

COVID -19 Roundtable Vaccination Mandates

November 10, 2021





Sarah Carlins Craig Leen

LEGAL PRACTICE GROUPS: HEALTHCARE,
EMPLOYMENT, LABOR, WORKPLACE SAFETY

K&L GATES



Agenda

- Prevailing Vaccination Mandate Guidance
 - Federal Contractors and Subcontractors
 - Health Care Staff and Settings
 - Employers with 100 or More Employees
- TPA Member Questions
- Recommendations
- Open Discussion

CHERYL BETTIGOLE, MD, MPH
Acting Health Commissioner

SHARA EPSTEIN, MD
Medical Director, Division of COVID-19 Containment

MOLLY HARRAR, MS
Director, Division of COVID-19 Containment

Health Alert

Guidance Regarding the COVID-19 Vaccine Mandate for Healthcare Workers August 25, 2021

The following is intended as a plain language summary of rules during the COVID-19 emergency and does not replace the need to follow all applicable federal, state, and local laws and regulations.

The City of Philadelphia has issued an Emergency Regulation Governing the Control and Prevention of COVID-19 Mandating Vaccines for Healthcare Workers and In Higher Education, Healthcare, and Related Settings (“Vaccine Mandate Regulation”), which mandates vaccine for healthcare workers and in higher education, healthcare, and related settings. This mandate became Effective on August 16, 2021 and requires Healthcare Workers and certain workers at Healthcare Institutions to be fully vaccinated by October 15, 2021.

Fully vaccinated means it has been two weeks since the final dose of vaccine.

Healthcare Institution:

Any entity or individual that employs or otherwise coordinates the services of Healthcare Workers in the City.

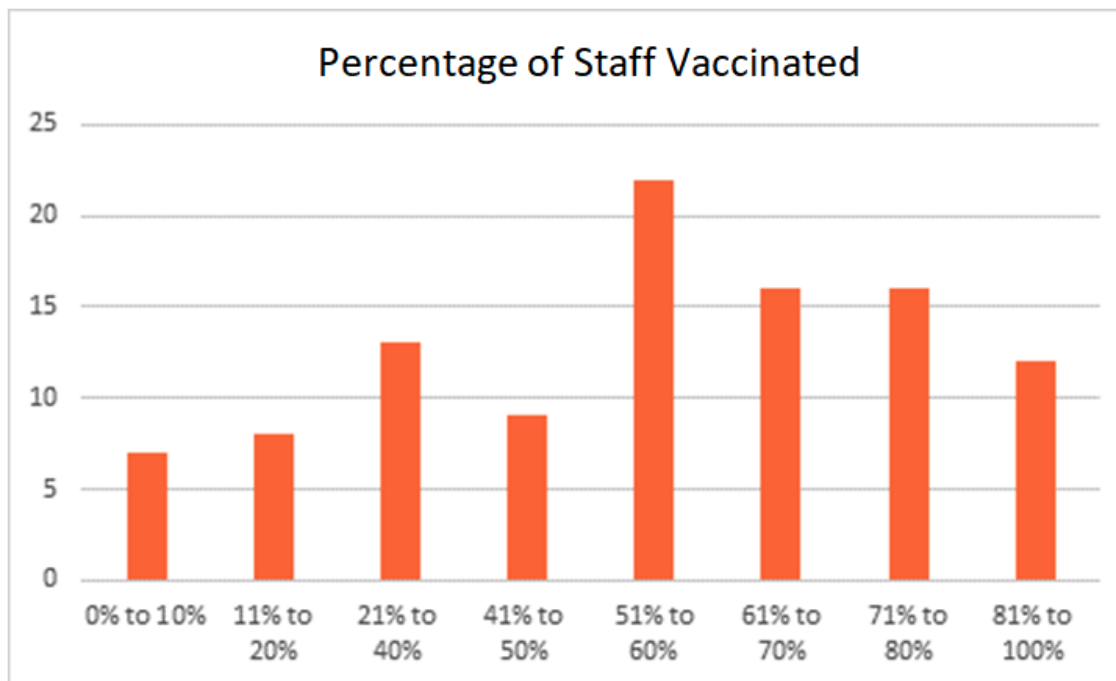
Healthcare Workers:

Any individual involved in providing any of the following healthcare related services in-person to patients or clients or any individual working in a Healthcare Institution must be fully vaccinated.



MyODP News Online, Sept. 3, 2021: ODP Vaccination Rate Survey Results

ODP found that 89% of individuals and 49% of staff in ICF and residential settings are vaccinated. However, staff vaccination rates deviate from the average significantly indicating a fairly even spread of staff vaccination rates per provider site. The graph below illustrates that distribution.





Reference Materials

1. Executive Order 14042 on Ensuring Adequate COVID Safety Protocols for **Federal Contractors (and Subcontractors)**
2. 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
3. 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
4. Applicable FAQs



PATH OUT OF THE PANDEMIC

PRESIDENT BIDEN'S COVID-19 ACTION PLAN



Vaccinating the Unvaccinated

Since January, the Administration has taken actions to make vaccination conveniently available to all. COVID vaccines have been available to every individual age 16 and older since April 19th and to those age 12 and older since May. The Administration took steps to make vaccines available at over 80,000 locations nationwide, worked with pharmacies to offer walk-in appointments, and put out a call to action to businesses and organizations across the nation.



PATH OUT OF THE PANDEMIC

PRESIDENT BIDEN'S COVID-19 ACTION PLAN

Requiring All Employers with 100+ Employees to Ensure their Workers are Vaccinated or Tested Weekly

Requiring Vaccinations for all Federal Workers and for Millions of Contractors that Do Business with the Federal Government

Requiring COVID-19 Vaccinations for Over 17 Million Health Care Workers at Medicare and Medicaid Participating Hospitals and Other Health Care Settings

Calling on Large Entertainment Venues to Require Proof of Vaccination or Testing for Entry

Requiring Employers to Provide Paid Time Off to Get Vaccinated

TPA Poll Results October 22 Membership Meeting

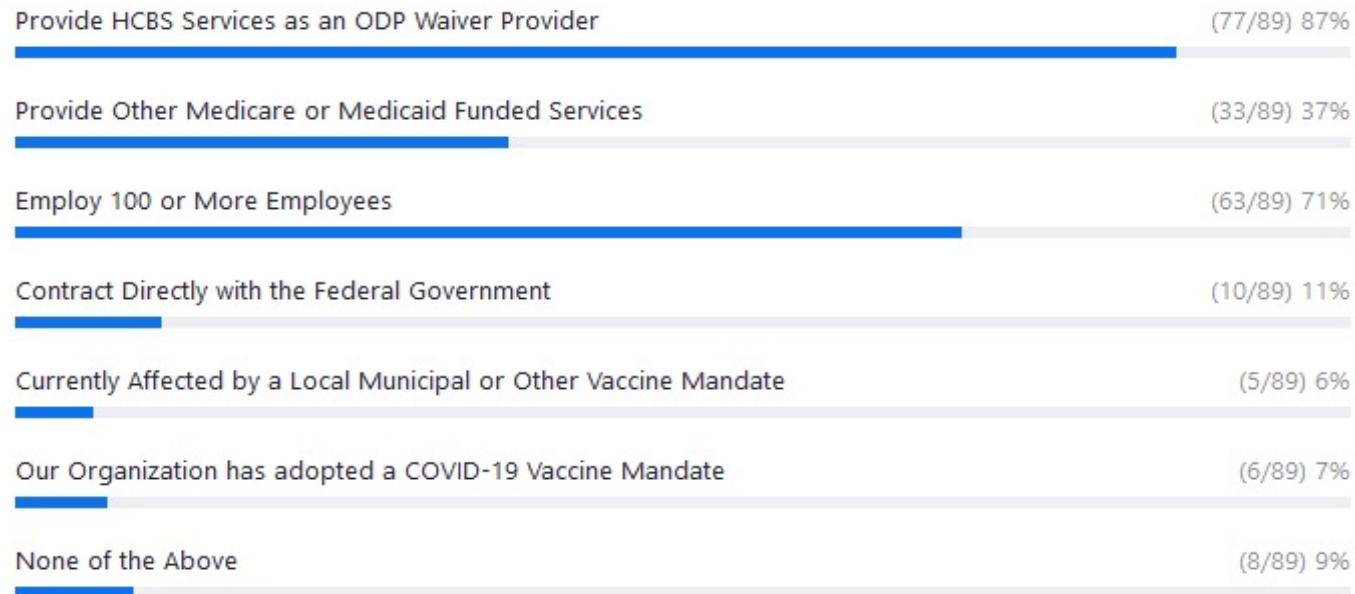


COVID-19 Vaccination Mandates

Poll ended | 1 question | 89 of 142 (62%) participated

1. Please Check all that Apply (Multiple Choice) *

89/89 (100%) answered



CMS Interim Final Rule: Omnibus Health Care Staff Vaccination



Q. What about Assisted Living Facilities, Group Homes, or other similar settings?

A: This regulation only applies to Medicare and Medicaid-certified facilities. CMS does not have regulatory authority over care settings such as Assisted Living Facilities or Group Homes. This regulation will also not apply to physician's offices because they are not subject to CMS health and safety regulations.

Q. Does this requirement apply to Medicaid home care services, such as Home and Community-based Services (HCBS), since these providers receive Medicaid funding but are not regulated as certified facilities?

A. No, this regulation only applies to those Medicare and Medicaid-certified provider and supplier types that are subject to CMS health and safety regulations. CMS's health and safety regulations do not cover providers of Home and Community-based Services.

CMS Interim Final Rule: Omnibus Health Care Staff Vaccination



Q. Does this requirement apply to schools receiving Medicaid funding?

A. No, this regulation only applies to those Medicare and Medicaid-certified provider and supplier types that are regulated under CMS health and safety regulations. CMS does not regulate schools.

Q: Why didn't CMS include all health care settings?

A: CMS is using the authority established by Congress under the Social Security Act to regulate Medicare and Medicaid-certified health facilities. Sections 1102 and 1871 of the Social Security Act (the Act) grant the Secretary of Health and Human Services authority to make and publish such rules and regulations, not inconsistent with the Act, as may be necessary to the efficient administration of the functions with which the Secretary is charged under this Act. Citations to the relevant statutory authorities for each specific type of provider and supplier is set out in the discussion of each provider- and supplier-specific provision of the regulation. This authority does not extend to certain facilities nor independent physicians/clinicians.

OSHA Emergency Temporary Standard



D. Employer Policy on Vaccination

OSHA has determined that requiring or strongly encouraging vaccination – the most effective and efficient control for reducing COVID-19 – is key to ensuring the protection of workers against the grave danger of exposure to SARS-CoV-2 in the workplace (see Grave Danger, Section III.A. of this preamble). **Therefore, this ETS requires employers to adopt mandatory vaccination policies for their workplaces, with an exception for employers that instead adopt a policy allowing employees to elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination.** In Need for the ETS (Section III.B of this preamble), OSHA explains its rationale for providing the exception.

OSHA Emergency Temporary Standard



Paragraph (d)(1) requires the employer to establish, implement, and enforce a written mandatory vaccination policy. As defined in paragraph (c), a mandatory vaccination policy is an employer policy requiring each employee to be fully vaccinated. Such a policy must require vaccination of all employees, other than those employees who fall into one of three categories:

- (1) those for whom a vaccine is medically contraindicated,
- (2) those for whom medical necessity requires a delay in vaccination, or
- (3) those who are legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.

The policy must also require all new employees to be vaccinated as soon as practicable.

OSHA Emergency Temporary Standard



Paragraph (d)(2) is a limited exemption from the mandatory vaccination policy requirement. As discussed in Need for the ETS (Section III.B. of this preamble), vaccination mandates are effective at increasing overall vaccination rates and protecting employees and, therefore, the agency encourages all employers to implement a mandatory vaccination policy. Under paragraph (d)(2), **however, employers can avoid the mandate in paragraph (d)(1)** if the employer establishes, implements, and enforces a written policy allowing any employee not subject to a mandatory vaccination policy to choose either to: (1) be fully vaccinated against COVID-19 or (2) provide proof of regular testing for COVID-19 in accordance with paragraph (g) of this section and wear a face covering in accordance with paragraph (i).

OSHA Emergency Temporary Standard



An employer who chooses to operate under paragraph (d)(2), however, must still offer the support for vaccination required under paragraph (f) and may not prevent employees from getting vaccinated.

Adopting a policy under paragraph (d)(2) simply means that employees themselves may choose not to get vaccinated, in which case they must get tested and wear face coverings per the requirements of the standard.

OSHA Emergency Temporary Standard – Policy Development



Establish Policy: (d)(1) Vaccination Mandate or (d)(2) Exemption with Testing and Face Coverings, address requirements in paragraphs (e) through (j) of the standard

- (e) determining vaccination status
- (f) employer support/paid time off
- (g) testing
- (h) employee notification
- (i) face coverings
- (j) information provided to employees

Implement: Ensure compliance with adopted policy; training, communication

Enforce: Use of such mechanisms as work rules and workforce disciplinary system



TPA Member Questions





TPA Member Questions

- 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?



TPA Member Questions

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? Employee need to both be tested within 7 days and show a negative test result. See FAQ 6.B

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.



TPA Member Questions

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 clergyperson? An employer should not generally require a statement from a clergyperson. 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 develop 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



TPA Member Questions

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

14. Regarding corporate structures affecting 100 employee threshold – can affiliates, subsidiaries be treated as separate organizations? Typically includes all employees corporatewide.

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?



TPA Member Questions

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

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

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

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

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

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



TPA Recommendations

1. Evaluate All Available Options and Requirements
2. Determine Current Vaccination Status of Your Workforce
3. Develop Policies Around Your Chosen Alternative
4. Keep it Simple – Assess The Least Onerous Methods to Achieve Compliance



Thank You!
