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HEALTHCARE LAWYERS

Client Alert: COVID Confusion Clarity:Federal CMS, OSHA, and CAL/OSHA Vaccination Mandates

At every level of government, the key policy question for the second half of 2021 has been what to do about unvaccinated Americans. The basic role of federal, state, and local government is to promote the public welfare. At the same time, government is responsible to preserve individual freedom and liberty. Amidst a global pandemic, the conflict between these values will continue to confront judges resolving legal challenges to the growing list of vaccine mandates. In turn, employers tasked with implementing and enforcing these mandates in their workplaces will face their own challenges. Below, we have analyzed the primary three Federal vaccination mandates that directly impact private employers, as well as the healthcare and life science industry:[1]

1. **November 4, 2021 —** The Centers for Medicare and Medicaid Services (CMS) issued the Interim Final Rule (IFR).
2. **November 5, 2021 —** The Occupational Safety and Health Administration (OSHA) issued ("100-Employee") Covid-19 Emergency Temporary Standard (ETS) .
3. **June 28, 2021 —** Mid-year, OSHA also issued a Covid-19 Healthcare ETS, tailored specifically to the Healthcare Industry.

Immediately following the November CMS and OSHA mandates, plaintiffs – including 27 States – brought legal challenges against these mandates. As these challenges move through the courts, the Delta and Omicron Covid-19 variants continue to spread, increasing the pressure at all levels to accelerate the implementation vaccination requirements. Let's first look at the CMS mandate and then the two OSHA rulings.

The CMS Mandate
As of November 5, 2021, CMS requires specified Medicare and Medicaid certified providers to enforce vaccination requirements for (1) staff members & employees, (2) licensed practitioners, (3) trainees, students, & volunteers as well as (4) employees of outside contractors that may provide care or other onsite services, such as cleaning or food services. As far as vaccinations themselves, those covered by the mandate should have received their first dose by Dec. 6, 2021 and their second dose by January 4, 2022. Some staff may be entitled to a legal exemption based on a medical condition or a sincerely held religious belief. However, 100% remote workers are not subject to the ordinance.

Penalties
Effective December 3, 2021, CMS has suspended enforcement of this mandate because of ongoing litigation. If the CMS mandate is reinstated, it may enforce through civil penalties, denial of payment for new patients, and termination of Medicare/Medicaid provider agreements. Given the threat to federal reimbursement, providers at risk should not delay compliance once the question of enforceability is resolved as determined by the courts.

What Entities Are Included?
There are over 20 specific types of providers and suppliers that are required to implement the ETS ruling. Here is the CMS list (Source):

- Ambulatory Surgical Centers (ASCs)
- Hospices
- Psychiatric residential treatment facilities (PRTFs)
- Programs of All-Inclusive Care for the Elderly (PACE)
- Hospitals (acute care, long-term care, psychiatric hospitals, children's hospitals, transplant centers, oncology hospitals, and inpatient rehabilitation facilities).
- Long Term Care (LTC) Facilities, including Nursing Homes (SNFs & NFs)
- Intermediate Care Facilities for Intellectual Disabilities (ICFs-IID)
- Home Health Agencies (HHAs)
- Comprehensive Outpatient Rehabilitation Facilities (CORFs)
- Critical Access Hospitals (CAHs)
- Clinics, rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services
- Community Mental Health Centers (CMHCs)
- Home Infusion Therapy (HIT) suppliers

- Rural Health Clinics (RHCs)/Federally Qualified Health Centers (FQHCs)
- End-Stage Renal Disease (ESRD) Facilities

What Healthcare Entities are Exempt?
The ruling does not apply to physician's offices, organ procurement companies, or portable X-Ray Suppliers. As far as *ad hoc* service providers—*i.e.* an elevator inspector, or a repair worker— visiting a health facility on a limited basis, they will not need to show proof of vaccination. In addition, companies that are not physically present at the patient treatment site are exempt. For example, Telehealth and off-site payroll providers are not subject to the CMS mandate.

OSHA's *Healthcare* Covid-19 ETS
On June 28, 2021 OSHA issued a directive specifically targeting Covid-19 exposures in the healthcare industry. Its purpose was to protect healthcare workers from the occupational hazard of contracting Covid-19. **With few exceptions, this ETS applies to *all* settings where any employee provides healthcare services**. This includes hospitals, assisted living facilities, emergency responders, home healthcare workers, as well as ambulatory caregivers working where suspected or confirmed Covid cases are being treated.

OSHA has published a summary of employer requirements. Generally, employers are required to:

- Conduct a hazard assessment and implement a Covid-19 plan for each workplace.
- Screen patients, non-employees, and any other visitors for symptoms of Covid-19.
- Ensure that employees where facemasks indoors, and provide facemasks on other PPE to protect individuals from exposure.
- To limit contact with suspected or confirmed COVID-19 patients to those employees essential for treatment. Clean and disinfect adjacent equipment.
- Maintain 6 ft. social distancing. Utilize disposable barriers and fixed work spaces in areas where a 6 ft. separation cannot be maintained.
- Follow standard cleaning and disinfection procedures in accordance with the CDC.
- Provide sanitizer and accessible handwashing facilities.
- As COVID-19 spreads through airborne transmissions, there are requirements for HVAC systems and air filters.
- Daily screening of employees.
- Notify specific employees who may have exposed to person in their workplace who has tested positive with COVID-19.
- Remove employees who have or are suspected of having Covid-19
- It may be necessary to provide paid leave and benefits for individuals who must quarantine.
- Provide reasonable time and paid leave for vaccination, and recovery from vaccine side-effects.
- Train employees so they are aware of workplace Covid-19 procedures and policies.
- Record employee cases of Covid-19.
- Report work-related Covid-19 fatalities within 8 hours, and in-patient hospitalizations for Covid-19 within 24 hours.

A significant number of States have already adopted or incorporated the OSHA ruling in their own mandates. While California, acting preemptively, issued guidance for healthcare workers on May 16, 2021, six weeks ahead of the federal mandate. Compliance with CAL/OSHA requirements ensures federal compliance by default. Additionally, on December 22, 2021, Governor Newsom announced that that CA healthcare workers will need booster shots by February 1, 2022.

OSHA's (100-Employee) Covid-19 ETS
OSHA's large employer mandate – covering private employers with 100 or more employees – is the most extensive national vaccination and testing regime to date. Entities that were *already* subject to OSHA's Healthcare-specific ETS (*see previous section*) are *exempt* from the new Covid-19 ETS. For life science organizations and all others with more than 100 employees, this may be the only relevant federal mandate.

Requirements 100-Employee Covid-19 ETS
In general, the ETS requires employers to:

- Develop and enforce a mandatory vaccination policy or, alternatively, to establish a bilateral policy allowing employees to either elect vaccination, or, to undergo weekly Covid-19 testing and to wear a mask at the workplace.
- Obtain proof of vaccination from employee and maintain records of each employee's vaccination status.
- Provide reasonable time and paid leave for vaccination, and recovery from vaccine side-effects.
- Require employees to give prompt notice if they have contracted Covid-19.

- Remove employees from workplace if they have been diagnosed with Covid-19, or tested positive for Covid-19.
- Ensure face coverings while indoors for employees who are not fully vaccinated.
- Inform employees in plain language writing of its Covid-19 policies and procedures, and provide them with the CDC document, "Key Things to Know About COVID-19 Vaccines" which discusses vaccine benefits, and describes employee protections against discrimination and retaliation.
- Report work-related Covid-19 fatalities within 8 hours to OSHA, and in-patient hospitalizations for Covid-19 within 24 hours.
- Make certain that employee Covid-19 are available upon request by the employee or a consented representative.

Employers must comply with most provisions by January 10, 2022. However, compliance with the testing provision is extended to February 9, 2022. For California businesses, unfortunately, the federal mandate will likely cause some confusion. On December 16, 2022, CAL/OSHA issued its own revised Covid-19 ETS for employers, which goes into effect January 14, 2022. There are some significant differences:

1. CAL/OSHA does **not** have a 100-employee minimum. All California employers, irrespective of their size, will need a "to establish, implement, and a maintain an effective written Covid-19 PreventionProgram." They have conveniently provided a fillable model program for employers.
2. CAL/OSHA does **not** have a vaccination requirement, but it will require employers to monitor employee vaccination status and make available free weekly or bi-weekly Covid-19 tests during paid time, whenever there is an "outbreak," or "major outbreak" in the workplace.

The CAL/OSHA board is scheduled to meet January 20, 2022. We believe they will attempt to better align state and federal standards at that time.

Enforcement and Unemployment: Vaccine Refusers *Beware!*
For organizations whose employees and other onsite personnel are providing proof of vaccinations, the primary burden of the vaccine mandates is likely to be compliance with recordkeeping requirements. For employers encountering reluctance and resistance from the workforce, on the other hand, the questions become (a) consideration of alternatives, such as permitting weekly Covid-19 testing; (b) consideration of requests for reasonable accommodation on medical or religious grounds; and (c) difficult choices of termination or suspension for employees who refuse to cooperate. For example, in some states, the calculus will be complicated by "anti-mandate" laws and regulations. Iowa, Florida, Tennessee, and Kansas have recently passed legislation specifying that workers terminated for vaccination refusal, can still receive unemployment benefits. However, in many other states, termination of employees refusing vaccination or testing, may be used as grounds for denying state unemployment benefits. Employers are well advised to seek state-specific counsel to navigate the implementation of vaccine related rules.

Nelson Hardiman LLP
Healthcare Law for Tomorrow

Nelson Hardiman regularly advises clients on workplace policies related to Covid-19. We offer legal services to businesses at every point in the commercial stream of medicine, healthcare, and the life sciences. For more information, please contact Info@nelsonhardiman.com

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[1] This article does not address the other two federal mandates, which apply to federal agency employees and to federal government contractors.

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