

CMS Issues its COVID-19 Vaccine Rule for Health Care Employers

Alert

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By Alisa Nickel Ehrlich

As [directed by President Biden](#) in September, the Centers for Medicare & Medicaid Services (CMS) issued its [interim final rule](#) on November 4, 2021 mandating COVID-19 vaccines for a broad group of health care workers. While it was originally contemplated that the mandate would apply to long-term care facilities only, the rule applies to a wide range of workers and volunteers at covered Medicare- and Medicaid-certified provider and supplier workplaces, regardless of their responsibilities or patient or resident contact, but does not apply to other health care entities such as physician offices. The rule provides an estimated January 4, 2022 deadline for covered individuals to receive their final COVID-19 vaccine shot.

- **Covered Employers:** The rule applies to hospitals, critical access hospitals, long term care facilities, home health agencies, rural health clinics/federally qualified health centers, ambulatory surgical centers, hospices, programs of all-inclusive care for the elderly, psychiatric residential treatment facilities, intermediate care facilities for individuals with intellectual disabilities, comprehensive outpatient rehabilitation facilities, clinics (rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services), community mental health centers, home infusion therapy suppliers, and end-stage renal disease facilities.
- **Covered Individuals:** The vaccine requirements in the rule apply to most employees, licensed practitioners, students, trainees, volunteers and contracted service providers who provide any care, treatment or other services for the covered facility or employer, regardless of the individual's duties or contact with patients or residents. The vaccination requirements do not apply to staff who exclusively provide telehealth or telemedicine services outside of the facility setting and who have no direct contact with residents or patients and/or other staff; and do not apply to staff who provide support services for the facility performed exclusively outside of the facility setting and who have no direct contact with

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patients or residents and other staff.

- **Compliance Deadlines:** The rule includes a Phase 1 deadline of December 5, 2021 for all covered employees to receive, at a minimum, their first dose of a two-dose series or a one-dose COVID-19 vaccine, or to have requested and/or be granted a legal exemption, prior to providing any care, treatment, or other services for the facility and/or its patients. Phase 1 also requires covered employers to implement appropriate policies in compliance with the rule. Phase 2 provides a January 4, 2022 deadline for all covered employees to receive their final COVID-19 vaccine shot, except where legal exemptions apply.
- **Other Requirements:** Covered employers must also create policies no later than December 5, 2021 to include processes for ensuring staff are vaccinated by the applicable deadlines; processes for requesting accommodations, where exemptions from the vaccination requirements are sought; a process for ensuring additional precautions to mitigate the spread of COVID-19 for staff who are not fully vaccinated; a process for tracking and securely documenting vaccination status and exemptions from vaccination requirements; a process for ensuring that requests for medical exemptions from vaccination requirements are signed off by an appropriate licensed medical practitioner and include certain items, including specifically identifying which COVID-19 vaccines are clinically contraindicated and the recognized clinical reasons therefor; a process to track and document staff vaccinations that must be temporarily delayed due to clinical precautions and considerations (e.g., for individuals who have experience acute illness secondary to COVID-19 or received antibody or plasma treatment); and contingency plans for staff who are not fully vaccinated for COVID-19.
- **No Testing Option:** Unlike OSHA's Emergency Temporary Standard (ETS) applicable to employers with 100+ employees, the CMS rule does not give covered individuals the option to undergo weekly COVID-19 testing in lieu of receiving a vaccine. However, an employer could elect to require COVID-19 testing as part of a reasonable accommodation for an employee who cannot receive the vaccine due to medical or religious reasons.
- **Legally Required Accommodations:** The vaccination requirements in the rule are subject to legally required accommodations for disabilities, sincerely held religious beliefs, practices and observances, and pregnancy. In granting exemptions, employers must ensure that they minimize the risk of transmission of COVID-19 to at-risk individuals, consistent with their obligation to protect the health and safety of patients. The EEOC recently updated its [guidance](#) on employers' obligations to provide reasonable accommodations to employees who cannot receive a COVID-19 vaccination because of a conflict with their sincerely held religious beliefs, practices or observances, and what an employer may do in considering such requests. Reasonable accommodations may also be required under the ADA for employees whose disability (i.e., medical issues) prevents them from receiving a vaccine. Health care employers will have to determine, in light of the nature of an employee's job duties, whether a reasonable accommodation can be made for employees who have a medical or religious basis for not receiving the vaccine.

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- **Interplay with Other Vaccine Requirements:** OSHA's [Emergency Temporary Standard](#) applicable to employers with at least 100 employees, issued the same date as the rule, does not apply to healthcare providers already subject to the requirements of 29 CFR 1910.502—the OSHA COVID-19 Healthcare Emergency Temporary Standard issued on June 21, 2021.

Health care employers, like employers in other industries are facing staffing shortages, and some expect the CMS rule to exacerbate the difficulty in finding workers. The rule is intended to “create a consistent standard across the country” to prevent employers with voluntary COVID-19 vaccine requirements from losing workers to other facilities not requiring the job.

Employers covered by the CMS rule will need to:

- Create and document policies and processes as required by the rule
- Determine the scope and application of COVID-19 vaccination requirements
- Manage collection of employee’s vaccination status information, as well as confidentiality and document retention considerations

The many requirements in the rule can be complicated and challenging to implement. We continue to advise employers on all of these issues and can help navigate the requirements and challenges created by them.

CONTACT

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