



Long-awaited federal vaccine mandates are here!

November 5, 2021

On September 9, 2021, President Biden announced a series of directives that would increase the number of vaccinated workers, in an effort to limit the spread of COVID-19 and its variants. Guidance applicable to federal contractors and subcontractors was published on September 24, 2021, and now the other two rules are set to be released on November 5, 2021. The first, an emergency temporary standard (ETS) developed by the Occupational Safety and Health Administration (OSHA), will impact workplaces with 100 or more employees. The second, an interim final rule from the Centers for Medicare and Medicaid Services (CMS), will affect Medicare- and Medicaid-certified health care providers.

Both rules are expected to be published in the Federal Register on November 5, 2021, and are effective upon publication with designated deadlines for covered employers to become compliant.¹ Almost simultaneously with the announcement of these two measures, lawsuits are being filed, including one by Ohio Attorney General Dave Yost, seeking to block implementation.

OSHA estimates that 24 percent of the approximately 84 million private-sector employees in the U.S. are unvaccinated, and that an additional 13 percent are vaccine-hesitant. OSHA and CMS both project that any turnover attributable to vaccine mandates will not be substantial enough to affect profit and revenue.

This summary will address the highlights of what covered employers must do to comply with these rules.

The OSHA ETS

The 490-page OSHA ETS:

- Affects businesses with 100 or more employees, and requires employees to be vaccinated by January 4, 2022. The 100-employee count includes full-time and part-time employees at all locations. Related entities are to count all employees of all entities.²
- Requires unvaccinated employees to show a negative test for COVID-19 at least weekly, or, if they have been away from work, within seven days of returning to the workplace.³ Test results must be retained on a confidential basis by employers.
- Requires employers to determine vaccination status⁴ and maintain a confidential record or roster of vaccine status, at least for the duration of the ETS.
- Requires that employees who can't produce a negative test or test positive for COVID-19 be removed from the workplace.
- Requires employers to pay for up to four hours of time off at the employee's regular rate to get vaccinated, and to allow employees to use a reasonable amount of sick time to recover from possible side effects of vaccination, if either of these occur during working hours. Employers are also free to use onsite clinics or to retain third parties to do this onsite.
- Does not require employers to pay for COVID-19 tests for unvaccinated employees who choose to be tested, subject to any collective bargaining requirements or similar obligations to the contrary.
- Requires unvaccinated workers to wear masks at work.
- Requires all employees, regardless of vaccination status, to promptly report exposure or positive diagnosis to the employer and to stay off work until they test negative or for the duration of isolation recommended by the CDC. The ETS does not require any time off due to a positive COVID-19 test or diagnosis to be paid, unless applicable local or state laws require this.
- Requires employers to report to OSHA any COVID-19 fatalities within eight hours and hospitalizations within 12 hours.
- Requires employers to develop, implement and enforce a policy that covers all of the above.

Employees who are unable to be vaccinated due to medical contraindication or medical necessity delaying vaccination (*i.e.*, attempting to become pregnant), or who have a sincerely held religious objection to the vaccine, must be offered the opportunity to seek accommodation from their employers. Where appropriate, the interactive process should be utilized, and agreed-upon accommodation should be documented.

Multi-state employers should check to see if states in which they do business have their own "mini-OSHA" laws (Ohio does not). If so, there may be additional considerations to heed.

The OSHA ETS does not apply to federal contractors and subcontractors (who are subject to a separate vaccine mandate). It also does not apply to health care providers subject to the health care-specific ETS previously issued by OSHA, as most of those healthcare providers are subject to the CMS rule.

The CMS rule

The CMS rule applies to Medicare- and Medicaid-certified providers and suppliers. Facilities covered by the CMS rule have until December 5, 2021, to implement policies and procedures necessary for compliance with the rule and to ensure that all covered staff have received either the first dose of a multi-dose COVID-19 vaccine or a single-dose vaccine. By January 4, 2022, covered staff must have received all required doses of a multi-dose vaccine or a single-dose vaccine.

Exemptions from these vaccine requirements (or, in limited situations, delays) are permissible for medical or religious reasons consistent with applicable federal laws governing such exemptions. Covered facilities must track and securely document the vaccination status of each staff member. Vaccine exemption requests and outcomes must also be documented.

The rule applies to all staff, regardless of clinical responsibility or frequency of patient contact, including all employees, licensed

practitioners, students, trainees, volunteers and contractors. However, the rule does not apply to individuals who provide services 100 percent remotely.

Both the OSHA ETS and the CMS rule preempt any state or local laws that are inconsistent with these rules. OSHA has prepared a 34-minute YouTube webinar, available [here](#).

¹ All deadlines noted in this article assume that the OSHA ETS and CMS rule will be published in the Federal Register on Nov. 5, 2021.

² Facilities that lease personnel from staffing agencies need not include that temporary labor, as the staffing agency will include them in its headcount. On multi-employer construction sites, each company need only count its own payroll employees and must include all personnel, regardless of where they report to work. All remote-working employees are included in the headcount. Independent contractors do not count toward a company's total.

³ If an employee has been diagnosed with COVID-19, testing must be 90 days following a positive test.

⁴ An employee is considered fully vaccinated two weeks following the single-dose Johnson & Johnson dose or the second dose of vaccines such as Pfizer BioNTech or Moderna. Employees who are partially vaccinated should be tested until considered fully vaccinated. While the U.S. Food and Drug Administration has given Pfizer full approval, Johnson & Johnson and Moderna have emergency use authorization (EUA) while awaiting full approval. The World Health Organization (WHO) has also granted emergency use listing (EUL) to Astra-Zeneca, Serum Institute of India, Sinopharm produced by Beijing Bio-Institute of Biological Products Co Ltd. and Sinovac COVID-19 vaccines.

Authors



Marie-Joëlle C. Khouzam

*Partner & Employment Practice Group
Chair*

Columbus

614.227.2311

jkhouzam@bricker.com

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