

COVID-19 and Employment Law: 2022 Update

Shiloh D. Theberge, Esq. & Tara A. Walker, Esq.
Labor & Employment Practice Group
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STEIN
SHUR**

Introduction & Agenda



Shiloh D. Theberge

Attorney & Co-Chair,
Labor & Employment Practice Group



Tara A. Walker

Attorney,
Labor & Employment Practice Group

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Introduction & Agenda

- OSHA ETS Vaccine-Testing Mandate (Employers 100+)
- Legal Issues for COVID-19 testing costs
- E.O. 14042, Vaccine Mandate for Federal Contractors
- Brief overview of vaccine and testing requirements for healthcare providers
- Portland minimum wage and emergency-pay update
- Changes to the self-isolation and quarantine guidance by U.S. CDC
- Best practices for COVID-19 during Omicron
- Q&A

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- OSHA ETS Vaccine-Testing Mandate (Employers 100+) (SDT)
- Legal Issues for testing costs (SDT)
- E.O. 14042, Vaccine Mandate for Federal Contractors (TAW)
- Brief overview of vaccine and testing requirements for healthcare providers (TAW)
- Portland minimum wage and emergency-pay update (TAW)
- Changes to the self-isolation and quarantine guidance by U.S. CDC (SDT)

- Best practices for COVID-19 during Omicron (TAW)
- Q&A

Snapshot: Where we are today....

- **Vaccine Mandates**

- OSHA ETS is revived;
- Federal contractor ETS is stayed nationwide;
- Healthcare providers:
 - OSHA healthcare ETS has been withdrawn;
 - CMS mandate stayed in 11 states;
 - State mandates – designated healthcare provider and EMS

- **Testing**

- **Face Coverings**

- Portland City Mask Mandate

OSHA Emergency Temporary Standard Vaccine-Testing Mandate

What is it?

- OSHA
 - November 5 - Issued 490-page Emergency Temporary Standard (“ETS”) – based on “grave danger” to workers
 - OSHA asked for comments on ETS by January 19 for developing a permanent standard
- **Current Legal Status**
 - U.S. Court of Appeals – Sixth Circuit – lifted prior stay by the Fifth Circuit.
 - OSHA revised deadlines – January 10 and February 9
 - Public employers in Maine – Announced after January 18
 - U.S. Supreme Court – oral argument – January 7, decision expected at any point
 - In the meantime, get prepared

SDT

OSHA Vaccine-Testing Mandate: Q&A

Who is covered?

- Covered employers: **private** with 100 or more employees
 - Likely includes non-CMS healthcare employers
 - Likely includes federal contractors with 100+
 - Not federal agencies (except U.S. Post Office)
- Also includes Maine's **public sector employers** with 100 or more employees (per Maine DOL)
 - Includes state, county, and local governments as well as public school systems that are 100+

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SDT: Not federal contractors covered by the Executive Order Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, but that has been stayed nationwide.

Not healthcare providers covered by the OSHA Healthcare ETS or the Center for Medicare and Medicaid Services ("CMS") vaccine mandate, one withdrawn and one stayed nationwide.

OSHA Vaccine-Testing Mandate: Q&A

How Do We Count Employees (for 100 threshold)?

- Do count:
 - All employees on a company-wide basis
 - Full-time/part-time
 - Seasonal and temporary workers if employed at any time during duration of the ETS (no minimum hours)
 - Employees at related entities should count employees together “if they handle safety matters as one company”
 - Count starting as of November 5, 2021

SDT If have 100 employees or more on 11/5/21 and then go below, comply
If have fewer than 100 employees on 11/5/21 but then hire additional employees, comply

OSHA Vaccine-Testing Mandate: Q&A

How Do We Count Employees (for 100 threshold)?

- Do not count:
 - Independent contractors
 - Employees jointly employed with staffing agency (they count only for staffing agency count)
 - Franchisees and franchisors are generally considered separate entities
 - Multiemployer worksites – each company represented counts only their own employees

OSHA Vaccine-Testing Mandate: Q&A

What about unionized employers?

- NLRB General Counsel Memo OM 22-03
 - ETS applies to all employers, including in unionized environment
 - There may still be a requirement that unionized employers are required to bargain over effects or the decisions (i.e., discipline or discharge)
 - Review your Collective Bargaining Agreement (depending on when negotiated, may require employers to be more generous)
 - Advice: talk with legal counsel early and often

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- May affect bargaining generally as unions use as leverage
- Union may have waived – provision in CBA allowing employer to unilaterally impose reasonable workplace safety and health rules – or past practice

OSHA Vaccine-Testing Mandate: Q&A

What am I required to do?

- **Written Policies/Notices**
 - Draft and maintain a written policy that includes certain specific information for employees
 - Inform employees about vaccines from CDC
- **Processes (broadly)**
 - Determine vaccination status of all employees
 - Request specific kinds of proof specified in the regulation
 - Maintain records/roster
 - Provide paid time off for vaccination/side effects
 - Unvaccinated employees must supply weekly negative COVID test before coming to work, and require use of face coverings
 - Exclude workers who test positive or have symptoms

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SDT: Policies must specify the following:

- The process that will be used to determine employee vaccination status;
- The time and pay/leave they are entitled to for vaccinations and any side effects experienced following vaccination;
- The procedures they need to follow to provide notice of a positive COVID-19 test or diagnosis of COVID-19 by a licensed healthcare provider
- The procedures to be used for requesting records
- policies and procedures for COVID-19 testing and face coverings
- Fact that law prohibits the employer from discharging or in any manner discriminating against an employee for reporting work-related injuries or illness, and Section 11(c) of the OSH Act, which prohibits the employer from discriminating against an employee for exercising rights under, or as a result of actions that are required by, the ETS. Section 11(c) also protects the employee from retaliation for filing an occupational safety or

health complaint, reporting a work-related injuries or illness, or otherwise exercising any rights afforded by the OSH Act

- 18 U.S.C. § 1001 and of Section 17(g) of the OSH Act, which provide for criminal penalties associated with knowingly supplying false statements or documentation

OSHA Vaccine-Testing Mandate: Q&A

What do I need to do for employees who are or will be vaccinated?

- **Verify Vaccine Status As Follows:**
 - Vaccine card
 - Medical records
 - Pharmacy records
 - Immunization records from public health, state, or tribal immunization system
 - Official document containing vaccine type, date(s), name of health care professional or clinic administering
 - Affidavit with very specific language
 - PRIOR TO EFFECTIVE DATE – “Grandfathered”

OSHA Vaccine-Testing Mandate: Q&A

What do I need to do for employees who are or will be vaccinated?

- Provide Extra Paid Time Off for Vaccination:
 - Employers must provide employees up to 4 hours of PTO, per dose, including travel time, for time spent getting vaccinated if during normal work hours
 - If employee needs more than 4 hours to get vaccinated, employer must provide reasonable unpaid time off for this purpose
 - Employers **cannot require that employees use existing PTO** for time spent getting vaccinated

OSHA Vaccine-Testing Mandate: Q&A

Who is responsible for the costs of the time spent recovering from side effects?

- Employers must provide “reasonable” PTO to recover
- Two days of PTO is “reasonable”
- Employers can require employees use existing accrued PTO or sick time (but not vacation)
- Employers cannot require employees to use an advance on their accrued PTO or sick time

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Regarding test itself, while insurance may cover, several states have laws predating COVID-19 requiring employers to pay for mandatory medical tests or reimburse employees for any such testing

FLSA FAQs published previously – employers required to pay employees for time spent waiting for and receiving medical attention (including COVID-19 testing) if done at their direction or on their premises during regular working hours. Likely will include required testing during days off.

OSHA Vaccine-Testing Mandate: Q&A

What do I need to do for employees who are or will be unvaccinated?

- **Testing Requirements**
 - Require unvaccinated employees to produce a weekly negative test before coming to work and use face coverings
 - Can be tested as follows:
 - PCR or Rapid
 - Healthcare provider
 - Authorized telehealth proctor, or
 - At-home test, but must be employer supervised (cannot be self-administered and self-read)
 - Can be pool testing
 - Does **not** include antibody testing

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OSHA Vaccine-Testing Mandate: Q&A

What do I need to do for employees who are or will be unvaccinated?

- Do I need to pay PTO for Testing?
 - ETS does not place this cost on employer
 - BUT...federal and state wage and hour law may apply
 - FLSA FAQ's – employers are required to pay employees for time spent waiting for and receiving medical attention (including COVID-19 testing) if done at their direction or on their premises

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Maine law – employer may not require any employee or accepted applicant for employment to bear medical expense of an examination when that examination is ordered or required by the employer

Arguments – OSHA and not employer are requiring; and employee has other option – vaccination

Regarding test itself, while insurance may cover, several states have laws predating COVID-19 requiring employers to pay for mandatory medical tests or reimburse employees for any such testing

FLSA FAQs published previously – employers required to pay employees for time spent waiting for and receiving medical attention (including COVID-19 testing) if done at their direction or on their premises during regular working hours. Likely will include required testing during days off.

OSHA Vaccine-Testing Mandate: Q&A

Are there exceptions for certain workers?

- Remote workers
- Workers who do not work in contact with others
- Employees who work exclusively outside

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Exclusively outdoors means outdoors on all days, who do not routinely occupy vehicles with other employees as part of work duties, and who work outdoors for the duration of the workday except for de minimis use of indoor spaces where other individuals may be present – as long as the time spent indoors is brief or occurs exclusively in the employee's home

OSHA Vaccine-Testing Mandate: Q&A

What records and I required to keep?

- All records
 - Retain vaccine and testing records as confidential medical records
 - Maintain records during ETS only
 - Be prepared to provide them as necessary to employee or DOL
 - Employee – personal records – end of next business day
 - Employee – aggregate numbers – end of next business day
 - OSHA – aggregate

OSHA Vaccine-Testing Mandate: Q&A

How will it be enforced?

- OSHA penalties and citations
 - Up to \$13,653 per violation
 - Unclear whether per facility or per employee
 - Additional citations for willful or egregious failure to comply

SDT \$13,653 per violation, and additional citations or penalties as determined by OSHA or state OSHA for willful or egregious failures to comply

To Mandate or Allow for Testing and Face Coverings: That is the Question

OSHA – *“Mandatory vaccine policy is the preferred method of compliance”*

CAN we make the vaccination mandatory and forego testing option?

- Currently, legally permissible under **federal law**
- What about state law?
 - In Maine, yes.
 - Other states: ETS states that it specifically preempts (takes precedence over) state and local laws, including laws banning or limiting an employer’s ability to mandate vaccines or require masking
- **Exceptions (accommodations) must be made for:**
 - Individuals for whom the vaccine is medically contraindicated
 - Individuals for whom medical necessity requires a delay in vaccination
 - Individuals with a disability and/or sincerely held religious belief unless undue hardship

To Mandate or Allow for Testing and Face Coverings: That is the Question

Things to Consider

- Employee relations considerations
- Composition of workforce
- Prepared to lose employees?
- Require for only certain employees?
- Testing may be administratively burdensome
- Testing may be expensive

Legal Issues for Testing Costs

Who is responsible for the costs of the test itself?

- OSHA ETS does not place cost on employer
- BUT...state law
- Several states, including ME and NH, have laws predating COVID-19 requiring employers to pay or reimburse employees or applicants for mandatory medical tests
- NH and ME DOL have not yet provided guidance on this issue
- Biden Administration has required insurance companies to cover starting January 15, 2022

SDT Maine law – employer may not require any employee or accepted applicant for employment to bear medical expense of an examination when that examination is ordered or required by the employer

Arguments – OSHA and not employer are requiring; and employee has other options - vaccination

Paralyzed by the Unknown: What Should I Do Now?

What steps should I take and when?

- Initial deadline for everything but testing – **January 10, 2022**
- Deadline for fully vaccinated or tested – **February 9, 2022**
- **Start now:**
 - Procedure for determining and tracking employees' vaccination status
 - Draft a policy
 - Determine a point person/team
 - Develop a plan for handling accommodation requests

Vaccine Mandate for Federal Contractors and Subcontractors

Executive Order 14042: Overview

- Safer Federal Workforce Task Force [Guidance](#): Ensuring Adequate COVID Safety Protocols for Federal Contractors
- **Vaccines** required, no testing option
- Additional requirements for **masking**, **social distancing**, protocols when someone tests positive

Vaccine Mandate for Federal Contractors and Subcontractors

Does this apply to me?

- Federal Contractors with “**contract[s] or contract-like instrument**”
Definition focuses on procurement through federal acquisition regulations (FAR) and services (including construction) contracts.
 - Does not apply to “products only”
- Subcontractors: required two ways:
 - **Covered-contractor workplaces**, which is any location where work is performed or likely to be performed on a covered contract (can include jobsites)
 - Specific **clauses** required in certain subcontracts for work performed on covered contracts.

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Clause is required in subcontracts for any location where work is performed in connection with a Federal Government contract or contract-like instrument. Not required but strongly recommended in *all* subcontracts.

[52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

ENSURING ADEQUATE COVID-19 SAFETY
PROTOCOLS FOR FEDERAL CONTRACTORS (OCT
2021) (DEVIATION)

(a) Definition. As used in this clause - United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) Authority. This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) Compliance. The Contractor shall comply with all guidance, including guidance

conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)].

Vaccine Mandate for Federal Contractors and Subcontractors

What am I required to do?

- Ensure all employees are “fully vaccinated” (using CDC definition) by January 18, 2022 or the first day of performance on a new covered contract.
 - Unlike OSHA ETS, no exceptions for employees working only outside, remotely only.
 - Exemptions only for medical conditions (ADA) and sincerely held religious belief or practice (Title VII).
 - Temporary exemption for a federal agency with a mission-critical need for 60 days.
 - Obtain proof of vaccination: Provider records, CDC Vaccination Record Card, or other official documentation naming the site, date, name of professional administering vaccine.

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If Vaccine Mandate applies to you (as a federal contractor or subcontractor), you are required to ensure all employees are vaccinated, not just those who are working on covered contracts. Unlike the OSHA ETS, the Executive Order does not contain any exceptions for employees who perform work exclusively outside or who are working remotely. The intention, as specified by the Task Force, is to get more people vaccinated.

The only exemptions available are those under the existing federal law, Title VII and the Americans with Disabilities Act: for a medical condition for which vaccination is contraindicated and sincerely held religious belief or practice. If you do not have one, you should obtain a form for certifying these requests. Employers are only permitted to seek

certain information, and the requirements are different as between the two laws regarding what information can be elicited. Documentation should be carefully drafted.

Covered contractors should also ensure that employees are aware of convenient places to locate vaccines, by referring them here: <https://www.vaccines.gov/>

Vaccine Mandate for Federal Contractors and Subcontractors

What am I required to do?

- Follow masking and physical distancing requirements in published CDC guidance.
 - **Masking** required in indoor environments with “high” or “substantial” transmission.
 - Exception: where an individual is **alone in an office** with floor-to-ceiling walls and closed door, or for limited time when eating and drinking.
 - Exception for **safety** if mask can get wet, high-intensity activities causing difficulty breathing, or risk to health and safety.
 - Follow prevailing **physical distancing** and **sanitation** requirements, depending on vaccination status and level of transmission.
 - Includes some form of symptom screening

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If Vaccine Mandate applies to you (as a federal contractor or subcontractor), you are required to ensure all employees are vaccinated, not just those who are working on covered contracts. Unlike the OSHA ETS, the Executive Order does not contain any exceptions for employees who perform work exclusively outside or who are working remotely. The intention, as specified by the Task Force, is to get more people vaccinated.

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what information can be elicited. Documentation should be carefully drafted.

Some limited exceptions for the duration of time a person is alone in an office with a closed door, or when eating and drinking if distanced.

Vaccine Mandate for Federal Contractors and Subcontractors

What am I required to do?

- Designate one or more person(s) to coordinate workplace safety.
 - Communicating requirements to all covered employees.
 - Collecting documentation, including to visitors (i.e., through signage).

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Designate one individual or a group (committee, e.g.) who is responsible for ensuring that the policies and requirements are adequately documented, communicated to affected employees, and in easy-to-understand language. They are responsible for ensuring compliance, including collecting proof of vaccination.

Sample signs are found here:

https://www.saferfederalworkforce.gov/downloads/Mask_Distancing_High-Substantial_Transmission_508.pdf

Vaccine Mandate for Federal Contractors and Subcontractors

What is the current legal status?

- U.S. District Court for the Southern District of Georgia entered a nationwide stay of enforcement on December 7, 2021.
 - President lacked authority under the Federal Property and Administrative Services Act (“Procurement Act”).
- Administration has appealed to the U.S. Circuit Court of Appeals for the Eleventh Circuit.
 - On December 17, refused to lift stay pending briefing.
 - Deadlines: January 24, 2022 (Replies).

Overview of Vaccine and Testing Requirements for Healthcare Providers

OSHA Healthcare ETS

- Required healthcare services employers to develop and implement a COVID-19 plan, which required, among other things:
 - Patient screenings
 - Follow CDC guidance on masking, social distancing
 - Provide PPE and ensure appropriate use by employees
 - Conduct regular health screenings of employees
- OSHA has [withdrawn](#) the Healthcare ETS.
 - OSHA Healthcare ETS, issued on June 20, 2021, under the OSH Act, had 6 months to promulgate a final rule
 - On December 20, that did not happen
 - On December 27, OSHA issued a statement to resolve the confusion
- **What to do now?**
 - Healthcare entities with 100+ employees should follow ETS
 - General duty clause: continue to comply with PPE requirements.

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In OSHA's announcement regarding the withdrawal of its ETS, the agency said the following:

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 COVID-19 log and reporting provisions, 29 CFR 1910.502(q)(2)(ii), (q)(3)(ii)-(iv), and (r), remain in effect. These provisions were adopted under a separate provision of the OSH Act, section 8, and OSHA found good cause to forgo notice and comment in light of the grave danger presented by the pandemic. See 86 FR 32559.

With the rise of the Delta variant this fall, and now the spread of the Omicron variant this winter, OSHA believes the danger faced by healthcare workers continues to be of the highest concern and measures to prevent the spread of COVID-19 are still needed to protect them. Given these facts, and given OSHA's anticipated finalization of this rule, **OSHA strongly encourages all healthcare 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.**

As OSHA works towards a permanent regulatory solution, OSHA will vigorously enforce the general duty clause and its general standards, including the Personal Protective Equipment (PPE) and Respiratory Protection Standards, to help protect healthcare employees from the hazard of COVID-19. **The Respiratory Protection Standard applies to**

personnel providing care to persons who are suspected or confirmed to have COVID-19. OSHA will accept compliance with the terms of the Healthcare ETS as satisfying employers' related obligations under the general duty clause, respiratory protection, and PPE standards. Continued adherence to the terms of the healthcare ETS is the simplest way for employers in healthcare settings to protect their employees' health and ensure compliance with their OSH Act obligations.

OSHA believes the terms of the Healthcare ETS remain relevant in general duty cases in that they show that COVID-19 poses a hazard in the healthcare industry and that there are feasible means of abating the hazard. OSHA plans to publish a notice in the Federal Register to implement this announcement.

Overview of Vaccine and Testing Requirements for Healthcare Providers

Center for Medicare & Medicaid Services Vaccine Mandate

- On November 5, 2021, CMS published “Healthcare Staff Vaccination” Interim Final Rule, requiring generally:
 - All facility staff must be vaccinated for COVID-19
 - Facilities must have a process for tracking and securely documenting vaccine status
 - Facilities must have a process for providing certain exemptions—medical and religious*
- **What is the current legal status?**
 - This applies in Maine, but not New Hampshire and 10 other states.
 - Two federal courts previously blocked the CMS rule nationwide, but on December 15, 2021, U.S. Circuit Court of Appeals for the Fifth Circuit narrowed the stay to the 10 states.

TAW

States where the CMS mandate remains enjoined include Alaska, Arkansas, Iowa, Kansas, Missouri, New Hampshire, Nebraska, Wyoming, North Dakota, and South Dakota. This decision is under review currently by the Eighth Circuit Court of Appeals. The CMS mandate is also now currently enjoined in Texas by way of the Texas district court’s decision also on December 15, 2021.

Florida has filed its own case requesting a stay, but has not received one.

States where the CMS mandate is currently *no longer enjoined* because of the Fifth Circuit's action include: California, Colorado, Connecticut, Delaware, Florida,³ Hawaii, Illinois, **Maine**, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington, and Wisconsin.

Provider specific guidance available here:

- [QSO-22-07 ALL Attachment A - LTC \(PDF\)](#) Long term care facilities
- [QSO-22-07-ALL Attachment B ASC \(PDF\)](#) Ambulatory Surgical Centers
- [QSO-22-07 ALL Attachment C Hospice \(PDF\)](#)
- [QSO-22-07 ALL Attachment D Hospital \(PDF\)](#)
- [QSO-22-07-ALL Attachment E PRTF \(PDF\)](#) Psychiatric Residential Treatment Facility
- [QSO-22-07 ALL Attachment F ICF-IID \(PDF\)](#) Intermediate Care Facilities for Individuals with Intellectual Disabilities
- [QSO-22-07 ALL Attachment G HHA \(PDF\)](#) Home Health Agency
- [QSO-22-07 ALL Attachment H CORF \(PDF\)](#)

Comprehensive Outpatient Rehabilitation Facilities

- [QSO-22-07 ALL Attachment I CAH \(PDF\)](#) Critical Access Hospitals
- [QSO-22-07 ALL Attachment J OPT \(PDF\)](#) Outpatient Physical Therapy
- [QSO-22-07 ALL Attachment K CMHC \(PDF\)](#) Community Mental Health Centers
- [QSO-22-07 ALL Attachment L HIT \(PDF\)](#) Home Infusion Therapy
- [QSO-22-07 ALL Attachment M RHCFQHC \(PDF\)](#) Rural Health Clinic/Federally Qualified Health Clinic
- [QSO-22-07 Attachment N ESRD \(PDF\)](#) End-Stage Renal Disease Facility

Overview of Vaccine and Testing Requirements for Healthcare Providers

Applicable deadlines

- CMS has yet to update its guidance on timing as a result of these various court stays
 - **Thursday, January 27, 2022:**
 - Policies and procedures are implemented for vaccination, and
 - 100% of staff have received at least one dose, or have requested and/or granted exemption, or recommended delay (e.g., recent receipt of monoclonal antibodies or convalescent plasma).
 - **Monday, February 28, 2022:**
 - Policies and procedures are implemented for vaccination, and
 - 100% of all staff have received necessary dose for primary series, or exemption, or recommended delay.
 - **Monday, March 28, 2022:**
 - Noncompliant facilities subject to enforcement action.

TAW

Vaccination Enforcement— Surveying for Compliance
Medicare and Medicaid-certified facilities are expected to comply with all regulatory requirements, and CMS has a variety of established enforcement remedies. For nursing homes, home health agencies, and hospice (beginning in 2022), this includes civil monetary penalties, denial of

payments, and—as a final measure—termination of participation from the Medicare and Medicaid programs. The sole enforcement remedy for non-compliance for hospitals and certain other acute and continuing care providers is termination; however, , CMS’s primary goal is to bring health care facilities into compliance. Termination would generally occur only after providing a facility with an opportunity to make corrections and come into compliance.

CMS expects all providers’ and suppliers’ staff to have received the appropriate number of doses by the timeframes specified in the QSO-22-07 unless exempted as required by law, or delayed as recommended by CDC. Facility staff vaccination rates under 100% constitute noncompliance under the rule. Non-compliance does not necessarily lead to termination, and facilities will generally be given opportunities to return to compliance. Consistent with CMS’s existing enforcement processes, this guidance will help surveyors determine the severity of a noncompliance deficiency finding at a facility when assigning a citation level.

These enforcement action thresholds are as follows:

Within 30 days after issuance of this memorandum², if a facility demonstrates that:

- Policies and procedures are developed and implemented for ensuring all facility staff, regardless of clinical responsibility or patient or resident contact are vaccinated for COVID-19; **and**
- 100% of staff have received at least one dose of COVID-19 vaccine, or have a pending request for, or have been granted qualifying exemption, or identified as having a temporary delay as recommended by the CDC, **the facility is compliant under the rule;**
or
- Less than 100% of all staff have received at least one dose of COVID-19 vaccine, or have

a pending request for, or have been granted a qualifying exemption, or identified as having a temporary delay as recommended by the CDC, **the facility is non-compliant under the rule**. The facility will receive notice of their non-compliance with the 100% standard. A facility that is above 80% **and** has a plan to achieve a 100% staff vaccination rate within 60 days would not be subject to additional enforcement action. States should work with their CMS location for cases that exceed these thresholds, yet pose a threat to patient health and safety. Facilities that do not meet these parameters could be subject to additional enforcement actions depending on the severity of the deficiency and the type of facility (e.g., plans of correction, civil monetary penalties, denial of payment, termination, etc.). 3

Within 60 days after the issuance of this memorandum⁴, if the facility demonstrates that:

- Policies and procedures are developed and implemented for ensuring all facility staff, regardless of clinical responsibility or patient or resident contact are vaccinated for COVID-19; **and**
- 100% of staff have received the necessary doses to complete the vaccine series (i.e., one dose of a single-dose vaccine or all doses of a multiple-dose vaccine series), or have been granted a qualifying exemption, or identified as having a temporary delay as recommended by the CDC, **the facility is compliant under the rule; or**
- Less than 100% of all staff have received at least one dose of a single-dose vaccine, or all doses of a multiple-dose vaccine series, or have been granted a qualifying exemption, or identified as having a temporary delay as recommended by the CDC, **the facility is noncompliant under the rule**. The facility will receive notice of their non-compliance with the 100% standard. A facility that is above 90% and has a plan to achieve a 100% staff vaccination rate within 30 days would not be subject to additional enforcement action. States should work with their CMS location for cases that exceed these thresholds, yet pose a threat to patient health and safety. Facilities that do not meet these parameters could be subject to additional enforcement actions depending on the severity of the deficiency and the type of facility (e.g., plans of correction, civil monetary penalties, denial of payment, termination, etc.). 5

Within 90 days and thereafter following issuance of this memorandum, facilities failing to maintain compliance with the 100% standard may be subject to enforcement action.

Federal, state, Accreditation Organization, and CMS-contracted surveyors will begin surveying for compliance with these requirements as part of initial certification, standard recertification or reaccreditation, and complaint surveys 30 days following the issuance of this memorandum. Additional information and expectations for compliance can be found at

the provider-specific guidance attached to this memorandum.

2 If 30 days falls on a weekend or designated federal holiday, CMS will use enforcement discretion to initiate compliance assessments the next business day.

3 This information will be communicated through the CMS Form-2567, using the applicable Automated Survey Process Environment (ASPEN) federal tag.

4 If 60 days falls on a weekend or designated federal holiday, CMS will use enforcement discretion to initiate compliance assessments the next business day.

5 This information will be communicated through the CMS Form-2567, using the applicable Automated Survey Process Environment (ASPEN) tag.

Overview of Vaccine and Testing Requirements for Healthcare Providers

Maine Licensing Regulation

- On August 12, 2021, Maine DHHS and CDC amended the Immunization Requirements for Healthcare Workers to include COVID-19.
 - Added Dental Offices
 - EMS separately addressed*
- All staff of “Designated Healthcare Facilities” must be fully vaccinated, enforced starting October 29, 2021.
- As a result of 2019 legislation, no religious exemptions are permitted.
 - Challenged in U.S. District Court for the District of Maine and upheld on October 12, 2021.

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This was adopted as a final rule on November 10, 2021, clarified the definition of “employee” to **include independent contractors** but does not include persons that provide ad hoc nonhealthcare services. For illustrative purposes only, these may include, but are not limited to, landscapers, snow plow operators, and delivery persons.

Does not include staff who exclusively work remotely and have no direct contact with patients, visitors, or other employees.

Overview of Vaccine and Testing Requirements for Healthcare Providers

Maine Licensing Regulation: EMS Supplement

- On August 27, 2021, Maine EMS released the [Emergency Rule](#) supplementing the Immunization Requirements for Healthcare Workers
 - Applies to “**Covered Emergency Medical Services Person**” advanced EMS, basic EMS, and “any person who routinely provides direct patient care.”
 - They are required to be immunized by October 15, 2021, or have valid exemption, otherwise not permitted to provide direct patient care.
 - If **exempt**, and service’s ability to obtain antigen tests, must be tested three times per week.
- Does not include dispatchers, other non-direct care personnel.
- Although seems to expire on November 21, 2021, most public employers are continuing to enforce. MEMS Board met on January 5, and will hold meeting to review subcommittee proposals [tomorrow](#), January 14, at 9:30a.

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EMS Rule is available here: <https://www.maine.gov/ems/sites/maine.gov/ems/files/inline-files/Chapter-20-COVID-19-Immunization-Final-Text.pdf>

Requires only that Covered Emergency Medical Services Person (EMTs, students, “any person who routinely provides direct patient care”) provide proof of immunization. Dispatchers or other staff are not included.

Portland Minimum Wage – Emergency Pay Update

What is happening with minimum wage in Portland (and in Maine)?

- In November 2020, referendum with year-over-year increase to minimum wage and “**emergency pay**” requiring 1.5 times the regular rate during declared states of emergency.
- City of Portland State of Emergency: **\$19.50** per hour minimum wage
- State of emergency was repealed on January 3, 2022.
- Must pay “emergency pay” rate for all work performed from **January 1 through January 13, 2022**. Back to **\$13.00**/hour in Portland (tipped \$6.50)
- Maine to **\$12.75**/hour minimum wage as of January 1, 2022 (tipped \$6.38).

Changes to Isolation and Quarantine Guidance by U.S. CDC

What is the current recommendation for isolation and quarantine by the CDC?

- **Quarantine (Exposure)**
 - **Fully vaccinated** within 6 months or Boosted: Wear a mask around others for 10 days, test on day 5.
 - **Unvaccinated**: Stay home for **5 days**, continue to wear a mask around others for 5 days. If you cannot quarantine, must wear a mask for 10 days.
- **Isolation (Positive Test or Symptomatic)**
 - Stay home for **5 days**
 - If no symptoms or symptoms are “resolving” in 5 days (no fever), can leave your house, but wear a mask around others for **5 days**.

checking FAQs)

- OSHA may not cite businesses for following CDC guidance, but no guarantee.

Best Practices During Omicron Variant

I'm not subject to any vaccine or testing mandate, but what should I be doing?

- **Best practices:**
 - Develop and regularly review **policies** consistent with [CDC guidance](#);
 - **Masking** in indoor areas where close contact can occur
 - Regular **sanitation** protocols, consider **ventilation**
 - If in-person, some form of **entry screening**;
 - Consider some form of **paid leave** for COVID-19 positive employees
 - Know/document which employees are vaccinated, consider mandating **boosters**.
 - Continue **contact tracing**
- **Sources of potential liability:**
 - OSHA general duty clause
 - Liability, including workers' compensation (employees) or personal injury (clients/visitors)

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<https://www.cdc.gov/coronavirus/2019-ncov/community/workplaces-businesses/index.html>

Questions?

Thank you!

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