraud and abuse
- ▼ **Examples of permissible activities include the following:**
  - ▼ Signature on attestation document indicating test was purchased for the individual's own personal use, provided that such steps do not create significant barriers to obtain these tests
    - ▼ May also include additional details, including that the test is not for employment purposes, has not been (and will not be) reimbursed by another source, and is not for resale
    - ▼ However, the Departments are of the view that fraud and abuse programs that require an individual to submit multiple documents or involve numerous steps that unduly delay a participant's, beneficiary's, or enrollee's access to, or reimbursement for, OTC COVID-19 tests are not reasonable
  - ▼ Plan may require reasonable documentation of proof of purchase with a claim for reimbursement for the cost of an OTC COVID-19 test, such as UPC code or receipt

# ACA Reporting Update

- ▼ IRS Proposed Regulations ([REG-109128-21](#))
  - ▼ Employers may rely on proposed regulations and guidance for 2021 ACA reporting
- ▼ Proposes an automatic 30-day extension to January 31 deadline for providing employee statements (1095-C)
  - ▼ Extension currently available by filing Form 8809
  - ▼ For 2022: **March 2, 2022**
  - ▼ Proposed extension does **NOT** apply to deadline to file with the IRS
- ▼ **Expired:** Good Faith Transition Relief

# ACA Reporting

## 2021 ACA Reporting Deadlines

### To IRS

#### Paper Filers

**February 28, 2022**

#### Electronic Filers

**March 31, 2022**

### To Employees

**March 2, 2022**

*(relying on extension in  
proposed regulations)*

# ACA Reporting Update

- ▼ **New Codes for Form 1095-C Related to individual coverage HRAs**
  - ▼ **1T. Individual coverage HRA offered to employee and spouse (no dependents) with affordability determined using employee's primary residence location ZIP code.**
  - ▼ **1U. Individual coverage HRA offered to employee and spouse (no dependents) using employee's primary employment site ZIP code affordability safe harbor.**
- ▼ **Alternative manner of furnishing statements to non-full-time employees via website**
  - ▼ **Does not apply to Forms 1095-C issued to full-time employees**
- ▼ **Penalties: \$280 per form (x2)**

# ACA Reporting Best Practices

- ▼ **Expired:** Good Faith Transition Relief
- ▼ Save PDF files
- ▼ Document efforts, responsible employees, service providers
- ▼ Double check ACA reporting service providers
  - ▼ Disclaimers..?
- ▼ Spot check for **Red Flag** code combinations
- ▼ Use “Buckets” for Coding Audit
  - ▼ e.g., status changes, 1H, PTC eligibility
- ▼ Form 1094-C – Be sure to mark “Yes” in Line 23, Column A
- ▼ Must complete Line 14
- ▼ Best to complete Line 16



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