

Client Alert

NOVEMBER 10, 2021

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Healthcare

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Biden Administration Unveils New COVID-19 Vaccination and Testing Requirements for Large Businesses and Healthcare Workers

On November 4, 2021, the Biden administration published two new rules governing employers with 100 or more employees and health care workers at hospitals, nursing homes and other facilities that participate in Medicare and Medicaid. These rules are explained in more detail below.

OSHA – Emergency Temporary Standard Governing Large Employers

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) published the [COVID-19 Vaccination and Testing Emergency Temporary Standard \(ETS\)](#). The ETS requires private employers with 100 or more employees (across all worksites) to develop, implement, and enforce COVID-19 testing and vaccination policies. To comply with the ETS, covered employers must do the following:

- **Policy:** Implement a written COVID-19 vaccination policy requiring that each employee be fully vaccinated or provide a negative COVID-19 test at least once every 7 days. Unvaccinated employees also should wear a face covering at all times when indoors in the workplace (except in limited situations as outlined in the ETS).
- **Record:** Maintain a record of each employee's vaccination status and preserve acceptable proof of vaccination for each employee.
- **Time Off:** Provide employees with up to 4 hours of paid time off, including travel time, at the employee's regular rate of pay, for each of their primary vaccination dose(s), as well as reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination dose. The ETS provides additional requirements governing such leave.

- **Testing:** Employees required to test weekly for COVID-19 may use any test that is cleared, approved, or authorized by the FDA to detect current infection. Over-the-counter tests that are both self-administered and self-read by the employee are excluded unless supervised by the employer or a telehealth provider. The ETS does not require the employer to pay for any costs associated with testing, unless required by other laws, regulations, or collective bargaining agreements. Employees who do not provide a negative test result are not permitted in the workplace until a test result is provided. Employees who test positive for COVID-19 do not need to undergo testing for 90 days following the date of their positive test or diagnosis. Employers are required to maintain records of test results.
- **Positive Cases:** Regardless of vaccination status, employees are required to inform the employer if they receive a positive COVID-19 test. If an employee tests positive, then that employee must be immediately removed from the workplace and must not return until: the employee receives a negative test result, meets the CDC's Isolation Guidance, or receives a recommendation to return to work from a licensed healthcare provider. The ETS does not require employers to provide paid time to any employee due to a positive COVID-19 test or diagnosis.
- **Deadlines:** The deadline for compliance with the vaccination and testing requirements is **January 4, 2022**. The deadline for compliance with the remainder of the ETS, including the requirements for face coverings and paid time for vaccination, is **December 5, 2021**.

As anticipated, lawsuits challenging the OSHA ETS were filed immediately, including in the 6th, 7th, 8th and 11th Circuits. On November 6, 2021, the Fifth Circuit stayed the ETS while it considers arguments for a permanent injunction. A decision is expected to be issued this week.

Omnibus COVID-19 Health Care Staff Vaccination

The Centers for Medicare & Medicaid Services (CMS) of the Department of Health and Human Services issued an interim final rule ("IFR") that requires staff at 21 types* of health care facilities and service providers that participate in Medicare or Medicaid programs to be fully vaccinated against COVID-19 by January 4, 2022. The IFR amends the respective Conditions of Participation, Conditions for Coverage, and Requirements for Participation in the Medicare and Medicaid programs for these facilities and providers to require these facilities and service providers to develop and implement policies and procedures to ensure all staff (with limited exceptions) are fully vaccinated. The required policies and procedures must also establish processes for (i) allowing staff to request exemptions from vaccination based on applicable Federal law; (ii) tracking and documenting vaccination status and requests for exemption, including documentation required for medical exemptions; and (iii) implementing precautions to mitigate the transmission and spread of COVID-19 for all staff who are not fully vaccinated. Notably, although this rule allows 60 days after publication for staff to be fully vaccinated, the rule is effective December 5, 2021 for the initial phase of implementation, including compliance with requirements relating to the development and implementation of policies and procedures, as well as requirements for staff to have received at least a single dose vaccine or the initial dose of a primary series, or to have requested and/or been granted an exemption.

Except in a few very limited situations applicable to a particular facility or provider, the IFR's vaccination mandate applies to all staff, regardless of whether their positions are clinical or non-clinical and includes employees, students, trainees, and volunteers. The rule also covers individuals who provide treatment or other services under contract or other arrangements. This vaccination mandate does not cover staff who have been granted exemptions under applicable law or CDC guidance or individuals whose work is performed via telehealth or telemedicine arrangements.

Facilities and providers covered by the IFR should carefully review relevant requirements and consult legal counsel as necessary to ensure their compliance with specific practices and procedures now required by the IFR within the short timeframe set by the rule.

The text of the CMS rule may be found [here](#).



* The providers and suppliers covered by this IFR include: Ambulatory Surgical Centers (ASCs); hospices; psychiatric residential treatment facilities (PRTFs); Programs of All-Inclusive Care for the Elderly (PACE); hospitals; Long Term Care (LTC) Facilities, including Skilled Nursing Facilities (SNFs) and Nursing Facilities (NFs); Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs-IID); Home Health Agencies (HHAs); Comprehensive Outpatient Rehabilitation Facilities (CORFs); Critical Access Hospitals (CAHs); clinics, rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services; Community Mental Health Centers (CMHCs); Home Infusion Therapy (HIT) suppliers; Rural Health Clinics (RHCs)/Federally Qualified Health Centers (FQHCs); and End-Stage Renal Disease (ESRD) facilities.

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