

OSHA and CMS Vaccine Mandates

Special Conversation with CAPLAW



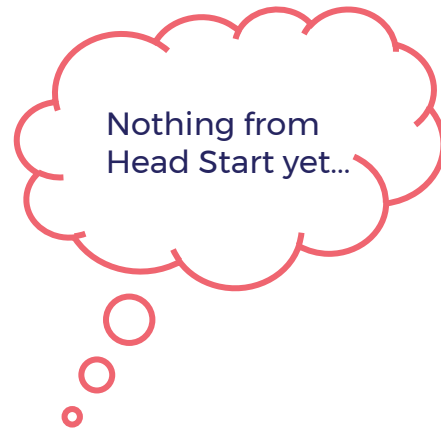
CAPLAW
Community Action Program Legal Services, Inc.

November 5, 2021

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Agenda

- OSHA ETS
 - Compliance Timeline
 - Covered Employers
 - Paid Leave
 - Testing and Masking
 - State Plans
 - Conflicting State Laws
- CMS Vaccine Mandate
 - Compliance Timeline
 - Applicability
 - Enforcement



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OSHA ETS

General Overview

- Covers employers with 100 or more employees
- Employers must implement written policy with:
 - One option – Mandatory vaccine; or
 - Two options – Vaccine or weekly tests/face coverings
- Must accommodate medical/religious exemptions
- Determine employee vaccination status and keep records
- Employee paid leave to get vaccinated
- Employees with COVID must promptly notify employer and be excluded from workplace
- Required notices/information for employees

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OSHA ETS

Compliance Timeline

- **November 5, 2021:** ETS takes effect
- **December 6, 2021:** Employer must adopt one of these policies
 - One option – Mandatory vaccine; or
 - Two options – Vaccine or weekly tests/face coverings
- **January 4, 2022:** Employees must be fully vaccinated or begin testing

OSHA expects the ETS to remain in effect for 6 months, but they may revisit the rule as conditions evolve

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OSHA ETS

Covered Employers

- 100 or more employees
 - "Employees" include:
 - Full- and part-time employees
 - Not independent contractors
- Multiple locations? Work from home?
 - Yes, all employees in all locations count
- Once 100 employee threshold met, standard applies for the duration of ETS

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OSHA ETS

Exemptions

- Not applicable to state and local government employers – public CAAs (unless state OSHA plans require otherwise)
- No vaccination or testing requirements for employees:
 - Who don't report to a workplace where others are present
 - While working from home (testing required to go into workplace)
 - Who work exclusively outdoors
- **No exemption** for employees who have contracted COVID-19 in the past and have not been vaccinated.

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OSHA ETS

Employee Paid Leave

- Employers must provide paid time off to get vaccinated
 - Up to 4 hours to receive each dose
 - Cannot force employees to take accrued sick/PTO leave to get vaccinated
 - Reasonable paid sick time off to recover from any adverse effects of the vaccine
 - Can be accrued sick/PTO leave, but if no leave is available, employer must provide it

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OSHA ETS

Test-out Option - Testing

- Available at the discretion of the employer
- If employee reports to workplace at least once every 7 days, must get tested at least once every 7 days
 - Results must be provided at least once every 7 days
 - No antibody tests, just screening for current infection
 - Employee may not self-administer and self-read test unless observed by employer or authorized telehealth proctor
 - **Employer does not need to pay for employee testing** but may elect to do so

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OSHA ETS

Test-out Option - Testing

- If employee tests positive, employee should be removed from workplace until:
 - Receives a negative NAAT COVID-19 test (includes PCR);
 - Meets the return to work criteria in CDC's isolation guidance; or
 - Receives a recommendation to return to work from licensed healthcare provider
- Employer must not require weekly testing for 90 days following positive test or diagnosis

OSHA ETS

Test-out Option - Masking

- **In addition to testing**, employer must ensure each unvaccinated employee wears a face covering when indoors and when occupying a vehicle with another person for work purposes, except when:
 - Employee is alone in a room with floor to ceiling walls and closed door
 - For a limited time, while employee is eating or drinking at the workplace
 - For a limited time, for identification purposes in compliance with safety and security requirements
 - When the employee is wearing PPE (respirator or facemask)
 - Where the employer can show that the use of face coverings is infeasible or creates a greater hazard that would excuse compliance with requirement

OSHA ETS

Test-out Option - Masking

- Must fully cover employee's nose and mouth and be replaced when wet, soiled or damaged
- Employers must not prohibit customers or visitors from wearing face coverings
 - Don't have to require them to mask
- **Employer does not need to pay for employee facemasks** but may elect to do so

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OSHA ETS

Medical + Religious Accommodations

- Must consider accommodations for employees who, due to **medical** or **religious** reasons:
 - Cannot be vaccinated;
 - Cannot wear a face covering; or
 - Cannot be tested for COVID-19
- Exemptions that qualify:
 - Disabilities under the ADA;
 - Religious beliefs under Title VII; and
 - Medical contraindications to vaccination (defined by the CDC)

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OSHA ETS

Recordkeeping

- Employee proof of vaccination
 - Record of immunization from health care provider or pharmacy;
 - Copy of COVID-19 Vaccination Record Card;
 - Copy of medical records documenting vaccination;
 - Copy of immunization records from public health, state, or tribal immunization information system;
 - Copy of any other official documentation that contains the type of vaccine administered, date(s) or administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s); or....

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OSHA ETS

Recordkeeping

- Employee proof of vaccination
 - Signed and dated statement by the employee:
 - Attestation of vaccination status (full or partial)
 - Attestation that employee has lost or is otherwise unable to produce proof of vaccination; and
 - "I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties."

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OSHA ETS

Recordkeeping

- Employer must maintain proof of vaccination and a roster of each employee's vaccination status
- Vaccination records and test results must be kept confidential and maintained pursuant to OSHA regs on employee medical and exposure records
- Must be kept while ETS remains in effect
- If employer previously collected vaccination proof from employees, do not have to re-collect
- Employer still required to report workplace-related fatalities to OSHA

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OSHA ETS

Notices to Employees

- Employers must include in information provided to employees:
 - OSHA ETS requirements and resulting policies and procedures, including:
 - Process for determining vaccination status
 - Paid leave for vaccination and side effects
 - Positive COVID test notice procedures
 - Procedures for requesting records
 - Testing and face covering policies and procedures
 - CDC's "Key Things to Know About COVID-19 Vaccines," <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
 - Prohibitions on retaliation against employees for reporting work-related injury/illness or filing occupational health and safety complaint (29 C.F.R. 1904.35(b)(1)(iv) and section 11(c) of OSH Act)
 - Prohibitions in statutes with criminal penalties associated with knowingly supplying false statements or documentation (18 U.S.C. 1001 and of section 17(g) of OSH Act)

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OSHA ETS

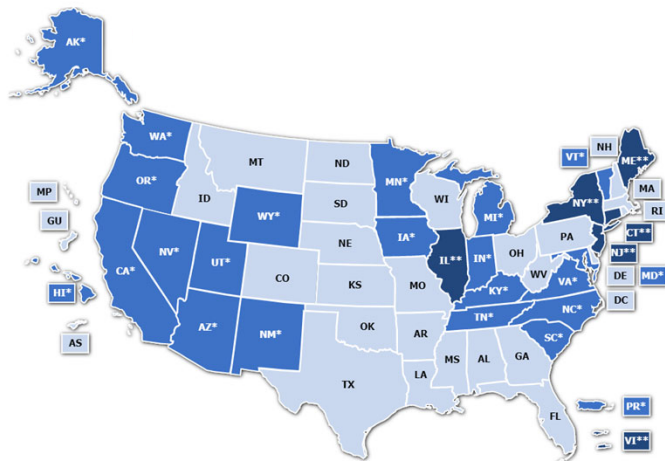
Enforcement

- Inspections usually triggered by employee complaints or employer OSHA reporting
- Criminal penalties for employees that falsely certify vaccination status or employers who knowingly allow them to (fines and imprisonment)
- OSHA standard penalties apply (\$13,653 - \$136,532 per violation)



OSHA ETS

State Plans



- This state's OSHA-approved State Plan covers private and state/local government workplaces.
- This state's OSHA-approved State Plan covers state/local government workers only.
- This state (with no asterisk *) is a federal OSHA state.



OSHA ETS

State Plans

- States with state plans must adopt a new state ETS within 30 days
- May demonstrate that an existing state standard is at least as effective as federal ETS
- State's failure to comply may result in OSHA seeking to revoke state plan

OSHA ETS

Conflicting State Laws

- Some states, like Texas, Montana, and Arkansas, have passed laws or executive orders that prohibit workplace vaccination policies
- OSHA intends the ETS to preempt state and local workplace rules on these topics:
 - COVID-19 vaccination
 - Face coverings
 - Testing

CMS Vaccine Mandate

Requirements

- Staff, volunteers, and some independent contractors of **Medicare- and Medicaid-certified providers and suppliers** must be fully vaccinated against COVID-19
- **No "test-out option"**
- Staff that cannot be vaccinated due to a medical disability or sincerely held religious belief may be reasonably accommodated

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CMS Vaccine Mandate

Requirements

- Must document vaccination status of all employees
 - Acceptable documentation: same as OSHA ETS
 - Keep in facilities immunization record or health info files
 - Keep confidential + separate from employee personnel files

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CMS Vaccine Mandate

Compliance Timeline

- Phase 1 – **December 6, 2021**
 - Staff must receive the first dose, or only dose as applicable, of a COVID-19 vaccine, or have requested or been granted an exemption to the vaccination requirement by this date
 - All documentation and policy establishment requirements must also be met
- Phase 2 – **January 4, 2022**
 - Staff must be fully vaccinated, except for those staff that have been granted exemptions, by this date
 - Staff who have completed the primary vaccination series but have not been “fully vaccinated” for 14 days after their final dose should continue following extra safety protocols in the workplace

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CMS Vaccine Mandate

Who Does the Mandate Apply to?

- All Medicare- and Medicaid-certified **providers & suppliers**
- **Key Categories for CAAs:**
 - Federally Qualified Health Centers (FQHCs)
 - Rural Health Clinics (RHCs)
 - Community Mental Health Centers (CMHCs)
 - Psychiatric Residential Treatment Facilities (PRTs)
 - Home Health Agencies (HHAs)

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CMS Vaccine Mandate

Who is Covered?

- **General Rule:** any individual that performs their duties at any site of care, or has the potential to have contact with anyone at the site of care, including staff or patients, must be fully vaccinated.
- **Includes:**
 - 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.

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CMS Vaccine Mandate

Who is Covered?

- Individuals NOT included in the mandate:
 - Staff that perform 100% of their work remotely/away from sites of care
 - Individuals who infrequently provide ad hoc non-health care services (such as annual elevator inspection), or services that are performed exclusively off-site, not at or adjacent to any site of patient care (such as accounting services)

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CMS Vaccine Mandate

Exemptions - Process

- **Establish a process** for considering exemption requests
- **Allowable exemptions:**
 - Medical contraindications to vaccination (CDC) + disabilities (ADA)
 - Employee **MUST** produce documentation from a “licensed practitioner” confirming their medical need for accommodation
 - Sincerely held religious beliefs (Title VII)
- **Temporary delays** in vaccination:
 - Recent COVID-19 diagnosis
- **No exemption allowed** for staff who have COVID-19 antibodies or who were previously infected with COVID-19

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CMS Vaccine Mandate

Enforcement

- **State Survey Agencies** conduct onsite compliance reviews:
 - Review vaccination policies + cases of COVID-19 + employee vaccination documentation
 - Interviews + observation of staff
- **Penalties**
 - Civil monetary penalties
 - Denial of reimbursement
 - Termination from Medicare/Medicaid program (after failure to correct)
 - CMS will issue additional guidance for State Survey Agencies to establish penalties schedule

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Federal Vaccine Mandates

New OSHA ETS or CMS Mandate or Head Start Mandate

- **CMS mandate** applies to site of care + individuals who have contact with site of care staff
 - **Ask:** Are you regulated by CMS health and safety standards (Conditions of Participation, Conditions for Coverage, or Req'ts for Participation)?
 - **Remember:** no test-out option
- **Head Start mandate** applies to “all Head Start teachers + staff”
 - Directive issued, but no regulations yet
- **New OSHA ETS**
 - More flexible – employers can choose to allow test-out option

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Questions?

This training is part of the Community Services Block Grant (CSBG) Legal Training and Technical Assistance (T/TA) Center. It was created by Community Action Program Legal Services, Inc. (CAPLAW) in the performance of the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Community Services Cooperative Agreement – Grant Award Number 90ET0467-03-C3.

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