



OSHA and CMS Interim Final Rules Overview and FAQ

NOTE TO THE READER: This document was prepared on November 15, 2021 and includes ANCOR's understandings of the regulations at that time. However, legal standards may change and consulting an attorney engaged to protect your interest is best practice in interpreting and applying state and federal law and regulation. This document is intended to convey general information only and should not be construed as legal advice or opinion.

OSHA & CMS Interim Final Rules

On November 5, 2021, the Occupational Safety and Health Administration (OSHA) and the Centers for Medicare and Medicaid Services (CMS) issued interim final rules mandating vaccination requirements for employees of certain employers. OSHA's COVID-19 Vaccination and Testing Emergency Standard (OSHA Vaccination ETS) requires employers with a total of 100 or more employees to create and enforce a mandatory COVID-19 vaccination policy or a policy requiring employees to either get vaccinated or wear a face covering and undergo regular COVID-19 testing. CMS' Omnibus COVID-19 Health Care Staff Vaccination Rule (CMS IFR) requires covered facilities to ensure that all eligible staff are vaccinated against COVID-19.

OSHA Vaccination ETS

Under OSHA's Vaccination ETS, employers with a total of 100 or more employees must develop, implement, and enforce a mandatory COVID-19 vaccination policy or adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination. Employers must comply with most requirements within 30 days of publication and testing requirements within 60 days of publication. By January 4, 2022, employees must either furnish evidence of full vaccination or produce a negative COVID-19 test on a weekly basis and wear face coverings.¹

- [Interim Final Rule](#)
- [OSHA FAQ](#)
- [OSHA Webinar](#)
- [OSHA Templates](#)

In determining the number of employees, "employee" is defined broadly and includes all employees across all workplaces. During implementation, the employer must determine the vaccination status of each employee, including maintaining a roster of each employee's vaccination status and acceptable proof of vaccination; providing paid time off for employees to receive the vaccination and recover from side effects; and ensuring that each employee who is not fully vaccinated complies with testing requirements. In accordance with federal law, employers must allow exemptions for employees for whom a vaccine is medically contraindicated, employees for whom medical necessity requires a delay in vaccination, and employees who are legally entitled to a reasonable accommodation for reasons including disability and/or religious beliefs and practices. After enactment, the policy need not apply to employees who do not report to a workplace where other individuals are present; employees while working from home; or employees who work exclusively outdoors.

¹ On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay ordering OSHA to "take no steps to implement or enforce" the ETS "until further court order." *BST Holdings, L.L.C. v. OSHA*, No. 21-60845 (5th Cir. Nov. 12, 2021) (order granting stay pending judicial review). With compliance deadlines fast approaching, providers affected by the mandates should continue to prepare for implementation and watch for new legal developments.

Unvaccinated employees must be tested for COVID-19 at least once every seven (7) days when reporting to a workplace where other individuals are present. If an employee does not provide documentation of a COVID-19 test result, the employer must keep that employee removed from the workplace until the employee provides a test result. Employees that receive a positive COVID-19 test or are diagnosed with COVID-19 must also be removed immediately from the workplace until receiving a negative result on a NAAT, meeting the return-to-work criteria in the CDC’s “Isolation Guidance,” or receiving a recommendation to return to work from a licensed healthcare provider.

Written comments on any aspect of the OSHA Vaccination ETS must be submitted by December 6, 2021, via <https://www.federalregister.gov/> referencing docket number OSHA-2021-0007.

CMS IFR

Under CMS’ IFR, covered facilities must ensure that all eligible staff have received the necessary shots to be fully vaccinated by January 4, 2022. This must be completed in two phases. Thirty (30) days following publication, Phase 1, all eligible staff must have received the first dose of a two-dose COVID-19 vaccine or a single-dose COVID-19 vaccine. Sixty (60) days following publication, Phase 2, all eligible staff must have received the necessary shots to be fully vaccinated. Phase 1 must be completed by December 5, 2021, and Phase 2 must be completed by January 4, 2022.²

- [Interim Final Rule](#)
- [CMS FAQ](#)
- [CMS Webinar](#)
- [CMS Slides](#)

The CMS IFR applies to Medicare- and Medicaid-certified provider and supplier types that are regulated under Conditions of Participation, Conditions for Coverage, or Requirements for Participation. This includes 21 separate types of providers and suppliers, including Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID). Any services unregulated by these conditions (e.g., Home and Community Based Services) are not subject to the CMS IFR. Eligible staff refers to 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.

Covered facilities must implement a process or plans for vaccinating all eligible staff, tracking exemptions and accommodations for those who are exempt, and tracking and documenting staff vaccinations. After enactment, the policies and procedures need not apply to staff who exclusively provide telehealth/telemedicine and/or support services exclusively outside of the facility setting and have no direct contact with residents and other staff. Facilities are required to allow exemptions to staff in accordance with federal law and develop a process for implementing additional precautions for any staff who are not vaccinated.

Written comments on any aspect of the CMS IFR must be submitted by January 4, 2022, via <https://www.federalregister.gov/> referencing docket number CMS-3415-IFC.

Community Providers’ Frequently Asked Questions

APPLYING MULTIPLE STANDARDS

Navigating the overlapping standards of OSHA’s emergency temporary standards and the CMS IFR can be difficult. Each assumes a siloed setting in which a provider offers a single type of service with limited types of employees. This makes it difficult to determine which standard applies when providers offer a diversified array

² On November 10, 2021, ten states filed a complaint in the US District Court for the Eastern District of Missouri requesting the CMS IFR be set aside. With compliance deadlines fast approaching, providers affected by the mandates should continue to prepare for implementation and watch for new legal developments.

of services and supports or delivers those diverse offerings by relying on a diverse range of types of personnel. A general rule of thumb is that when more than one standard applies, the provider must follow the more stringent standard.³

For example, if a provider has 100+ employees and operates an ICF/IID, other unrelated health care services, and other unrelated non-health care services, it's likely that (1) the CMS IFR would apply to the ICF/IID, (2) the OSHA Health Care ETS would apply to the other health care services, and the OSHA Vaccination ETS would apply to all other non-health care services.⁴

OSHA VACCINATION ETS

Counting employees: The OSHA Vaccination ETS is triggered any time the employer has 100+ employees on or after November 5, 2021, and remains in effect for the duration of the ETS *regardless* of whether the employer later dips back below 100 employees. "Employee" is construed broadly—it includes part-time and full-time employees for the entire business, regardless of onsite or offsite location or exemption status. There are no clear exemptions for employees with whom the provider also provides services. It does not, however, include independent contractors. *For more information, see part (b) of the interim final rule and Section 2 of the OSHA Vaccination ETS FAQ.*

Paid time off for vaccination and recovery: The OSHA Vaccination ETS requires employers to provide a reasonable amount of time to each employee for vaccination and to recover from side effects experienced following any primary vaccination dose to each employee for each dose. For employees receiving each vaccination, the employer is responsible for up to four hours of paid time, at the employee's regular rate of pay, which cannot be offset by other leave that the employee has accrued. However, for employees recovering from vaccination side effects, the employer may require the employee to use accrued sick leave or general paid time off. If the employee does not have any available sick leave or general paid time off, the employer must provide up to two days of paid sick leave per primary vaccination dose. *For more information, see part (f) of the interim final rule and Section 5 of the OSHA Vaccination ETS FAQ.*

Cost of testing and face coverings: The OSHA Vaccination ETS does not require employers to pay for the costs associated with testing and face coverings. However, other state laws and collective bargaining agreements may create more specific standards with added responsibility.⁵ A wide array of testing options are available to the employee, including an over-the-counter antigen test, with the caveat that it cannot be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. While point-of-care tests may require a CLIA certification where appropriate, it is not required for over-the-counter employee self-tests that are observed by employers. *For more information, see part (g) of the interim final rule and Section 6 of the OSHA Vaccination ETS FAQ.*

Enforcement: If the current stay is lifted, employers will be required to demonstrate compliance with the OSHA Vaccination ETS by January 4, 2022. Noncompliance with the OSHA Vaccination ETS will be considered a willful and egregious violation under which it can issue a separate penalty for each instance of noncompliance. These types of penalties carry significant civil fines. The current pending text of the Build Back Better Act recommends further increases from \$5,000-70,000 to \$50,000-700,000 for each willful and repeated violation, and \$7,000-70,000 for each day during which an employer fails to correct a violation.

³ Another general rule of thumb is the interim final rules create a floor and not a ceiling for vaccination and testing. The rules preempt state laws prohibiting or limiting employers' authority to require employees to be vaccinated. Conversely, employers and states are free to create more stringent requirements for vaccination.

⁴ Prior to OSHA's Vaccination ETS, OSHA published an emergency temporary standard for "all settings where an employee provides health care services or health care support services." To support ANCOR members to analyze whether their services fell within the scope of the OSHA Health Care ETS, ANCOR issued an OSHA Health Care ETS Worksheet.

⁵ Legal experts have also surmised that in most cases, federal law will require employers to cover the cost of testing for exempt employees. The [U.S. Equal Employment Opportunity Commission](#) has consolidated relevant coronavirus and COVID-19 information to answer questions from the public about the equal employment opportunity laws and COVID-19.

CMS IFR

Multiple services: Providers that offer services both covered and not covered by the CMS IFR may need to conduct an individual analysis of its employees to determine which staff fall under the required vaccination requirements and which do not. The rule itself speaks broadly to “facility staff” including “facility employees; licensed practitioners; students, trainees, and volunteers; and individuals who provide care, treatment, or other services for the facility and/or its clients, under contract or by other arrangement.” In its background, CMS includes “administrative staff, facility leadership, volunteer or other fiduciary board members, housekeeping and food services, and others.” The only exceptions speak specifically to staff “who do not have any direct contact with residents and other staff.”

ANCOR will be seeking clarification of the term “facility staff” due to ambiguity in the rule for providers offering multiple services. A narrow reading of the rule would focus on the individual’s contributions to the covered service and its clients. A broader reading would focus on the relationship of the individual to the provider and their potential for direct contact with the covered service and clients. Employees working within the same office under different programs, for example, may or may not be outside of the scope of the rule. *For more information, see background to the interim final rule section (II)(A)(1) Staff Subject to COVID-19 Vaccination requirements.*

Contracted services: Included in the definition of facility staff, are individuals who provide care, treatment, or other services for the facility and/or its client “under contract or by other arrangement.” It is not uncommon for providers of ICF/IID services to contract with Home and Community Based Services providers to offer community integration services to their clients. In these circumstances, the client is generally entering a separate program outside of the control of the ICF/IID and operated by a different provider, making it difficult to assure the vaccination of specific individuals. *CMS is expected to release interpretive guidance speaking more specifically to these and other types of arrangements.*

Enforcement: Covered services are required to complete Phase 1 by December 5, 2021, and Phase 2 by January 4, 2022. CMS will work directly with the State Survey Agencies to regularly review compliance with the CMS IFR through recertification surveys and complaint surveys. Facilities that are out of compliance will be cited and provided an opportunity to return to compliance. Through the survey process, CMS may use enforcement remedies including civil penalties, payment denial and recoupment, and termination from the Medicare or Medicaid program as a final measure. *For more information, please see the CMS FAQ under Enforcement.*