

Nov. 4, 2021

## OSHA, CMS issue much-anticipated vaccine-related guidance

The wait is over. The Occupational Health and Safety Administration (OSHA) and the Centers for Medicare and Medicaid Services (CMS) have issued guidance implementing their vaccine-related requirements directed by the Biden administration in its announcement in early September.

The OSHA guidance, in the form of Emergency Temporary Standards (ETS), requires larger employers to either require their employees to be vaccinated or provide an option for unvaccinated employees to provide weekly proof of COVID-19 testing. The guidance provides exceptions for health or religious reasons. The CMS guidance, in the form of an interim final regulation, imposes an outright vaccination mandate on healthcare providers participating in the Medicare or Medicaid programs, and also allows for limited exceptions.

The rules take effect Nov. 5, 2021, and impose short timeframes for employers to come into compliance. Swift legal challenges to both are expected.

**Lockton comment:** The [OSHA announcement](#) included [FAQs](#) and sample policy templates for employers. The [CMS announcement](#) also included [FAQs](#).

Here are a few of the highlights:

### OSHA guidance

- The OSHA rules apply to employers with at least 100 employees on or after Nov. 5, 2021. The 100-employee threshold includes all employees, whether full-time, part-time, temporary, seasonal or remote, but independent contractors are not included. The employee count is limited to U.S.-based employees in the same corporate entity (EIN), not merely those at a single location. The count does not appear to be a “controlled group” calculation, aggregating employee counts across multiple, related EINs.
- Employers must provide employees with paid time off to be vaccinated (up to four hours per dose) and reasonable time (up to two days) to recover from a vaccine-related illness.
- Employees may bear the cost of weekly testing, but employers must ensure compliance with the Fair Labor Standards Act, Title VII, the Americans with Disabilities Act and any applicable state law.

**Lockton comment:** COVID-19 *diagnostic testing* ordered by a physician to rule a COVID-19 infection in or out must be paid by the employer’s group healthcare for individuals enrolled in that plan.

- Several testing methods are available; however, COVID-19 tests that are both self-administered and self-read do not meet the definition of “COVID-19 test” in this ETS (unless observed by the employer or an authorized telehealth proctor).
- Paid time off is not required for an employee removed from the workplace due to a positive COVID-19 test but may be required by other laws or a collective bargaining agreement.
- All testing records must be maintained by the employer and are subject to inspection by OSHA, but are not subject to OSHA record retention requirements for employee medical records and need only be retained for the duration of the ETS.
- OSHA anticipates the ETS will be in effect for six months from publication (until April 4, 2022).
- By Dec. 4, 2021, employers must:
  - Establish a policy on vaccination (mandate or testing alternative).
  - Determine vaccination status of employees, obtain proof of vaccination, maintain records and compile a roster of vaccination status.
  - Provide employees with paid time off for vaccinations and paid leave for reasonable recovery of vaccine-related illness.
  - Require employees to provide notice of a positive COVID-19 test or COVID-19 diagnosis.
  - Remove from the workplace any employee testing positive for COVID-19 or diagnosed with COVID-19.
  - Require employees who are not fully vaccinated to wear face coverings indoors or when inside a vehicle with another employee.
  - Provide employees with information about the ETS, workplace policies/procedures, vaccination efficacy, safety and benefits, protections against retaliation and discrimination, and laws that provide for criminal penalties for knowingly supplying false documentation.
  - Report work-related COVID-19 fatalities to OSHA within eight hours and work-related COVID-19 in-patient hospitalizations within 24 hours.
  - Make certain records available to employees and OSHA.
- The testing component begins Jan. 4, 2022.
- The OSHA guidance is intended to preempt, as to employers subject to the rule, and invalidate any state or local laws or rules that ban or limit an employer’s authority to require vaccination, face covering or testing.

**Lockton comment:** OSHA permits states that wish to assume responsibility for workplace safety standards to submit for approval a “state plan” that adopts workplace safety standards that are at least as effective as OSHA’s requirements. Twenty-two states have done so. State plans must either amend their standards to be identical or “at least as effective as” the new vaccination standard, or show that the existing plan is “at least as effective” as the new OSHA standard. State plans have 30 days to come into compliance. A state plan prohibiting employers from requiring vaccination is not “at least as effective” as the new OSHA standard.

- Entities that don’t comply will face significant OSHA fines.

## CMS guidance

- Generally, the CMS guidance applies to healthcare providers participating in the Medicare or Medicaid programs. Specifically, it applies to Medicare and Medicaid-certified providers and suppliers regulated under the Medicare health and safety standards known as Conditions of Participation (CoPs), Conditions for Coverage (CfCs), or Requirements. This includes:

- Ambulatory surgery centers
- Hospitals (including Indian Health Services facilities) and clinics, including critical access hospitals, rural health clinics and federally qualified health centers
- Community mental health centers, psychiatric residential treatment facilities and intermediate care facilities for individuals with intellectual disabilities
- Comprehensive outpatient rehabilitation facilities, rehabilitation agencies and public health agencies as providers of outpatient physical therapy and speech-language pathology services
- End-stage renal disease facilities (e.g., dialysis centers)
- Home health agencies
- Home infusion therapy suppliers
- Hospice facilities
- Long-term care facilities
- Programs for All-Inclusive Care for the Elderly Organizations (PACE).

Religious Nonmedical Health Care Institutions (RNHCIs), Organ Procurement Organizations (OPOs) and portable x-ray suppliers are not directly included in these requirements, but their staff might be indirectly subject to the mandate if performing services for an entity subject to the rule. In addition, the OSHA rule might apply.

The following are *not* subject to the rule. However, they might be subject to the OSHA rule:

- Physician offices
- Assisted living facilities, group homes and similar settings
- Medicaid home and community-based services
- Schools receiving Medicaid funding
- The rule requires vaccination of staff, *regardless of clinical responsibilities or patient contact*, including employees, licensed practitioners, students, trainees and volunteers. Vaccinations are also required for individuals providing care or other services for the facility under contract or other arrangement, as well as for physicians with admitting privileges at the facility. *However, vaccination of individuals providing services 100% remotely and who have no direct contact with patients or other staff are not subject to the mandate.*
- Vaccinations (subject to limited exceptions, see below) are required as follows:
  - By Dec. 5, 2021: First vaccine dose administered (or the only dose, for single-dose vaccines)
  - By Jan. 4, 2022: Fully vaccinated (complete the primary vaccination series)

Proof of booster shots is not required at this time. Temporary delays to these deadlines are allowed for individuals where appropriate, e.g., a recent COVID-19 diagnosis. There is no exception for individuals with COVID-19 antibodies.

- Exemptions apply for:
  - Medical conditions where vaccines are not recommended; documentation in support of this exemption must be signed and dated by a licensed practitioner, not the individual seeking the exemption
  - Sincere religious beliefs, observances or practices, per [EEOC guidelines for religious accommodations](#)

Where an exemption is granted, the healthcare facility should implement additional precautions for any staff who are not vaccinated to mitigate the transmission and spread of COVID-19. CMS encourages facilities to review [EEOC guidance on accommodations](#). Accommodations must be designed to minimize the risk of transmission of COVID-19.

- The CMS rule preempts any state law to the contrary (e.g., an anti-vaccination mandate or “vaccine rights” law). Where a healthcare facility might be subject to both the CMS rule and the OSHA ETS (or the vaccine-related executive order applicable to federal contractors), the facility should comply with the CMS rule.
- CMS may apply its existing enforcement remedies to non-compliance facilities. For nursing homes, home health agencies and hospice facilities (beginning in 2022), this includes civil monetary penalties, denial of payment and even termination from the Medicare and Medicaid program. For hospitals and certain other acute and continuing care providers, the penalty is termination from the Medicare and Medicaid programs; however, termination would generally occur only after providing a facility with an opportunity to make corrections and come into compliance.

## More to come

We will provide additional details in the coming days on the OSHA ETS and CMS interim final rule. Please join us next **Wed., Nov. 10 from 2-3 p.m. CT** for a webcast covering the key points large employers need to be aware of and how Lockton can assist those clients navigating through the vaccination and testing components. [Click here to register.](#)

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