

Feds Release New COVID-19 Vaccination Rules for Large Employers, Medicare/Medicaid Providers

November 4, 2021

As announced by President Joe Biden in September, vaccine mandates are becoming a reality for private sector employers having 100 or more employees and for providers of services under Medicaid and Medicare. Both become **fully** implemented by Jan. 4, 2022 but both will likely also face court challenges. The details for each are provided below.

OSHA's Mandate for Large Employers

The Occupational Safety & Health Administration (OSHA) just released its *COVID-19 Vaccine and Testing Emergency Temporary Standard (ETS)* for employers with 100 employees or more, preempting all state and local laws and regulations. It is effective upon publication in the Federal Register.

The Michigan Occupational Safety & Health Administration (MIOSHA) must adopt a plan that is at least as effective, within 30 days. While OSHA covers only private employers, MIOSHA's plan must also cover state and local government employees, including school systems.

Employers must comply by Dec. 4, with testing compliance by Jan. 4, 2022. OSHA strongly encourages employers to comply as soon as possible.

The ETS applies to all employers (excluding health care and federal contractors who are covered under other rules) that have a total of at least 100 employees, across all of their U.S. locations, at any time the ETS is in effect. Employees who work remotely are counted as well as part-time employees, but independent contractors are not. Temporary employees are counted by the temp agency, not the host employer. Related entities may count as one, if they handle safety matters as one company.

Even if the ETS applies to an employer, the requirements may not apply to employees who:

- Do not report to a workplace where others are present;
- Who work from home exclusively; or
- Who work exclusively outdoors.

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Employers must establish, implement and enforce a written mandatory vaccination policy that requires vaccination of all employees, including vaccination of all new employees as soon as practicable, other than employees who are medically exempt or legally entitled to a reasonable accommodation due to disability or sincerely held religious beliefs. Employers are exempt from the mandatory vaccination requirement only if the employer's policy requires unvaccinated employees to provide proof of regular testing for COVID-19 and requires them to wear a face covering.

The ETS requires not fully vaccinated employees, who report at least once every seven days to a workplace where others are present, to be tested for COVID-19 at least once every seven days; and provide documentation of the most recent test result to the employer within seven days of providing the last test result. Employees who come in less frequently, must be tested within seven days prior to coming into the workplace and provide test documentation upon returning to the workplace. An employee who tests positive can't be required to take another test for 90 days.

Employers *are* required to provide employees with reasonable paid time off (up to four hours, if during work hours) to receive each vaccination dose, which can't be from their Paid Time Off (PTO) bank. Employers must also give employees reasonable time and paid sick leave (which can be from accrued sick leave banks) to recover from side effects experienced following any primary vaccination dose.

Employers are *not* required to pay for testing required of unvaccinated employees or pay employees who test positive and are kept out of the workplace, unless required to by other policies or laws.

Employers must still remove any employees with COVID-19 from the workplace, but unlike the health care ETS, the employer does not have to pay these employees.

The ETS requires employers to provide the following to all employees:

- Any employer policies and procedures established to comply with the ETS
- The details of the employer's vaccination policy
- The process that will be used to determine vaccination status
- The time and pay/leave they are entitled to for vaccinations and recovery
- The procedures to notify the employer of a positive test or diagnosis
- The procedure to request records
- The CDC's "Key Things to Know About COVID-19 Vaccines"
- Notice that anti-retaliation and/or discrimination applies

In addition, employers must give unvaccinated employees information about the employer's policies and procedures for COVID-19 testing and face coverings.

Employers must maintain confidential updated records of each employee; preserve acceptable (as defined in the ETS) written/documentary, proof of vaccination for fully and partially vaccinated employees; and maintain a roster of each employee's vaccination status. Employees who fail to submit acceptable proof of vaccination must be treated as unvaccinated.

It is expected that companies will self-police the rule. The usual rules apply to reporting work-related COVID-19 fatalities and hospitalizations. OSHA will respond to complaints from employees and include compliance as part of regular site inspections. OSHA's regular penalties apply to violations of the ETS.

Interim Final Rule by Centers for Medicare & Medicaid Services (CMS)

The Biden administration also released today the Interim-Final Rule (IFR) concerning COVID-19 vaccination requirements for health care staff employed by providers of services in the Medicare and Medicaid programs, as identified below.

While the publication is over 200 pages long, less than 50 pages contain the actual IFR.

The IFR would amend the regulations for 42 CFR Parts 416.51 (ambulatory surgical centers), 418.60 (hospices), 441.151 (psychiatric residential treatment facilities), 460.74 (programs of all-inclusive care for the elderly, known as PACE), 482.42 (hospitals, including acute care, psychiatric, swing beds, long term care, children's, transplant centers, cancer, and rehabilitation hospitals/inpatient rehabilitation facilities), 483.80 (long-term care facilities, including skilled and nursing homes), 483.430 (intermediate care facilities for individuals with intellectual disabilities), 484 (home health agencies), 485.58 and .70 (comprehensive outpatient rehabilitation facilities), 485.640 (critical access hospitals), 485.725 (clinics, rehabilitation agencies, public health agencies providing both outpatient physical therapy and speech-language pathology services), 485.904 (community mental health centers), 486.525 (home infusion therapy), 491.8 (rural health clinics and federally qualified health centers) and 494.30 (end-stage renal disease facilities).

Each of the parts amended is written in the same general broad strokes requiring the staff at the facility to be fully vaccinated against COVID-19 (two weeks or more after the completion of the "primary vaccination series," which includes both doses of the Moderna or Pfizer vaccines or the single dose of the Johnson & Johnson vaccine).

"Staff" is broadly defined to include everyone (employees, licensed practitioners, students, trainees, volunteers and others who provide care, treatment or other services for the entity or its patients under contract or any other arrangement), regardless of clinical responsibility or patient contact. However

there are exceptions for those who provide *exclusively* telehealth/ telemedicine services or support services. But the exception only applies if the work is performed *exclusively* outside of the settings where services are provided to the patients and the individual does not have any contact with patients, their families or caregivers.

Policies and procedures must include a process for ensuring that all workers (as identified above) have received, at a minimum, their single dose or first dose (of Moderna or Pfizer) *prior* to staff providing care for patients. There are exceptions for staff who have pending requests or who have been granted exemptions to the vaccination requirement or “for those staff for whom COVID-19 vaccination must be temporarily delayed, as recommended by the CDC, due to clinical precautions and considerations.”

Medical exemptions must be based on documentation which “confirms recognized clinical contraindications to COVID-19 vaccinations” and must be signed and dated by a licensed practitioner (and who is not the person requesting the exemption). Similar documentation must be obtained for staff who must delay vaccination (as recommended by CDC) due to “clinical precautions and considerations, including, but not limited to individuals with acute illness secondary to COVID-19, and individuals who received monoclonal antibodies or convalescent plasma for COVID-19 treatment.” Contingency plans must be in place for staff who are not fully vaccinated.

The IFR requires additional precautions to mitigate transmission and spread for staff who are not fully vaccinated and a process for tracking/documenting vaccine and booster status of staff and for those who have requested and been granted exemptions.

The interim final rule becomes effective the date it is published in the Federal Register, which is anticipated to occur on Friday, Nov. 5 and public comments are due within 60 days of publication. However, implementation is in two phases, one occurring 30 days for most everything above and one 60 days after publication of the rule (for staff who must delay vaccination on a temporary basis). “Staff who have completed a primary vaccination series by [the latter deadline] are considered to have met these requirements, even if they have not yet completed the 14-day waiting period required for full vaccination.”

The IFR does not apply to health care entities (such as physician offices and staff in small health care entities), that are not regulated by the CMS. However, because most states have separate licensing requirements for these entities, it is important to review applicable state rules. Also, those with 100 or more employees may be subject to the new rule published by OSHA or state counterparts.

As anticipated, there is a lot of opposition to both rules, and we expect to see legal challenges begin immediately, including from 24 state attorney generals. Michigan Congressman John Moolenaar has already introduced an Act to try and block OSHA from implementing its new emergency temporary standard. We will be sure to issue more updates as developments warrant but, until then, please

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contact your Plunkett Cooney labor and employment attorney if you have specific questions.