

Overview of the Biden plan vaccination mandates & accommodations

Updated Jan. 13, 2022

Topic	OSHA Emergency Temp. Standard (ETS)	CMS interim final rule	Executive order on federal contractors
Effective date	<p>1/13/22: STAYED BY THE U.S. SUPREME COURT Nov. 5, 2021; public comments accepted until Jan. 19, 2022; rule is effective immediately, but compliance dates were modified as identified below.</p>	<p>1/13/22: U.S. SUPREME COURT LIFTED STAYS – MANDATE EFFECTIVE NATIONWIDE Nov. 5, 2021; public comments accepted until Jan. 4, 2022.</p>	<p>12/7/21: MANDATE STAYED NATIONWIDE Sept. 9, 2021; the deadline for covered contractor employees to be vaccinated is Jan. 4, 2022.</p>
Who is subject to the rule?	<p>Employers with at least 100 employees. The employee count includes:</p> <ul style="list-style-type: none"> • Full- and part-time employees • Temporary and seasonal employees (but not staffing employees) • Employees working from home or away from the employer’s normal work site <p>Independent contractors are not counted. At a multiemployer work site, each separate employer counts its own employees. The count appears to be made at the EIN level, not the narrower location-by-location level or the broader controlled group level but consider whether there is a single safety director and look to how OSHA has viewed the entities in the past. An employer is covered for the duration of the ETS once it has 100 or more employees. If the employer drops below 100 employees at any point after Nov. 5, 2021, the ETS still applies. Likewise, if the employer does not reach 100 employees until Nov. 10, 2021 (or anytime thereafter), the ETS applies as of that date for the duration of the ETS. <u>NOTE:</u> State plans are required to adopt and enforce standards at least as effective as the</p>	<p>Generally, healthcare providers participating in the Medicare or Medicaid programs. Specifically, Medicare- and Medicaid-certified provider and suppliers regulated under the Medicare health and safety standards known as Conditions of Participation (CoPs), conditions for coverage (CfCs), or “Requirements for Participation.” This includes:</p> <ul style="list-style-type: none"> • Ambulatory surgery centers • Hospitals (including Indian Health Services facilities) and clinics, including critical access hospitals, rural health clinics and federally qualified health centers • Community mental health centers, psychiatric residential treatment facilities, and intermediate care facilities for individuals with intellectual disabilities • Comprehensive outpatient rehabilitation facilities, rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services • End-stage renal disease facilities • Home health agencies • Home infusion therapy suppliers • Hospices 	<p>All federal contractors that have contracts for:</p> <ul style="list-style-type: none"> • Services, construction or leasehold interest in property • Services covered by the Service Contract Labor Standards (formerly the Service Contracts Act) • Concessions • Work relating to federal property or lands and related to offering services for federal employees, their dependents or the general public <p>The vaccine mandate does not apply to:</p> <ul style="list-style-type: none"> • Grants • Contracts or subcontracts below the simplified acquisition threshold (currently \$250,000) • Contracts and subcontracts solely for products • Employees who perform work outside of the United States • Contracts or agreements with Indian Tribes <p><u>NOTE:</u> Only federal contracts including the vaccine mandate and related workplace safety protocols are covered. Existing contracts would need to be modified. All covered contracts entered into on or after Nov. 14, 2021, will be subject to the requirements. Agencies are encouraged to include</p>

Topic	OSHA Emergency Temp. Standard (ETS)	CMS interim final rule	Executive order on federal contractors
	<p>Federal standard within 30 days. State and local government employers with 100 or more employees will be covered by State OSH requirements.</p>	<ul style="list-style-type: none"> • Long-term care facilities • Programs for All-Inclusive Care for the Elderly Organizations (PACE) <p>Religious Nonmedical Health Care Institutions (RNHCIs), Organ Procurement Organizations (OPOs) and portable x-ray suppliers are not directly included in these requirements, but their staff might be indirectly subject to the mandate if performing services for an entity subject to the rule. See <i>What does the rule require?</i> below. In addition, the OSHA rule might apply.</p> <p>The following are <i>not</i> subject to the rule. However, they might be subject to the OSHA rule or the executive order applicable to federal contractors:</p> <ul style="list-style-type: none"> • Physician offices • Assisted living facilities, group homes and similar settings • Medicaid home and community-based services • Schools receiving Medicaid funding 	<p>the vaccine mandate even if the contract falls outside the scope of the executive order.</p>
<p>What does the rule require?</p>	<p>Covered entities must:</p> <ul style="list-style-type: none"> • Develop, implement, and enforce a mandatory COVID-19 vaccination policy unless the entity adopts a policy requiring employees to choose either to get vaccinated or undergo weekly COVID-19 testing and wear a face covering at work (Policy templates from OSHA can be found here) • Determine vaccination status of employees, obtain proof of vaccination, maintain records and compile roster of vaccination status • Provide employees with paid time off for vaccinations and paid leave for reasonable recovery of vaccine-related illness • Require employees to provide notice of a positive COVID-19 test or COVID-19 diagnosis • Remove any employee testing positive for COVID-19 or diagnosed with COVID-19 	<p>Covered providers must:</p> <ul style="list-style-type: none"> • Develop, implement and enforce a mandatory COVID-19 vaccination policy to ensure that all staff subject to the vaccine mandate are fully vaccinated for COVID-19. The mandate applies to: <ul style="list-style-type: none"> – Staff, regardless of clinical responsibilities or patient contact, including any employees, licensed practitioners, students, trainees, and volunteers – Individuals providing care or other services for the facility under contract or other arrangement – Physicians with admitting privileges at the facility <p>The policy must effect processes by which:</p> <ul style="list-style-type: none"> • All new staff subject to the vaccine mandate (except for those who have pending requests 	<p>Vaccination of all employees within a covered workplace (which is broadly defined to include any work site controlled by a federal contractor or subcontractor where an employee of the federal contractor or subcontractor working on or in connection with a covered contract is likely to be present during the performance of the contract). This includes others performing work necessary to the performance of the contract (human resources, legal, payroll, billing etc.). All persons within the workplace are required to be vaccinated.</p> <p>Compliance with CDC masking and social distancing requirements.</p> <p>Identifying a COVID-19 Workplace Safety Coordinator to coordinate and implement compliance with the vaccine mandate.</p>

Topic	OSHA Emergency Temp. Standard (ETS)	CMS interim final rule	Executive order on federal contractors
	<ul style="list-style-type: none"> Require employees who are not fully vaccinated to wear face coverings indoors or when in a vehicle with another employee <p>Provide employees with information about the ETS, workplace policies/procedures, vaccination efficacy, safety and benefits, protections against retaliation and discrimination and laws that provide for criminal penalties for knowingly supplying false documentation. [Workers' Rights under the COVID-19 Vaccination and Testing ETS can be found here (Spanish). Information for Employees on Penalties for False Statements and Records can be found here (Spanish).]</p> <p>Report work-related COVID-19 fatalities to OSHA within eight hours and work-related COVID-19 in-patient hospitalizations within 24 hours. Details can be found here.</p> <p>Make certain records available to employees and OSHA.</p> <p>Test employees who are not fully vaccinated weekly before reporting to work.</p>	<p>for, or who have been granted, exemptions to the mandate or those for whom vaccination must be temporarily delayed due to clinical considerations) have received, at a minimum, a single-dose COVID-19 vaccine, or the first dose of the primary vaccination series for a multi-dose COVID-19 vaccine prior to providing any care, treatment, or other services for the provider and/or its patients</p> <ul style="list-style-type: none"> All existing staff subject to the vaccine mandate are fully vaccinated for COVID-19, except for those granted exemptions to the mandate or those staff for whom vaccination must be temporarily delayed due to clinical considerations The vaccination status of staff for whom COVID-19 vaccination must be temporarily delayed due to clinical is tracked and securely documented Additional precautions are implemented, designed to mitigate the transmission and spread of COVID-19, for all staff who are not fully vaccinated for COVID-19 COVID-19 vaccination status of all staff subject to the mandate is tracked and securely documented COVID-19 vaccination status of any staff who have obtained any booster doses as recommended by the CDC is tracked and securely documented Staff subject to the mandate may request an exemption based on an applicable Federal law Information provided by those staff who have requested, and for whom the hospital has granted, an exemption from the staff COVID-19 vaccination requirements is securely documented. 	

Topic	OSHA Emergency Temp. Standard (ETS)	CMS interim final rule	Executive order on federal contractors
Does the rule apply to employees/staff working off-site?	Remote employees are counted when determining whether an employer meets the 100-employee threshold. Remote employees who are not fully vaccinated are subject to mandatory weekly testing only when physically present at the workplace.	Generally, yes. Must vaccinate all staff who interact with other staff, patients, residents, clients, or PACE program participants in any location beyond the formal clinical setting. <i>However, individuals providing services 100% remotely (including telemedicine providers) and have no direct physical contact with patients or other staff are not subject to the mandate.</i>	Yes. A covered contractor employee who works remotely must be vaccinated.
What is the timing for these requirements?	<p>By Jan. 10, 2022:</p> <ul style="list-style-type: none"> • Establish a policy on vaccination (mandate or testing alternative) • Determine vaccination status of employees, obtain proof of vaccination, maintain records and compile roster of vaccination status • Provide employees with paid time off for vaccinations and paid leave for reasonable recovery of vaccine related illness • Require employees to provide notice of a positive COVID-19 test or COVID-19 diagnosis • Remove any employee testing positive for COVID-19 or diagnosed with COVID-19 • Require employees who are not fully vaccinated to wear face coverings indoors or when in a vehicle with another employee • Provide employees with information about the ETS, workplace policies/procedures, vaccination efficacy, safety and benefits, protections against retaliation and discrimination and laws that provide for criminal penalties for knowingly supplying false documentation • Report work-related COVID-19 fatalities to OSHA within eight hours and work-related COVID-19 in-patient hospitalizations within 24 hours • Make certain records available to employees and OSHA 	<p>Subject to exceptions:</p> <p>By Dec. 5: First vaccine dose administered</p> <p>By Jan. 4: Fully vaccinated (primary vaccination series)</p> <p>Proof of booster shots is not required at this time.</p> <p>Temporary delays to these deadlines are allowed for individuals where appropriate, e.g., a recent COVID-19 diagnosis. There is <i>no exception</i> for individuals with COVID-19 antibodies.</p> <p>See the row above titled <i>What does the rule require?</i> for more information on the elements of a covered provider's required vaccination policy.</p>	<p>Subject to exemptions:</p> <p>By Jan. 4: Fully vaccinated (primary vaccination series)</p> <p>Temporary delays to these deadlines are allowed for individuals where appropriate, e.g., a recent COVID-19 diagnosis. There is <i>no exception</i> for individuals with COVID-19 antibodies.</p>

Topic	OSHA Emergency Temp. Standard (ETS)	CMS interim final rule	Executive order on federal contractors
	By Feb. 9, 2022: Weekly COVID-19 testing of unvaccinated employees present in the workplace		
What exemptions apply for individuals?	<p>An employer may choose to have a mandatory vaccine policy in which case exemptions can be afforded for:</p> <ul style="list-style-type: none"> • Medical contraindications • Medical necessity requiring delay in vaccination • Reasonable accommodations for workers with disabilities or sincerely held religious beliefs 	<p>Exemptions apply only for:</p> <ul style="list-style-type: none"> • Medical conditions where vaccines are not recommended; documentation in support of this exemption must be signed and dated by a licensed practitioner, not the individual seeking the exemption • Reasonable accommodations for workers with disabilities or sincerely held religious beliefs 	<p>Exemptions apply only for:</p> <ul style="list-style-type: none"> • Medical necessity requiring delay in vaccination • Reasonable accommodations for workers with disabilities or sincerely held religious beliefs
What accommodations should entities subject to the rule require for exempted individuals?	Face coverings and weekly COVID-19 testing	Entities should implement additional precautions for any staff who are not vaccinated, to mitigate the transmission and spread of COVID-19. CMS encourages facilities to review EEOC guidance on accommodations . Accommodations must be designed to minimize the risk of transmission of COVID-19.	Face coverings, physical distancing and weekly COVID-19 testing.
How does an entity verify an employee's vaccination status?	<p>Acceptable documentation of vaccination includes:</p> <ul style="list-style-type: none"> • The record of immunization from a healthcare provider or pharmacy • A copy of the U.S. CDC COVID-19 Vaccination Record Card • A copy of medical records documenting the vaccination • A copy of immunization records from a public health, state, or tribal immunization information system • A copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s) • Attestation subject to criminal penalties only as last resort after copy sought without success 	<p>Acceptable documentation of vaccination includes:</p> <ul style="list-style-type: none"> • CDC COVID-19 Vaccination Record Card (or a legible photo of the card) • Documentation of vaccination from a healthcare provider or electronic health record • State immunization information system record • If vaccinated outside of the U.S., a reasonable equivalent of any of the previous examples 	<ul style="list-style-type: none"> • The record of immunization from a healthcare provider or pharmacy • A copy of the U.S. CDC COVID-19 Vaccination Record Card • A copy of medical records documenting the vaccination • A copy of immunization records from a public health, state, or tribal immunization information system • A copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the healthcare professional(s) or clinic site(s) administering the vaccine(s) <p><u>NOTE:</u> An attestation of vaccination is not an acceptable substitute for documentation of proof of vaccination.</p>

Topic	OSHA Emergency Temp. Standard (ETS)	CMS interim final rule	Executive order on federal contractors
How will the rule be enforced?	OSHA has not yet detailed enforcement mechanisms, but it will likely occur through worker complaints and OSHA inspections.	CMS contracts with state agencies to review providers' compliance with Medicare/Medicaid rules. These agencies will review providers' COVID-19 vaccination policies and procedures during standard review as well as during reviews driven by complaints. These surveys will review the number of resident and staff COVID-19 cases over the last four weeks, and a list of all staff and their vaccination status. CMS will also require accrediting organizations to update their survey processes to assess facilities they accredit for compliance with vaccination regulations	The executive order and related guidance are silent on how compliance will be monitored or enforced.
What are the penalties for non-compliance?	The standard OSHA penalty is \$13,653 for a single violation; willful violations can lead to a maximum penalty of \$136,532.	<p>CMS may apply its existing enforcement remedies:</p> <ul style="list-style-type: none"> • For nursing homes, home health agencies, and hospice (beginning in 2022), this includes civil monetary penalties, denial of payment and even termination from the Medicare and Medicaid program • For hospitals and certain other acute and continuing care providers, the penalty is termination; however, termination would generally occur only after providing a facility with an opportunity to make corrections and come into compliance 	The executive order and related guidance are silent.
If an entity subject to the rule is also subject to competing federal vaccination-related requirements, which rule should it follow?	An entity must follow the stricter requirement if within the scope of either the vaccine mandate imposed by CMS and the executive order covering certain federal contractors.	Potentially competing federal rules include a presidential executive order for federal contractors, an OSHA ETS from June 2021, and an OSHA ETS issued Nov. 5, 2021. Generally, for healthcare providers subject to this CMS rule, the CMS rule has primacy, but the other federal rules may require vaccination of staff <i>not</i> required to be vaccinated under the CMS rule.	Since this is a vaccine mandate, it takes precedence over the OSHA ETS (if applicable to the covered contractor).
How does the rule interact with state law?	The rule is intended to preempt, as to employers subject to the rule, and invalidate any state or local laws or rules that ban or limit an employer's authority to require vaccination, face covering or testing.	The rule preempts any state law to the contrary (e.g., an anti-vaccination mandate or "vaccine rights" law).	The executive order preempts any state law to the contrary (e.g., an anti-vaccination mandate or "vaccine rights" law).

Topic	OSHA Emergency Temp. Standard (ETS)	CMS interim final rule	Executive order on federal contractors
	<p>Note that OSHA permits states that wish to assume responsibility for workplace safety standards to submit for approval a “state plan” that adopts workplace safety standards that are at least as effective as OSHA’s requirements. State plans must either amend their standards to be identical or “at least as effective as” the new vaccination standard, or show that the existing plan is “at least as effective” as the new OSHA standard. State plans have 30 days to come into compliance. A state plan prohibiting employers from requiring vaccination is not “at least as effective” as the new OSHA standard.</p>		
Additional Lockton resources	See our alert .	See our alert .	See our alerts here and here .
Government FAQs	OSHA ETS FAQs	CMS FAQs	Safer Federal Workforce Task Force FAQs



UNCOMMONLY INDEPENDENT