

# Insights

## The Wait Is Over: OSHA and CMS Release Interim Final Rules on Mandatory Vaccinations and Other COVID-19 Safety Issues

November 5, 2021

By: Shelley M. Jackson and Elizabeth M. Roberson

Yesterday employers learned details of two significant new COVID-19 employment-related vaccine and safety mandates from the Biden Administration. First, the U.S. Occupational Safety and Health Administration (“OSHA”) released an Interim Final Rule applying an Emergency Temporary Standard (“OSHA ETS”) which requires employers with 100 or more employees to meet certain minimum COVID-19 vaccination, vaccination verification, face covering, and testing requirements. Second, the U.S. Centers for Medicare and Medicaid Services (“CMS”) released an Interim Final Rule (“CMS Rule”) requiring health care facilities receiving CMS funding to ensure their workforces are fully vaccinated for COVID-19.

### OSHA ETS

The **OSHA ETS**, which is expected to be officially published in the Federal Register today, November 5, 2021, applies to “covered employers,” defined as employers with 100 or more employees who are not already subject to certain other COVID-19 standards.

### **Which employers are covered by the OSHA ETS?**

The OSHA ETS generally applies to all employers<sup>1</sup> with 100 or more employees, except for (a) workplace settings subject to the **Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors** and (b) workplace settings subject to the **OSHA Healthcare Emergency Temporary Standard**. § 1910.501(b)(2). Note that these exemptions apply only so long as such other standards remain in effect.

### **Are any employees of covered employers exempt from the OSHA ETS?**

Employees of a covered employer are not subject to the OSHA ETS requirements “(i) ... [if they] do not report to a workplace where other individuals such as coworkers or customers are present; (ii) [w]hile working from home; or (iii) [w]ho work exclusively outdoors.” § 1910.501(b)(3). OSHA has released **FAQs** which address various other worker scenarios, such as part time workers and independent contractors.

### **What are the specific requirements of the OSHA ETS?**

Covered employers must, at a minimum, meet the following **vaccination, vaccination verification, face covering, and testing requirements**:

- Develop, implement, and enforce a mandatory COVID-19 vaccination policy (which may contain an exception for employees who are not fully vaccinated<sup>2</sup> to elect to undergo weekly testing and wear a face covering at work)

- Offer paid time off (up to four hours of paid time, including travel time, at the employee's regular rate of pay) and a reasonable amount of time off for employees to obtain primary vaccinations
- Offer reasonable time and paid sick leave to recover from any primary vaccination-related side effects that prevent employees from working.
- Require all unvaccinated employees to wear a face mask in the workplace.
- Otherwise comply with all OSHA ETS reporting and recordkeeping requirements, such as providing required information to employees, requiring employee notification of a positive COVID-19 test, and making timely reports of COVID-19 related hospitalizations and fatalities.

### **What is the compliance deadline for covered employers, assuming the publication date in the Federal Register is November 5, 2021?**

The compliance deadline for all parts of the OSHA ETS except the deadline for employees to be fully vaccinated is December 6, 2021. The deadline for employees to be fully vaccinated is 60 days after publication, or by January 4, 2022.

\*\*\*

### **CMS Rule**

The **CMS Rule**, which is expected to be officially published in the Federal Register today, November 5, 2021, applies to facilities that are Medicare and Medicaid-certified including, but not limited to the following: ambulatory surgical services, hospice care, programs of all-inclusive care for the elderly, hospitals, long term care facilities, home health services, comprehensive rehabilitation programs, infection prevention and control and antibiotic stewardship programs, end-stage renal disease facilities, community mental health centers, psychiatric residential treatment facilities, and federally qualified health centers.

### **Which facilities are covered by the CMS Rule?**

The CMS Rule applies to all Medicare and Medicaid-certified facilities that are required to abide by the CMS Conditions of Participation. If the facility falls within that group, there is no other factor that affects whether the CMS Rule applies. This means it doesn't matter how many employees the facility has or the size of the facility. Within any covered facility, not only does the CMS Rule apply to employees, licensed practitioners, and contractors, but it also applies to students, trainees, and volunteers regardless of clinical responsibility or patient contact. The CMS rule does not apply to those who are only engaged in telemedicine or telehealth and who do not interact with patients or employees who are not exclusively teleworkers.

### **What are the specific requirements of the CMS Rule?**

The CMS Rule requires covered facilities to create a policy and procedure to implement the following requirements:

- A process for ensuring all eligible staff have received at least a single-dose COVID-19 vaccine, or the first dose of a multi-dose COVID-19 vaccine prior to staff providing any care, treatment, or services for the facility and/or its patients;
- A process for ensuring all eligible staff are fully vaccinated for COVID-19;
- A process for ensuring the implementation of additional precautions intended to mitigate the transmission and spread of COVID-19, for all staff who are not fully vaccinated for COVID-19;

- A process for tracking and securely documenting the COVID-19 vaccine status of staff, including any staff who have obtained any booster doses;
- A process by which eligible staff may request an exemption from the COVID-19 vaccination requirements based on applicable Federal law and a process for tracking such requests and procedures governing the authenticity of such requests;
- A process for ensuring that tracking and secure documentation of the vaccination status of eligible staff for whom the COVID-19 vaccination must be temporarily delayed due to various medical reasons; and
- Contingency plans for eligible staff who are not fully vaccinated for COVID-19.

### **What is the compliance deadline for covered facilities, assuming the publication date in the Federal Register is November 5, 2021?**

The CMS Rule's first compliance date is December 6, 2021. By that date, covered facilities must ensure all eligible staff have received the first dose of a two-dose COVID-19 vaccine or a one-dose COVID-19 vaccine prior to providing any care, treatment, or other services. Thereafter, by January 4, 2022, all eligible staff must have received the necessary shots to be considered fully vaccinated. Unlike the OSHA ETS, the CMS Rule does not provide an exception for weekly testing and mask wearing for those who choose to not be vaccinated.

\*\*\*\*

### **NEXT STEPS**

We know employers will have many questions and concerns as they work to comply with the new requirements of the OSHA ETS and the CMS Rule. Our attorneys are working to provide employers with the resources they need to navigate these new compliance obligations. One resource we are providing is a webinar covering the new federal COVID-19 vaccination mandates hosted by Krieg DeVault LLP attorneys **Amy J. Adolay**, **Shelley M. Jackson**, and **Elizabeth M. Roberson** on Wednesday, November 10, 2021. You may register for the webinar **HERE**.

In the meantime, please contact any member of Krieg DeVault LLP's **Labor and Employment Practice** with questions.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

[1] Generally, the OSHA ETS applies to private employers with 100 or more employees. The OSHA ETS also includes the U.S. Postal Service, which is treated as a private employer under the U.S. Occupational Safety and Health Act. OSHA ETS, p. 347.

[2] The OSHA ETS considers fully vaccinated to mean completion of the "entire primary vaccination dose(s)." It does not require boosters.