

Blog Post

Medicare and Medicaid Facilities Are Put On Notice: Employees Must Be Vaccinated

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By [Elizabeth F. Hodge](#)

Medicare and Medicaid certified facilities will be required to ensure that their employees are vaccinated for COVID-19, the Centers for Medicare & Medicaid Services (CMS) [announced](#) on September 9, 2021. Healthcare providers with 100 or more employees also may be subject to a forthcoming Emergency Temporary Standard (ETS) from the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) that also will require that employees be vaccinated for COVID-19. These mandates are part of President Biden's new six-prong COVID-19 Action Plan (the Plan) that he announced last week.

The CMS Vaccine Mandate

Importantly, the new requirements will be a condition of participating in the Medicare and Medicaid programs and will be issued through emergency regulations as an Interim Final Rule with Comment Period expected to be published in October 2021. CMS will accept public comments after the rule is published. The Interim Final Rule will apply to any healthcare facility receiving Medicare or Medicaid reimbursement. The Interim Final Rule builds on the Administration's August 18, 2021, announcement of a vaccination requirement for nursing facilities. This new rule will apply not

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only to nursing home staff, but also to staff in hospitals, dialysis facilities, ambulatory surgical centers, and home health agencies. It also will extend to clinical staff and individuals providing services under arrangements, as well as volunteers and staff who are not involved in direct patient, resident, or client care. CMS expects that this new action will protect patients of the 50,000 providers and over 17 million healthcare workers in facilities that receive Medicare and Medicaid funding.

In the meantime, prior to the issuance of the Interim Final Rule, CMS expects certified Medicare and Medicaid facilities to “act in the best interest of patients and staff by complying with new COVID-19 vaccination requirements.” CMS urges facilities to use all available resources to support employee vaccinations, including employee education and clinics, so that facilities will be in compliance when the Interim Final Rule takes effect. CMS also strongly encourages unvaccinated healthcare workers to begin the vaccination process as soon as possible.

The OSHA ETS

Healthcare providers, including those not subject to CMS requirement, may still need to consider the OSHA ETS which will require private employers with 100 or more employees to ensure their employees are either “fully vaccinated” or provide proof of a negative COVID-19 test at least once a week. OSHA will publish the ETS in coming weeks, and it will initially be effective for six months until a final rule is promulgated.

During a briefing on September 10, 2021, OSHA representatives stated that if an employer, including a healthcare provider, is subject to more than one requirement or standard under the Plan, employers will be expected to comply with all requirements and standards. However, OSHA said that its new ETS will be consistent with the other requirements and standards of the Plan. OSHA also stated during the briefing that guidance will be forthcoming for

healthcare settings already subject to the current COVID-19 Healthcare ETS. Notably, that current Healthcare ETS permits weekly testing in lieu of vaccination, whereas the Plan does not appear to allow for that option. Therefore, as a result of the Plan, entities covered by the COVID-19 Healthcare ETS may need to revise their OSHA compliance plans.

With regard to compliance specifics and the timeline for complying, in a White House briefing on September 13, 2021, OSHA stated that the ETS will provide the answers. Further, OSHA expects to have a Q&A posted later this week addressing general questions such as coverage and information regarding state plans and covered public employees. Further, OSHA encourages employers who are not subject to the ETS to follow CDC guidance, including circumstances where employees are exposed to persons with unknown vaccination status.

While a publication date for the ETS is unknown, the White House announced it should be published in the coming weeks, with an effective date shortly thereafter. OSHA has the authority to issue citations for non-compliance with a penalty of up to \$14,000 per violation. Note also that employers with Collective Bargaining Agreements will still have collective bargaining obligations, and OSHA has advised that the ETS will not change those obligations any more than any other OSHA standard would.

What's Next

Pending publication of the CMS Interim Final Rule and the OSHA ETS, there are a number of unanswered questions for healthcare providers, including:

- Whether the CMS Interim Final Rule will include a testing option for employees. As mentioned above, in stark contrast to the information provided about the anticipated OSHA ETS for

private employers with more than 100 employees, the Plan does not state whether the CMS action will permit regular testing as an alternative to vaccination.

- Who pays for the testing under the anticipated OSHA ETS for large private employers, and, if applicable, under the CMS Interim Final Rule. During the September 10 briefing, OSHA said it had not yet decided who will be required to pay for the weekly testing in lieu of vaccination under the forthcoming ETS.
- The extent to which physician practices are covered by this requirement. The CMS [press release](#) has a [hyperlink](#) to the following site for Medicare facilities, which includes “all fee-for-service facilities.”
- How healthcare providers are to verify vaccination status of employees. With respect to ETS compliance, OSHA said during its briefing that it has not yet decided on the process employers are to use to verify the vaccination of status of employees.
- How this new requirement will affect those facilities and providers already struggling with a shortage of healthcare workers during the current surge in COVID-19 cases.

Because the CMS Interim Final Rule and the OSHA ETS will be issued without notice-and-comment periods beforehand, healthcare facilities participating in Medicare and Medicaid should redouble their efforts to get their workers vaccinated so they can comply. In the meantime, employers should monitor ongoing developments and new guidance and be prepared to pivot accordingly. For assistance with workplace vaccination and other COVID-19 issues, contact your Akerman attorney.

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