

Covid-19 Requirements for Healthcare Employers: A Recap of Where Things Stand

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There is a lot going on right now for healthcare employers. The first phase of CMS's vaccine mandate is in full effect nationwide (now including Texas), the CDC has changed masking guidance in some circumstances, and it has been two months since OSHA let the Health Care Emergency Temporary Standard expire. To help you navigate where things stand, we've provided an update on each of those topics below.

CMS Vaccine Mandate

On November 4, 2021, CMS enacted an Interim Final Rule ("IFR") requiring staff at certain Medicare or Medicaid providers and suppliers ("Covered Healthcare Employers") to be fully vaccinated against COVID-19 unless they qualify for a medical or religious exemption. That rule was temporarily enjoined in 25 states on November 29, 2021. On January 13, 2022, the Supreme Court lifted the temporary injunction. Thus, Covered Healthcare Employers nationwide have an obligation to ensure that staff (defined broadly by the IFR) are vaccinated against COVID-19 or risk citation from CMS. See our prior blog post on this topic for more details about the IFR.

The IFR broadly defines the term "staff" to include "facility employees; licensed practitioners; students, trainees, and volunteers; and individuals who provide care, treatment, or other services for the facility and/or its patients, under contract or other arrangement."

The fact that care may not be provided in a formal clinical setting does not relieve staff from the mandate. How frequently a person physically enters a Covered Healthcare Employer's setting is also irrelevant. Only those staff who perform 100 percent of their work remotely (for example, telehealth or payroll) are fully exempt from the vaccine mandate.

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Note that the IFR's definition of "staff" includes those providing services "under contract or other arrangement." That means, to demonstrate compliance with the IFR, Covered Healthcare Employers must be able to establish that contract staff (for example, from agencies or locum providers) are fully vaccinated

against COVID-19 or have approved medical or religious exemptions from the vaccine. Covered Healthcare Employers must have access to documentation regarding the vaccinations of the contract employees, or approved exemptions, during a compliance survey.

CMS has previously stated that Covered Healthcare Employers are not expected to maintain on-site physical copies of proof of vaccination or exemption for contractors. Because of that, some Covered Healthcare Employers used attestation forms to verify the vaccination status of contracted employees or included vague language in contracts such as, "Agency will provide vaccinated employees to provider organization." CMS has clarified that, if used, an attestation must be specific, and a blanket attestation will not be sufficient. CMS provided the following examples:

Acceptable: "Staff X is fully vaccinated against COVID-19" or "Staff Y has been granted an exemption that meets the requirements of the rule."

Unacceptable: "Contracting organization X will send to provider organization Y only staff who are either fully vaccinated or who have been granted an exemption that meets requirements of the rule."

Because all Covered Healthcare Employers must be able to obtain and submit to surveyors proof of vaccination status and information regarding exemptions and accommodations for all staff (as defined by the IFR) upon request, Covered Healthcare Employers should include COVID-19 vaccination language in new contracts and amend existing contracts to include such language.

Changes to the CDC's Masking Guidance

On February 25, 2022, the CDC (once again) revised its masking guidance. Now, *regardless of vaccination status*, individuals are advised to consult the CDC's COVID-19 Community Level data to help guide masking decisions. That guidance, however, does not apply in healthcare settings. Rather, healthcare entities should continue to use the COVID Data Tracker. Specifically, the CDC states:

CDC's new COVID-19 Community Levels recommendations do not apply in healthcare settings, such as hospitals and nursing homes. Instead, healthcare settings should continue to use community transmission rates and continue to follow CDC's infection

prevention and control recommendations for healthcare settings.

This has caused a bit of whiplash for healthcare employers, who may have employees asking why masks are still required if community levels are “Low.” The simple explanation is that the COVID Data Tracker utilizes different metrics, so even though community levels may be “Low,” community transmission may be “High,” thus requiring continued masking in healthcare settings. We anticipate clarification and/or further changes may be coming from the CDC, but for now, healthcare entities must continue to follow the masking guidance based on the COVID Data Tracker.

Expiration of the OSHA Emergency Temporary Standard

OSHA’s ETS expired on December 21, 2021. On December 27, 2021, OSHA issued a statement that included the following explanation:

OSHA announces today that it intends to continue to work expeditiously to issue a final standard that will protect healthcare workers from COVID-19 hazards, and will do so as it also considers its broader infectious disease rulemaking. However, given that OSHA anticipates a final rule cannot be completed in a timeframe approaching the one contemplated by the OSH Act, OSHA also announces today that it is withdrawing the non-recordkeeping portions of the healthcare ETS.

The following are the recordkeeping portions of the healthcare ETS that covered employers *must still follow*:

- establishing and maintaining a COVID–19 log to record each instance identified by the employer in which an employee is COVID–19 positive, regardless of whether the instance is connected to exposure to COVID–19 at work;
- making records available upon request for examination and copying, including all versions of the employer’s written COVID-19 policy, the individual COVID-19 log entry for a particular employee, a version of the COVID-19 log that removes employee identifying information; and
- reporting COVID–19 fatalities and hospitalizations to OSHA.

With the expiration of OSHA’s ETS, healthcare employers are no longer required—under the ETS—to screen employees for COVID-19. However, that does not necessarily mean that employers should stop screening altogether. It is prudent for healthcare employers to continue some level of a screening process to ensure compliance with OSHA’s general duty clause, which requires all employers to provide a work environment “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” (Recall that when OSHA issued the ETS for healthcare employers, it identified COVID-19 as a recognized hazard). While screening won’t guarantee that employees will avoid catching COVID-19 at work, ongoing screening for the duration of the public health emergency will serve an important role in demonstrating an employers’ mitigation strategies in the event an employer is audited or must respond to an OSHA complaint.

This approach of ongoing screening is further underscored by the following from OSHA’s December 27, 2021, statement, in which OSHA encouraged employers “to continue to

implement the ETS's requirements in order to protect employees from a hazard that too often causes death or serious physical harm to employees.”

What Should Healthcare Employers Do?

Healthcare employers should consider the following practices:

1. Include language in agency or other contractor agreements that addresses CMS's vaccine mandate, and/or amend existing agreements.
2. Follow CDC masking guidance for healthcare facilities.
3. Continue to screen for COVID-19.



Dorsey's employment and health care attorneys will continue to monitor the developments related to COVID-19 requirements, and will update our [health law blog](#) with changes. Feel free to reach out to the authors or to your regular Dorsey attorney if you have any questions about the vaccine mandate, language for agency or other contractor agreements, screenings, OSHA obligations and record keeping.