

CLIENT ALERT

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THE PRIVATE EMPLOYER COVID-19 VACCINE MANDATE IS HERE: WHAT EMPLOYERS NEED TO KNOW

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On Thursday, November 4, 2021, the federal Occupational Safety and Health Administration (“OSHA”) and Centers for Medicare & Medicaid Services (“CMS”) rolled out temporary emergency standards (“ETS”) implementing COVID-19 vaccine mandates, which are expected to become effective November 5, 2021. These emergency rules are intended to address the “grave danger of COVID-19 in the workplace.”

OSHA’s ETS is available [here](#) (starting at page 473). CMS’ interim final rule is available [here](#), along with a [press release](#). OSHA has issued a [summary](#) of the rule, a [fact sheet](#), and a useful [FAQ page](#) to help employers implement the new rules.

OSHA’s Emergency Temporary Standard

OSHA’s rules are applicable nationwide, and states with specific COVID-19 protocols must have standards “at least as effective as” the new rules. The rules expressly preempt state and local requirements that ban or limit the authority of employers to require vaccination, face covering, or testing.

Employers must comply with the new rules within 30 days for most requirements and be fully compliant within 60 days. Although these rules are very likely to be challenged in courts across the U.S. in the coming days (as we discussed in our All Things HR Blog [here](#)), employers should take proactive steps toward compliance immediately. Employers who violate the new rules could face fines of up to \$13,653 per violation for serious violations and up to \$136,532 per violation for willful or repeated violations.

Frequently Asked Questions

Is my company impacted?

- OSHA’s rules cover all employers with 100 or more employees (including part-time workers), except for:
 - Certain healthcare employers (as they are covered by the CMS rule discussed below); and
 - Federal contractors subject to the Safer Federal Workforce Task Force COVID-19 Workplace Safety Guidance

Are all employees impacted?

- The OSHA rule applies to all employees of a covered employer except:
 - Employees who do not report to a workplace where any other person is present
 - Employees exclusively working from home
 - Employees who exclusively work outdoors

Does my company have to mandate COVID-19 vaccines?

- Under the OSHA rule, employers can choose to either:
 - Implement a policy requiring full vaccination of employees, including new employees, as soon as practicable; or
 - Implement a policy that allows employees to be fully vaccinated or provide proof of regular, weekly testing for COVID-19 and wear a face covering, which must be made with two or more layers of fabric
- Employers can “mix and match” and have a vaccine mandate for certain groups of employees (e.g., public-facing employees) and offer a testing option for others
- Employees are not required to be vaccinated if they are not medically able to receive a vaccine or if they are entitled to a reasonable accommodation under federal civil rights law due to a disability or sincerely held religious belief. Such employees may be required to be tested and wear face coverings

Can employers request proof of vaccination status?

- Employers can require proof of vaccination status.
- Acceptable forms of vaccination status include:
 - The record of immunization from a healthcare provider or pharmacy;
 - A copy of the COVID-19 Vaccination Record Card;
 - A copy of medical records documenting the vaccination;
 - A copy of immunization records from a public health, state, or tribal immunization information system; or
 - A copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the healthcare professional(s) or clinic site(s) administering the vaccine(s).
- If an employee is unable to produce one of these acceptable forms of proof of vaccination, despite attempts to do so (e.g., by trying to contact the vaccine administrator or state health department), the employee can provide a signed and dated statement attesting to their vaccination status (fully vaccinated or partially vaccinated); attesting that they have lost and are otherwise unable to produce one of the other forms of acceptable proof; and including the following language: “I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.”

What records must we keep?

- Employers must require and keep documentary proof of vaccination
- Employers must also maintain a roster of each employee’s vaccination status
- Employers must keep records of all COVID-19 test results
- All such records must be maintained as confidential medical records and be available within one business day for copying and examination on request
- An employer’s COVID-19 policies must be available within 4 hours of a request by OSHA

Does the employer have to pay for the vaccine or testing?

- Employers do not have to pay for testing or vaccinations but may be required to pay employees for time spent getting a test or vaccine
- Employers must provide a reasonable amount of time off for employees to get vaccinated
- Employers must provide up to 4 hours of paid time off, including travel time, at the employees' regular rate of pay to get vaccinated
- Employers must provide reasonable time and paid sick leave to recover from side effects related to vaccination and can require employees to use paid sick leave (and in some cases, other paid time off)

Are there other requirements?

- Employers are required to promptly remove employees from the workplace who test positive or are diagnosed with COVID-19
- Employers must ensure that any employee who is not fully vaccinated wears a face covering when indoors or in a vehicle
- Employers must provide employees with specified information regarding COVID-19, including the requirement of the new rule, CDC [publication](#) regarding COVID-19 facts, and requirements regarding non-retaliation and discrimination related to COVID-19 under OSHA
- Employers must report to OSHA any work-related COVID-19 fatality within 8 hours of learning of same and of each work-related COVID-19 in-patient hospitalization within 24 hours of learning of the same

Are there any exemptions from the vaccination requirement?

- Employees may request an exception if the vaccine is medically contraindicated for them or medical necessity requires a delay in vaccination.
- Employees also may be legally entitled to a reasonable accommodation if they cannot be vaccinated and/or wear a face covering of a disability, or if the provisions in this policy for vaccination, and/or testing for COVID-19, and/or wearing a face covering conflict with a sincerely held religious belief, practice, or observance.
- Employers will have to determine how they will comply with the exception allowances through policy.

Are there sample documents to help employers create their own policies?

- OSHA issued Mandatory Vaccine Sample and Vaccination or Testing and Face Covering Sample policies, which are available [here](#).

The CMS Rule

The CMS rule requires all health care facilities participating in Medicare and Medicaid to establish policies to ensure that all staff providing care, treatment, or services to patients are “fully vaccinated” for COVID-19. The rule applies to Medicare and Medicaid-certified providers, including hospitals, home health agencies, hospices, clinics, rehabilitation centers, physical therapy and speech pathology services, long-term care facilities, and ambulatory surgery centers, among others. The rule does not apply to assisted living facilities or group homes that are not Medicare or Medicaid-certified.

Importantly, unlike the OSHA rule, health care facilities do not have a testing option—all eligible staff must be “fully vaccinated.” The CMS rule covers all staff members who provide any care, treatment, or services to patients, regardless of clinical responsibility or patient contact, and it expressly includes employees, licensed practitioners, trainees, volunteers, and others who provide services for the facility under contract or other arrangements. Under the rule, within 30 days after the rule's publication, all applicable staff members must have received, at a minimum, the first dose of a two-dose COVID-19 vaccine or have received a single dose COVID-19 vaccine prior to providing care or treatment. Staff members must be fully vaccinated within 60 days after the rule's publication. Significantly, the CMS rule does not apply to staff members who exclusively provide telehealth or telemedicine services and do not have direct contact with patients.

As with the OSHA rule, the CMS rule requires the policy of the healthcare facility to include, among other things, processes to:

- Ensure all staff, with the exception of those who have been granted medical or religious exemptions, have met the vaccination requirements;
- Ensure that the facility follows nationally recognized infection prevention guidelines;
- Track and document the COVID-19 vaccination status of all staff;
- Allow staff to request an exemption under applicable federal law; and
- Provide “contingency plans” for staff who are not fully vaccinated for COVID-19, consistent with CDC guidelines.

CMS expects state agencies to ensure compliance with the rule and will employ its established enforcement remedies, including civil monetary penalties, denial of payment, or termination from the Medicare and Medicaid programs, if a health care facility is not in compliance.

If these rules apply to your business, please contact an attorney to discuss the policies and procedures that might be applicable. The above information is a general summary of the federal rules; it does not cover every scenario or issue and does not constitute legal advice.

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Employer Takeaways

While the courts take up the issue of whether the mandate is legal, employers should take steps to prepare for its effective date. While there is a lot to do in little time, please join us next Thursday, November 11, for a free webinar titled *"The Private Employer Vaccine Mandate: It's Here, It's There, It's Every Where and What You Need to Know About It,"* during which our Labor and Employment team will discuss the many moving parts of this new law and answer the questions on everyone's minds, including:

- What employees / what companies are affected by the mandate?
- When will the new rule take effect?
- Will it apply to remote workers?
- Who pays for the COVID-19 tests?
- Do employers have to pay employees for time spent being vaccinated and/or tested?
- How are exceptions to be applied?
- Can employers ask for documentation and, if so, what must they do with it?
- How will OSHA enforce the rule?
- And many others!

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