

**TPA COVID-19 Vaccination  
Mandate Roundtable Summary & Fact Sheet  
November 10, 2021**

**Prevailing Federal Guidelines**

**Executive Order 14042** Ensuring Adequate COVID Safety Protocols for **Federal Contractors (and Subcontractors)**

- **Effects Federal Contractors and Subcontractors. Does not include HCBS Provider Agreements.**
- **Links to [Executive Order 14042](#) and [Federal Contractor FAQs](#)**

**CMS Interim Final Rule** U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS), Medicare and Medicaid Programs; Omnibus COVID-19 **Health Care Staff** Vaccination, Interim Final Rule

- **Includes Medicaid Approved Facilities such as ICF/ID. Does NOT include HCBS or Group Homes.**
- **Links to [CMS Rule for Health Care Staff](#) and [CMS FAQs](#)**

**OSHA Emergency Temporary Standard** U.S. Department of Labor, Occupational Safety and Health Administration (OSHA), Vaccination and Testing; Emergency Temporary Standard (ETS) for **Employers with 100 or More Employees**, Interim Final Rule

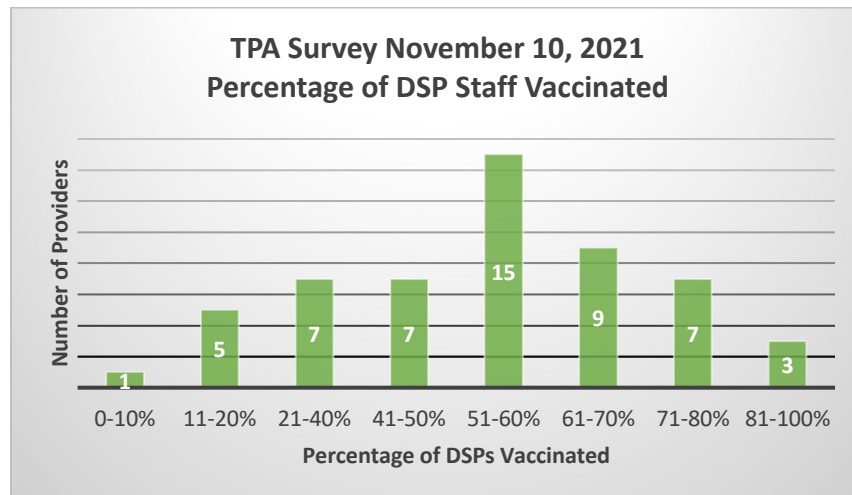
**Applies to ALL Employers with 100 or more Employees. Standards referenced above take precedence if applicable.**

**Policy Option 1, Paragraph (d)(1): Vaccination Mandate for All Employees with Allowable Exemptions and Accommodations**

**Policy Option 2, Paragraph (d)(2): Employee Option to be Vaccinated with Requirements for Weekly COVID-19 Testing and Face Coverings**

Links to [OSHA ETS](#) and [OSHA FAQs](#)

**Member Survey Regarding COVID-19 Vaccination Status of Employees**



**Q&A Session with Sarah Carlins & Craig Leen, K&L Gates**  
**Representing Legal Practice Groups: Healthcare, Employment, Labor, Workplace Safety**

**1. Do employers have to pay for the weekly tests?**

*No, not generally (see FAQ 6.G). It is possible that employers may have to pay for testing where an employee has received that as an accommodation from a mandatory vaccine policy.*

**2. Are employers required to make weekly tests available regardless of who pays?**

*No, employees can be required to get their own tests and be excluded from the workplace if they are not vaccinated or do not provide a negative test result. (See FAQ 6.C)*

**3. Can employers provide the test and charge (deduct from pay) the cost of the test to the employees who use them?**

*This is a complicated question without obtaining employee consent under federal, state, and local law. Please obtain consent from the employee.*

**4. Can an employer make tests available (and pay for them) for only certain cohorts of workers within the company? For example, could a provider provide and pay for tests for DSPs but not for admin staff?**

*Most likely. Please ensure it is based on a discernible reason and not on a protected class basis. FAQs 3A and 3B re Employer Policy address this issue.*

**5. Are there only certain tests that may be used?**

*See FAQ 6.J. NAAT and antigen tests can be used; not antibody tests.*

**6. What happens if an employee gets a test within 7 days, but the result doesn't come back for 24 hours (or longer). May they still work?**

*Employees need to both be tested within 7 days and show a negative test result. See FAQ 6.B. Regarding routine residential scheduling, the standard indicates every seven days so testing is valid for seven days. On a rolling basis testing that occurs at least every seven days should achieve compliance.*

**7. What constitutes proof of a negative test? Is there a standard form? Must it be from a medical professional?**

*See FAQ 6.J and 6.K. The test result from the entity administering the test at the POC is sufficient. If over the counter, then must be validated/proctored.*

**8. Does the employer have to keep records of the negative test and if so for how long?**

*Yes, they must be maintained as long as the ETS is in effect. See Section V of ETS.*

**9. What can an employer approve for a religious exemption? Must it be signed by a member of the clergy or is it an attestation of the employee? If former, who is considered a bona fide clergy person?**

*An employer should not generally require a statement from a clergy person. A statement by the employee expressing sincerely held religious belief should generally be sufficient. See EEOC Guidance.*

**10. What can an employer approve for a medical/disability exemption? Must it be signed by a certain level of medical professional? (if so, any medical professional or just MD or equivalent?); or can it be an attestation by the employee?**

*A statement of the employee can be sufficient, or an employer can request medical documentation as part of the interactive process.*

**11. Can employers developing their own exemptions vs. blanket testing requirement for unvaccinated employees?**

*Employees who work outside, work at home, or do not contact other employees may be exempt. Any unvaccinated employees coming to work with other employees would have to be tested absent an accommodation.*

**12. What are penalties for noncompliance with OSHA guidance?**

*Fines and injunctive relief.*

**13. Are there any other considerations for employers who intend to pay for all employee testing?**

*This obligation is for an indefinite time period and may be expensive if the ETS becomes a permanent standard. It may be more difficult to implement a vaccine mandate later because employees have relied on free testing.*

**14. Regarding corporate structures affecting 100 employee threshold – can affiliates, subsidiaries be treated as separate organizations?**

*Typically includes all employees corporatwide. As long as you operate separately you can be treated as a single entity. There is more specific guidance included under the Federal Contract executive order. The OSHA ruling is silent on this matter. It is recommended that you confer with your counsel if this situation applied to your organization(s).*

**15. Does the scope of the OSHA rule affect any recipients of Medicaid Funding?**

*The mandates apply to covered staff/employees. Only to the extent that a Medicaid recipient is also an employee of your organization.*

**16. Are there any pending federal actions under consideration that would require Medicaid recipients to be vaccinated?**

*No, there are no pending guidelines regarding any Medicaid recipients.*

**17. How does the OSHA ruling interact with the other guidance affecting federal contractors and health care workers?**

*Other federal mandates take precedence; if contractor mandate or CMS interim rule applies, they take precedence over OSHA ETS.*

**18. Can prospects be asked about vaccination status during an employment interview?**

*EEOC has indicated that applicants and employees could be asked about vaccination status, although they should not be asked follow-up questions about why an applicant has or has not gotten vaccinated as it may get into protected medical or disability-related information. I would recommend that this question be done as part of the application process and not in an interview though because information would likely not be handled confidentially and impermissible follow up questions may be asked. Applicants and employees can also be informed of any of the employer's requirements regarding vaccination and testing. Please be aware that applicants can seek disability/medical and religious accommodation as well as employees.*

**19. Are there options under the OSHA requirements for employees who refuse to be vaccinated or tested?**

*Yes, those employees could telework, work outside (following guidelines), or be granted a disability/medical or religious accommodation. Employer would still need to take measures to ensure safety.*

**20. Can work at home ever be deemed a workplace under OSHA definition?**

*OSHA expressly indicated that employees subject to the ETS can work from home and not be subject to vaccine or testing mandate. More generally, OSHA issued a policy directive in 2000 that it does not generally take action or enforce OSHA regulations in home offices/worksites. Please note, under the federal contractor mandate, employees working remotely who are directly or indirectly supporting a federal contract are subject to the vaccine mandate unless they have an accommodation.*

**21. What is status of current litigation and likelihood of delay?**

*OSHA ETS is stayed by a Fifth Circuit order (and petitions challenging ETS filed in almost every circuit court). OSHA may not move forward with implementation until stay is lifted. Multi-circuit lottery is expected November 16, and another circuit may have opportunity to lift the stay. If not lifted, stay likely to be challenged in the Supreme Court. Challenges have been filed against contractor mandate and CMS, but no stay or injunction has been issued as far as I'm aware.*

**22. What do OSHA or CMS do with comments, and do they affect effective date if changes are made?**

*Comments that raise material issues (not just statements for and against) must be considered and addressed. The comment process does not affect the effective date of the ETS or CMS Interim Rule.*

**23. Do the OSHA deadlines necessarily get pushed back commensurate with how long the Court stay is in place or do the deadlines remain as is?**

*Do not expect this - it's up to OSHA and the courts. Assume this will be put in place because this has been declared as a 'grave emergency'. OSHA has been criticized for extending the deadline under the assertion that this is a grave emergency.*

**24. Are we allowed to have a testing plan regardless of religious or medical waiver?**

*We recommend that you confer with counsel on this. You must allow for religious or disability accommodations.*

**25. Do the religious and medical exemptions only apply to the vaccination requirement or could they also apply to the testing requirement?**

*Exemptions can apply to any policy of the employer.*

**26. Can employees also request religious exemption for weekly testing? For the religious exemption, is there still an undue hardship?**

*Yes. Employees can request religious accommodations but they will need to justify. Their request does not need to be supported by formal positions of organized religious organizations. If someone claims religious exemption, it is recommended that employers do not challenge or oppose the request but evaluate whether it requires undue hardship. For example, if employee is expected to provide patient care an accommodation could result in undue hardship.*

**28. Does PA labor law require employers to pay for the testing? Some say PA requires employers to pay for things required to keep one's job. In this case, is it the vaccination that's required and the testing is only an alternative or accommodation, or is the testing considered "required" to keep one's job?**

*Yes, local and state law and/or collective bargaining agreements can require employers to pay. These take precedence over OSHA guidance. OSHA has indicated that costs can be passed on to employees. Testing is not necessarily required to keep your job, because you could get vaccinated. Necessary for the job employer has to pay for, consult with your counsel.*

**29. Are employers allowed to claim an undue hardship and NOT allow any religious exemptions?**

*Unlikely but each request should be evaluated individually, and you should confer with you legal counsel.*

**30. It's my understanding that as long as the Public Health Emergency is active that all COVID testing is free. If this mandate is enacted will employees be able to get free testing? I believe the current Public Health Emergency is due to expire January 16, 2022.**

*There are potential resources for testing but no commitment of free testing under the published standards.*

**31. Can employers require employees to have weekly testing completed outside of normal work hours i.e., off-shift?**

*This would depend upon testing policy adopted by the employer. Likely yes but please confer with counsel.*

**32. If you work at home, with a family member who lives in your home as your only client, can you be considered exempt if you have no other contact with employees or other clients?**

*Private homes have been identified under OSHA as not included in the definition of work location.*

**33. Best guess on how the US Supreme Court will eventually rule on the OSHA mandate?**

*Please see answer to question 21.*

**34. We provide supported employment and pre-vocational services, and our clients receive a paycheck if they perform any work during services. Are they considered employees under this mandate? If so, how can we afford to pay for the tests?**

*If your organization falls under the requirements of the standard, all employees would be included under the rulings.*

**35. Is there any guidance on how to obtain the weekly test results from staff and how long these will need to remain on file?**

*For as long as the ETS remains in effect or other guidance is published.*

**36. If an employee works for multiple employers is one test sufficient to meet all employer requirements?**

*Yes, under OSHA requirements employees should be able to show evidence of testing to each applicable employer, so no need for multiple tests in the same week. Would ultimately depend on employer policy.*

## **TPA Recommendations**

1. Evaluate and Assess All Applicable Requirements and Available Compliance Alternatives
2. Determine Current Vaccination Status of Your Workforce and Project Short-Term Impact of Mandate on Vacancies
3. Develop Policies Around Your Chosen Alternative (See Applicable Federal Guidance for Policy Requirements)
4. Seek Simple Solutions That Minimize Workforce Impact and Access Resources That Are Already Available