

Federal Vaccine Mandates: Step-by-Step Compliance Guide for Community Action



CAPLAW
Community Action Program Legal Services, Inc.

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Agenda

- Legal Challenges
- Applicability + Compliance Timeline
- Compliance Approach
- Template Mandatory Vaccine Policy
- Template Vaccine or Test and Mask Policy
- OSHA Reports and Records
- Accommodations Process
- Enforcement and Penalties
- Additional Resources

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Step-By-Step Compliance Guide

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Federal Vaccine Mandates: Step-by-Step Compliance Guide for Community Action

This step-by-step compliance guide is intended to help the Community Action network navigate the employee vaccination mandates announced by OSHA, Head Start, and the Centers for Medicare & Medicaid Services (CMS). We describe the planning process your CAA should consider as you develop and update your policies to reflect the new requirements. We also provide template policies and additional resources to assist CAAs in preparing for and implementing the mandates. We will update this resource as additional guidance is issued and legal developments arise.

1. Identify which mandate(s) apply
2. Determine timeline for compliance
3. Identify approach for compliance
4. Adopt written vaccine policy
5. Update written leave policies
6. Maintain OSHA reports

- OSHA Emergency Temporary Standard (ETS)
- Centers for Medicare & Medicaid Services (CMS) Interim Final Rule
- Head Start Mandate
- State Law Preemption

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Legal Challenges

OSHA ETS

- **November 6:**
 - 5th Circuit Court of Appeals issued temporary stay (i.e., halt) on implementation and enforcement of the OSHA ETS
 - Unclear if stay applies nationwide
- **November 12:**
 - 5th Circuit extended stay, pending full judicial review of the ETS
 - Orders OSHA not to take any steps to implement or enforce ETS
- **Additional lawsuits have now been filed in every circuit**

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Legal Challenges

OSHA ETS

- **November 16:**
 - Cases will be consolidated and heard by a single circuit
 - Multidistrict Litigation lottery winner: **Sixth Circuit**



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Legal Challenges

OSHA ETS

- **What's next?**
 - OSHA has suspended activities related to the implementation and enforcement of OSHA pending litigation developments.
 - 6th Circuit to consolidate legal challenges across circuits, could issue decision quickly
 - Supreme Court could take up the case
- **For now, CAAs should:**
 - Evaluate options for compliance
 - Prepare policies to implement by **December 6, 2021** if rule is upheld

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Applicability

Which Mandate(s) Apply?

- **OSHA Emergency Temporary Standard (ETS)**
 - Employers can choose policy:
 - Mandatory vaccination, **or**
 - Vaccine or test + mask
 - 100+ employees across all locations
 - Including part-time + seasonal
 - Not including volunteers or independent contractors
 - Applies once 100 employee threshold is reached
 - Expected to last 6 months

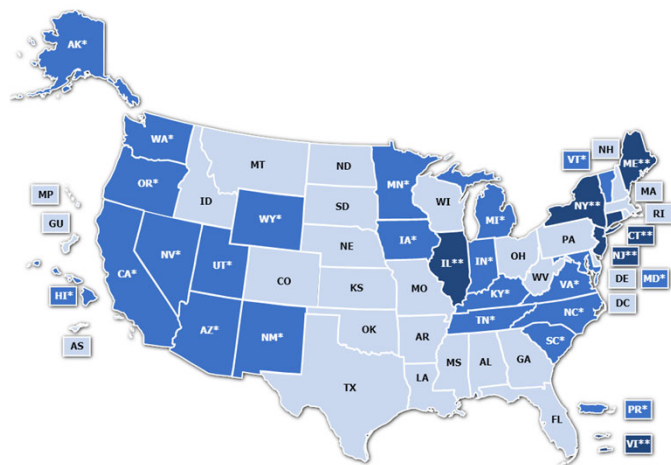


Applicability

OSHA State Plans

- State Plan states have 30 days to adopt a comparable state-level ETS
- OSHA prepared to revoke approval for State Plans that don't comply

Recommendation:
Prepare to comply with federal OSHA ETS



■ 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.



Applicability

Which Mandate(s) Apply?

- **Centers for Medicare & Medicaid Services (CMS) Final Rule**
 - Employers **must** mandate vaccination (no test-out option)
 - Applies to Medicare- and Medicaid-certified healthcare providers
 - Medicare Conditions of Participation + Conditions for Coverage
 - FQHCs, community mental health centers, rural health clinics
 - Who is covered?
 - All employees
 - Volunteers, independent contractors, and individuals who provide care/services at a Site of Care
 - Any individual who has the potential to have contact with anyone at a Site of Care

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Applicability

Which Mandate(s) Apply?

- **Head Start Mandate**
 - Regulations not yet released
 - Employers likely **must** mandate vaccination (no test-out option)
 - Who is covered?
 - Head Start directive: “Head Start teachers and staff employed by Head Start programs”

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Preemption of State Laws

- Both OSHA ETS and CMS rule intend to **preempt all state + local laws** banning or limiting workplace:
 - Vaccine mandates
 - Face coverings
 - Testing

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Compliance Timeline

OSHA ETS

- **By November 20, 2021**
 - State Plans notify OSHA – adopting equivalent state ETS
- **By December 6, 2021**
 - Employers adopt a written policy – either:
 - Mandatory vaccination
 - Give employees option to choose vaccine or test weekly + mask
 - Determine the vaccination status of each employee
 - All unvaccinated employees must mask in workplace
- **By January 4, 2022**
 - Employees must be fully vaccinated*, or begin weekly testing

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Compliance Timeline

CMS Rule

- **By December 6, 2021**
 - Employers adopt a written mandatory vaccination policy
 - Determine the vaccination status of each covered individual
 - **All covered individuals must receive at least 1st vaccine dose**
 - All covered individuals not fully vaccinated must mask in workplace

- **By January 4, 2022**
 - All covered individuals must be fully vaccinated*

**Completed 2 week waiting period after final dose, but if last dose received by 1/4/22, individual doesn't have to test but must mask through end of waiting period*

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Compliance Timeline

Head Start Mandate

- **By January 2022**
 - All Head Start staff and employees must be fully vaccinated

- Awaiting Head Start regulations for additional guidance

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Compliance Approach

Options for Employers Covered by Multiple Mandates

- **One rule for all employees**
 - Streamlines procedures
 - Reduces risk of discrimination claims
 - Must adopt most restrictive rule and apply to all employees (no test-and-mask)
 - Consider benefits that may be available to some employees (e.g., PTO)
 - Consider morale implications
- **Different rules for groups of employees**
 - Lay out rule applicability in written policy
 - Identify legitimate business reason for treating employees differently (e.g., funding source requirement)
 - Describe any differences in policy application (e.g., procedures)
 - Consider morale implications


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Compliance Approach


Written Policy

- All policies subject to **equal employment laws**, which require employers to provide reasonable accommodations to certain groups of employees
- All policies subject to applicable **collective bargaining agreements**
- Employer obligations vary by state, so remember to **consult with a local employment attorney!**

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Template Vaccine Policies



COVID-19 Vaccination or Testing and Face Covering Policy Template

This template policy is for CAA employers who are subject to the OSHA COVID-19 Emergency Temporary Standard (ETS) on Vaccination and Testing (29 CFR 1910.501(d)(1)), and who want to provide a test-out option to employees (i.e., allow employees to submit weekly negative COVID-19...



Mandatory COVID-19 Vaccination Policy Template

This Mandatory Vaccination Policy requires all employees to be fully vaccinated against COVID-19. This policy does not offer employees the option to undergo weekly COVID-19 testing and masking in lieu of getting vaccinated, except as part of a reasonable accommodation for individuals who cannot be...

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Comparing the Templates

Mandatory Vaccination Policy

- OSHA- and CMS-compliant
- Applies to employers (1) subject to CMS mandate; or (2) that voluntarily choose to mandate vaccines
- No test-out option *(unless as part of medical/religious accommodation)*

Vaccination or Mask and Test Policy

- OSHA-compliant
- Allows employees to choose test-out option in lieu of vaccination
- Allows employers to apply different rules to different groups of employees (e.g., require vaccines for some employees and allow others to choose testing and masking)

Overlapping

- Proof of vaccination
- Paid leave
- Remove employees who test positive
- Return to work
- Face coverings
- Confidentiality
- OSHA + employee records requests
- Reasonable accommodations

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Mandatory Vaccination Policy

General Overview

- OSHA-only **or** OSHA + CMS compliant
 - CMS-specific text highlighted in green
- No "Test-Out" option – covered individuals **MUST** be vaccinated
 - Excepting medical or religious accommodations
- Customize highlighted text
- ~~Delete footnotes~~
- Work with an attorney in your state

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Mandatory Vaccination Policy

Purpose & Defined Terms

- "Covered Individual" - depends on the rules that apply
 - **OSHA only**: all employees, including part-time, seasonal, and new hires
 - **OSHA + CMS**: all employees, plus volunteers, independent contractors, and individuals who provide services at a Site of Care, or **have the potential to have contact with** anyone who may be present at a Site of Care, including staff or patients.

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Mandatory Vaccination Policy

Purpose & Defined Terms

- "Excluded Individual"
 - OSHA only: reports to workplace where other individuals are not present, works from home, or works exclusively outdoors
 - OSHA + CMS: any of the above, or works outside a Site of Care with no potential to come into contact with someone at a Site of Care
 - Also remember medical & religious exemptions
- "Site of Care"
 - CMS-specific definition
 - List of applicable Medicare- and Medicaid-certified facilities

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Mandatory Vaccination Policy

Vaccination Mandate – Proof of Vaccination

- Covered Individuals must provide documentation of vaccination status
- Acceptable forms of proof
 - Vaccination card, immunization records, other official documentation (full list in policy)
 - Self-attestation allowable under OSHA as last resort
 - **NOT** allowed under CMS

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Mandatory Vaccination Policy

Supporting COVID-19 Vaccination

- Can include leave in this policy **or** in general employee leave policy
- Must provide up to 4 hours of **paid time** to get each vaccine dose at employee's regular rate of pay
- Paid sick leave to recover from adverse effects
 - Employer may require employees to use existing sick leave
 - Including if employees have one single PTO bank for leave
 - If separate banks for sick, vacation, and/or others, can only require employees to take sick leave
 - Employer must provide to employees who have no sick leave
 - OSHA didn't specify but presumes 2 days to be reasonable

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Mandatory Vaccination Policy

Notification of COVID-19 and Removal from the Workplace

- Employee must notify employer of positive test/diagnosis
- Remove from workplace
 - Employer leave and remote work policies may apply
- Return to work when:
 - Receive negative NAAT test result
 - Meet return to work criteria in CDC's Isolation Guidance
 - Upon written recommendation from licensed healthcare provider

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Mandatory Vaccination Policy

Face Coverings

- Covered Individuals not fully vaccinated must wear face coverings over the nose and mouth when indoors and when occupying a vehicle with another person for work purposes
- OSHA specifies what is meant by face coverings and how to comply
- Describe how employees will obtain face coverings (purchased by employer, self-provided, etc.)
- Few exceptions, e.g., when alone in a room with floor to ceiling walls and closed door; while eating; while wearing PPE

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Mandatory Vaccination Policy

Accommodations for Medical & Religious Exemptions

- Employees granted an accommodation from vaccinations must test and mask
- Employers may:
 1. Include accommodation provisions on testing and masking in this policy (highlighted in blue in the template); or
 2. Move these accommodation provisions to another policy provided only to employees seeking a medical or religious accommodation

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Mandatory Vaccination Policy

Confidentiality and Privacy, Records Requests, and Questions

- Comply with applicable confidentiality and privacy laws for medical records
- Both **employees** and **OSHA** have the right to request COVID-19 records from employers
 - Policy should reflect deadlines for providing information
- Determine who employees should contact with questions about policy

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Vaccine or Test and Mask Policy

General Overview

- **OSHA** compliant
- Option for different rules to apply to groups of employees
- For employers that allow a test-out and face covering option for unvaccinated employees
- Customize **highlighted text**
- ~~Delete footnotes~~
- Work with an attorney in your state

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Vaccine or Test and Mask Policy

Purpose and Scope

- Policy applies to all employees, including part-time, seasonal, and new/future
 - Not applicable to independent contractors or volunteers
- Reasonable accommodations for:
 - Medical necessity
 - Disability or sincerely held religious belief
- Employees not in compliance are subject to discipline

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Vaccine or Test and Mask Policy

Vaccination Mandates, Options, and Exceptions

- Mandatory Vaccination
 - Employer may still require some employees to be vaccinated
 - Specify in policy – e.g., CMS and Head Start employees; public-facing positions
- All other employees may elect to vaccinate or test and use face coverings
- Excluded employees:
 - Who do not report to a workplace where other individuals are present;
 - Who work exclusively outdoors; or
 - While working from home.

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Vaccine or Test and Mask Policy

Vaccination Status and Acceptable Forms of Proof of Vaccination

- Employees must provide documentation of vaccination status
- Acceptable forms of proof
 - Vaccination card, immunization records, other official documentation (full list in policy)
 - Self-attestation allowable as last resort

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Vaccine or Test and Mask Policy

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Vaccine or Test and Mask Policy

COVID-19 Testing

- Employees not fully vaccinated must test weekly beginning **January 4, 2022**
- Employees who report to workplace at least once every 7 days must test:
 - At least once every 7 days; and
 - Provide documentation no later than 7th day following date of last provided test
- Employees who are absent from the workplace for 7 consecutive days must test:
 - Within 7 days prior to returning; and
 - Provide documentation upon returning

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Vaccine or Test and Mask Policy

COVID-19 Testing

- Employees may not self-administer and self-read test results unless observed by employer or telehealth proctor
- Antibody tests do not satisfy requirements
- Employees who have received a positive COVID-19 test/been diagnosed with COVID-19 are **not required** to test for 90 days following the date of their positive test/diagnosis
- Specify how testing will be conducted and who will pay for it

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Vaccine or Test and Mask Policy

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Vaccine or Test and Mask Policy

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Reporting and Recordkeeping

OSHA

- **OSHA ETS:** If a COVID-19-related fatality or in-patient hospitalization occurs **at any time** after a work-related exposure, CAAs must report to OSHA.

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Reporting and Recordkeeping

OSHA

- How can you tell if an incident is work-related?
 - [29 C.F.R. § 1904.5](#), if an event or exposure in the work environment caused or contributed to the resulting condition
 - When did the suspected exposure occur?
 - Was the employee recently working at a CAA office or center? Were they working with the public there?
 - Have other employees tested positive for COVID-19?
 - Have clients tested positive for COVID-19?
 - Have employees been consistently using appropriate PPE?
 - What is the rate of community transmission in your area?
 - Is there an alternative explanation for the employee's infection (e.g., a close friend of theirs recently tested positive)?

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Reasonable Accommodations

- All employers must consider employee requests for **reasonable accommodations**, even if no test-out option allowed
- Steps:
 1. Refer to existing accommodations policy + procedures
 2. Accommodation request forms (see **CAPLAW Template Medical + Template Religious Exemption Forms**)
 3. Single reviewer to handle requests
 4. Engage in interactive process
 - Determine basis for the exemption
 - Explore possible accommodations
 5. Undue hardship? Direct threat?

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Exemption Request Forms



Religious Exemption Request – COVID-19 Vaccine

This sample form was developed in connection with CAPLAW's Vaccines and the COVID-19 Pandemic series of conversations. The template allows employees to request an exemption from an employee vaccination mandate and provide corroborating information and documentation. It also contains some...



Medical Exemption Request – COVID-19 Vaccine

This sample form was developed in connection with CAPLAW's Vaccines and the COVID-19 Pandemic series of conversations. The template allows employees to request an exemption from an employee vaccination mandate and provide corroborating information and documentation. It also contains some...

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Basis for the Exemption

- **Disability (ADA)**
 - Mental or physical impairment that substantially limits one or more major life activities, which prevents:
 - Vaccination,
 - Testing, and/or
 - Masking
- **Medical contraindication to the vaccine (CDC)**
 - Past allergic reactions to a vaccine
 - Known diagnosed allergies to a component of COVID-19 vaccine

Ask for medical documentation from health care professional

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Basis for the Exemption

- **Sincerely held religious belief or practice (Title VII)**
 - Discuss conflict between employee's belief and:
 - Vaccine,
 - Testing, and/or
 - Masking
 - What qualifies?
 - Religion defined broadly → generally, assume belief is sincere unless there is an objective basis for questioning belief or sincerity
 - Can request additional supporting information
 - What isn't protected?
 - Political, social, and economic philosophies
 - Personal preferences

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Basis for the Exemption

- **Pregnancy (PDA/Title VII)**
 - CDC recommends all pregnant + nursing women get vaccinated
- **Pregnancy itself ≠ disability**
 - But medical conditions (e.g., severe morning sickness) can be, so ADA could apply
- **Title VII:** Can't discriminate on basis of pregnancy
 - May need to accommodate pregnant women comparably to other employees similar in their ability/inability to work
 - Ask for medical documentation to support need for accommodation

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Possible Accommodations

- Individuals who are not fully vaccinated **must**:
 - Wear a mask (beginning December 6) and
 - Test weekly (beginning January 4)

Accommodation
from vaccination

First consider testing + masking

Accommodation
from testing or
masking

Consider other possible
accommodations

Social distancing, modified/staggered shifts, changes to physical environment, remote work, reassignment to another workspace, delaying vaccination

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Undue Hardship

ADA + Title VII Accommodations

- Employer may deny accommodation if it can show that it would pose an **undue hardship** to the organization
 - **ADA**: Must pose significant difficulty or expense
 - **Title VII**: Must pose more than de minimis (minimal) cost
- Factors:
 - Work outdoors or indoors?
 - Works in a solitary or group work setting?
 - Close contact with other employees or members of the public (especially medically vulnerable individuals)?
 - # employees seeking similar accommodation (cumulative cost)

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Direct Threat

ADA Accommodations

- Employer may deny ADA accommodation if it would not reduce or eliminate the **direct threat** posed by unvaccinated employee to employee's + others' health and safety
- Assessment must be **individualized** (i.e., no blanket policy)
 - Most current medical knowledge about COVID-19 (e.g., community transmission levels)
 - Employee's work environment
 - Alone or with others? Frequency + duration of interaction?
 - Inside or outside? Ventilation?
 - Other employees masked or being tested?
 - Available space for social distancing?

Document Retention

Accommodation Requests

- **Keep records**
 - Employee's request for an accommodation
 - Medical records collected
 - Must be kept separately from personnel file
 - Whether accommodation was approved or denied

Enforcement and Penalties

- **OSHA**

- On-site inspections, citations and fines (issued within 6 months of violation)
- Inspections largely based on employee complaints and employer reporting
- Fines for de minimis, other-than-serious, serious, willful, failure to abate, and repeated violations, range from \$9,639 - \$136,532

- **CMS**

- State surveyor inspections
- Civil penalties, denial of payment, termination from Medicare/Medicaid programs if fail to make corrections

Enforcement and Penalties

- **Head Start**

- TBA
- Revocation of award and recompetition may be among penalties

- **Equal employment laws**

- Employee complaint to EEOC or state EEO office
- Administrative charge
- Mediation, settlement or investigation
- Determination of probable cause
- Private lawsuit

Questions?

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