

Mandatory Vaccinations for Health Care Workers: Policy Implementation & Best Practices

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For years now, many health care organizations have required their employees and others furnishing services in their facilities to get the annual influenza vaccine in order to help protect patients and coworkers during flu season. With the availability of vaccinations against COVID-19, many health care and non-health care organizations are similarly imposing some form of mandatory vaccination policy for COVID-19. The Centers for Medicare & Medicaid Services (“CMS”) is in the process of developing an Interim Final Rule which will require most workers in health care facilities that receive Medicare or Medicaid reimbursement to obtain to the COVID-19 vaccination. Additionally, OSHA is in the process of implementing an Emergency Temporary Standard (“ETS”) which will require all employers with more than 100 employees to mandate the COVID-19 vaccine or to require weekly COVID-19 testing of their unvaccinated employees. It remains to be seen how these two publications will relate to and interact with OSHA’s COVID-19 Healthcare Emergency Temporary Standard.

The continued development of mandatory vaccination policies has resulted in questions pertaining to the legality of such policies, as well as how to properly implement a mandatory vaccination policy.

Legal Regulation of Vaccination Policies

As a condition of employment, an employer may require that all employees receive a flu or COVID-19 vaccination. However, an employer’s mandatory vaccination policy must provide for certain exemptions in order to comply with various federal and state laws. A typical exemption is for an employee’s medical condition. For example, if an employee cannot obtain a vaccination due to a medical condition, the employee may be eligible for a reasonable accommodation instead of receiving the COVID-19 vaccine. Upon request for a reasonable accommodation, the employer must consider and engage in an interactive process with the employee to determine if a reasonable accommodation exists, in order to comply with the federal Americans with Disabilities Act (“ADA”) and the Michigan Persons with Disabilities Civil Rights Act. An employer is required to provide a reasonable accommodation to the employee, unless the accommodation would impose an undue hardship on the employer. A reasonable accommodation could take the form of exempting the employee from the vaccination requirement and instead requiring a different protective measure, such as wearing a face covering and enforcing stringent social

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distancing measures. Similarly, if an employee objects to obtaining a vaccine due to a sincerely held religious belief, the employer may have to provide a reasonable accommodation, unless doing so would impose more than a de minimis cost or burden on the employer, in order to comply with the federal Civil Rights Act of 1964 and the Michigan Elliot-Larsen Civil Rights Act.

If an employee refuses to comply with the employer's mandatory vaccine policy or does not qualify for a religious and/or medical exemption, an at-will employer may pursue disciplinary action which could include termination. An employer should understand that, as with other employment decisions, its determination to impose disciplinary action for noncompliance could be challenged by the employee and is not binding on governmental agencies or the courts. In appropriate circumstances, an employer should consult knowledgeable legal counsel before making termination or disciplinary decisions.

Employers Should Adopt a Written Policy

It is advisable for an employer that wishes to mandate a vaccination to adopt a written policy so that all employees have reasonable advance notice that receiving a vaccination is a condition of employment. The policy should set a compliance deadline and outline consequences for noncompliance. The policy should also specify what written documentation the employee must furnish the employer to prove that the employee was vaccinated. For instance, a copy of the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record Card, a copy of medical records documenting the vaccination, etc.

An Employer's Policy Should Include Exemptions

An employer's mandatory vaccination policy should provide a process for employees to request an exemption from the employer. Additionally, the policy should notify employees that if the employer grants an exemption, employees are required to comply, as a condition of employment, with reasonable alternative protective measures specified by the employer.

Exemptions should be allowed for sincerely held religious beliefs or a medical condition which precludes employees from obtaining the vaccination. Sincerely held religious beliefs include both generally recognized belief systems and individualized beliefs which are not part of any recognized religion, e.g., veganism.

If an employee requests an exemption, the employer will need to determine what documentation is needed from the employee to support the request, along with whether an exemption should be granted and if so, the reasonable alternative protective measures that it will require the employee to comply with. An employee's request for an exemption, as well as the employer's decision, should be documented in writing. Employers should contact legal counsel to determine the best process for evaluating exemptions. In most cases, employers are encouraged to provide exemption forms for employees to complete, and should require medical documentation from a health care provider to support any request for a medical exemption.

Application of Vaccination Policies to Vendors and Other Non-Employees Rendering Services in the Employer's Facilities

Employers may extend their mandatory vaccination and/or COVID-19 testing policies and requirements to all individuals entering or rendering services in the employer's facilities, including vendors, suppliers, and other non-employees. For example, health care systems throughout Michigan and elsewhere in the country have enacted mandatory COVID-19 vaccination policies which apply to vendors, medical staff members, and others working in their facilities.

Commonly Asked COVID-19 Vaccine Questions

Employers should keep in mind that the ETS to be issued by OSHA and the Interim Final Rule to be issued by CMS will likely impact the answers to several of the questions below. The exact dates of publication have yet to be announced, but both are expected to be published in October.

Who pays for the COVID testing supplies (you or your employee?)

Pursuant to OSHA's Healthcare ETS, published in June 2021, healthcare employers¹ (including independent medical practices) which require their employees to be tested for COVID-19 must pay for the cost of the test itself, as well as for any time spent (during or outside of working hours) getting the test or time spent waiting for test results before the employee is allowed to enter the workplace. Although it is presently unclear, the pending OSHA ETS (applicable to all healthcare and non-healthcare employers with 100 or more employees) is anticipated to incorporate comparable provisions with respect to payment for testing. The pending ETS would not apply to most private medical practices, as they typically employ less than 100 employees. However, private medical practices which employ less than 100 employees will remain subject to OSHA's Healthcare ETS published in June 2021, unless and until announced otherwise by OSHA.

Generally, health insurance plans will not pay for tests which are intended for general workplace safety and health. However, health insurance plans may elect to pay for such general workplace safety and health COVID related testing and vaccinations, but employers should confirm this with their plans.

¹OSHA's Healthcare ETS published in June 2021 applies in all settings in which any employee provides healthcare services or healthcare support services, except that it does not apply to any of the following: (a) the provision of first aid by an employee who is not a licensed healthcare provider; (b) the dispensing of prescriptions by pharmacists in retail settings; (c) non-hospital ambulatory care settings where all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter those settings; (d) well-defined hospital ambulatory care settings where all employees are fully vaccinated and all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter those settings; (e) home healthcare settings where all employees are fully vaccinated and all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not present; (f) healthcare support services not performed in a healthcare setting (e.g., off-site laundry, off-site medical billing); or (g) telehealth services performed outside of a setting where direct patient care occurs.

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What policies should you include to protect against COVID vaccine liability?

COVID-19 vaccine liability arising from adverse reactions is a developing area of law. For employers who mandate the vaccine as a condition of employment, if an employee has a severe reaction to the vaccine which causes serious illness or injury, then the employee may be entitled to Workers' Compensation benefits. Due to the exclusive remedy of Workers' Compensation, employees should be barred from seeking other damages against the employer. If the employer is considered a "program planner," that is a person who supervises or administers a program with respect to the administration, dispensing, distribution, provision, or use of the COVID-19 vaccine, then that employer may also be protected by the Public Readiness and Emergency Preparedness ("PREP") Act which provides certain personal injury and property damage liability protections.

Is it an ADA violation if an employee's vaccination status becomes known to everyone?

The ADA requires employer to keep any medical information learned about an employee confidential. Pursuant to guidance issued by the Equal Employment Opportunity Commission ("EEOC"), documentation or other confirmation of COVID-19 vaccination is considered employee medical information. As such, an employee's vaccination status must be kept confidential and stored separately from the employee's personnel file.

Are you required to pay employees that have days off due to vaccine side effects?

The OSHA Healthcare ETS published in June 2021 requires covered healthcare employers (including independent medical practices) to provide reasonable time and paid leave for COVID-19 vaccinations and vaccine side effects. It is anticipated that OSHA's pending ETS will address the same points for employers with more than 100 employees.

Are there specific testing documentation requirements for nonvaccinated staff?

It is anticipated that OSHA's ETS will mandate that employers with more than 100 employees to require all non-vaccinated employees to undergo weekly COVID-19 testing. The parameters of such testing will be more fully explained in the forthcoming ETS. It is unclear at this time whether CMS's Interim Final Rule will contain similar alternatives to vaccination.

Are you required to fire staff who refuse to comply with these mandates?

Employers who choose to implement mandatory vaccination requirements as a condition of employment may terminate employees who refuse to comply and who do not otherwise qualify for an exemption. It is being reported by various media outlets that some employers are treating non-compliance with mandatory

vaccine policies as a voluntary quit, while other employers are classifying such termination as termination "for cause" due to non-compliance with a workplace policy.

Is natural immunity considered a viable vaccination exemption reason?

No, natural COVID-19 immunity, due to having previously had COVID-19, is not legally recognized as a viable vaccine exemption.

How can you identify and head off potential employee OSHA complaints?

Employers are encouraged to implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards. Specifically, employees should be advised that they will not be discriminated against or discharged for reporting or engaging in occupational safety and health activities, including raising reasonable concerns about infection control or wearing their own personal protective equipment in the workplace.

How will CMS define Medicare and Medicaid-certified "facilities" for purposes of its vaccine mandate?

The Biden Administration has published a COVID-19 action plan, Path Out of the Pandemic, which states that the Centers for Medicare & Medicaid Services ("CMS") is taking action to require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement, including hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies. In its announcement, CMS confirmed that most workers at Medicare and Medicaid certified facilities will be required to be vaccinated and that CMS is currently developing an Interim Final Rule which is expected to be released in October 2021.

The announcements by the Administration and CMS suggest that the vaccine mandate is not intended to apply to physician medical practices (whether hospital based or non-hospital based), because they are not identified in those announcements and normally not considered to be "facilities" or institutional providers for purposes of Medicare and Medicaid enrollment and reimbursement. Consistent with this view, the [CMS announcement](#) contains a link to a [CMS webpage](#) listing facility providers which includes hospitals, ambulatory surgical centers, federally-qualified health centers, skilled nursing facilities, durable medical equipment suppliers, and clinical labs. This list does not include physician medical practices. However, at least one national organization representing institutional provider interests has publicly encouraged CMS to expand the application of its mandate to other types of entities receiving Medicare or Medicaid reimbursement, such as non-hospital based physician practices. When released, the CMS Interim Final Rule will need to be reviewed to determine the extent, if any, to which the vaccine mandate may apply to hospital and non-hospital based physician practices and other types of providers.



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