



## COVID-19 Employee Vaccination Rules

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The Occupational Safety and Health Administration (OSHA) and Centers for Medicare and Medicaid Services (CMS) have issued regulations requiring vaccination or testing for COVID-19 in many places of employment.<sup>1</sup> This issue brief describes those requirements and provides additional background on the effect on public employees and employer-mandated vaccines in general.

### OSHA STANDARD FOR PRIVATE-SECTOR EMPLOYEES

Congress enacted the Occupational Safety and Health Act of 1970 to address personal injuries and illnesses arising out of work situations.<sup>2</sup> OSHA, an entity in the U.S. Department of Labor, implements the law, and is required to set mandatory occupational safety and health standards that are “reasonably necessary” to provide safe or healthful places of employment. The law applies to all private sector employers engaged in business affecting commerce.

OSHA may implement provisional safety and health standards for places of employment through the “emergency temporary standards” or “ETS” process. To implement an emergency temporary standard, OSHA must first make two determinations: (1) that employees are exposed to **grave danger** from substances or agents determined to be toxic or physically harmful or from new hazards; and (2) that an emergency standard is **necessary** to protect employees from the danger.<sup>3</sup> An emergency temporary standard takes effect immediately upon publication in the Federal Register, and may remain in effect for up to six months, unless superseded earlier by a permanent rule.

On November 5, 2021, OSHA published an **emergency temporary standard** requiring vaccination or testing of certain employees. Under the standard, covered employees must be fully vaccinated by January 4, 2022, or the employer may offer an alternative for weekly testing of unvaccinated employees. An employer must establish the plans for the “vaccine or test” policy, collect proof of vaccination status, and require face coverings for unvaccinated employees by December 6, 2021. However, the standard is subject to litigation in multiple jurisdictions and may or may not be enforceable at particular times and places.

The OSHA standard applies to businesses with 100 or more total employees, firm- or corporate-wide. Employees who work exclusively outdoors are counted for the 100-employee threshold, but the standard’s requirements only apply to employees who work indoors around other individuals. An employer must provide up to four hours of paid time for a first or single vaccination dose (and second, in a two-dose series) during regular work hours, and a reasonable amount of paid sick leave, generally up to two days, to recover from any side effects. An employer is not required to pay for costs associated with testing, but under other labor laws, time for testing during regular work hours should generally be paid.<sup>4</sup> Testing is not required for 90 days following a positive test result.

The vaccination requirement is subject to individual determinations for disability and religious exemptions. All vaccination and testing records must remain confidential, except for limited purposes.

For more information on the standard, see the [OSHA FAQ](#).

### CMS RULE FOR HEALTH CARE FACILITY EMPLOYEES

Congress enacted the Social Security Act Amendments of 1965, commonly known as the Medicare bill, “[t]o provide a hospital insurance program for the aged” and “improve the Federal-State public assistance programs.”<sup>5</sup> CMS, in the U.S. Department of Health and Human Services (HHS), administers Medicare, Medicaid, and other programs that provide health care coverage. The Social Security Act

directs the HHS Secretary to prescribe regulations “as may be necessary to carry out the administration of the insurance programs under [the act].”<sup>6</sup>

On November 5, 2021, CMS published an interim final rule for certain health care employees. Under the rule, covered health care employees must be fully vaccinated by January 4, 2022. “Phase 1” completion of a first or single vaccination dose is due by December 6, 2021. The CMS rule does not allow for testing of unvaccinated employees in lieu of vaccination. The vaccination rule is subject to individual determinations for disability and religious exemptions.

The CMS rule requires COVID-19 vaccination of staff at many health care facilities that participate in the Medicare and Medicaid programs. The requirement applies to all staff regardless of patient contact and even if the employee works offsite, but not to employees who work 100 percent remotely. All vaccination records must remain confidential, except for limited purposes.

For more information on the rule, see the [CMS FAQ](#).

## APPLICABILITY TO PUBLIC EMPLOYEES

OSHA regulations do not apply to state or local public employers in Wisconsin, but state law requires “equal” standards to be adopted by administrative rule for public sector employees.<sup>7</sup> Vaccination against COVID-19 is not currently required in state administrative rules. Vaccination may be required as a general occupational safety and health standard for Wisconsin state and local public sector employees only by direct revision to the statutes or through the state’s administrative rulemaking procedures.<sup>8</sup>

The CMS rules apply to public sector health care facilities that are subject to CMS regulations.

## EMPLOYER-MANDATED VACCINATION REQUIREMENTS

The U.S. Equal Employment Opportunity Commission (EEOC) has stated that employers may require workers to be vaccinated against COVID-19, if nondiscrimination and other laws are followed. The U.S. EEOC has also recognized testing of employees before they may enter a workplace as an acceptable method of determining a direct threat from COVID-19.<sup>9</sup>

State law does not prohibit or require employee vaccinations. Accordingly, if a federal requirement does not apply, a public or private employer may make a determination for its own workplace on steps to reduce safety risks, including mandating vaccines, if the requirement is job related and consistent with business necessity.<sup>10</sup>

An employer may exclude an employee from the workplace if an individual’s presence would pose a “direct threat” to workplace safety, and if reasonable accommodations for a disability or religious beliefs would impose an undue hardship on the employer’s operations.<sup>11</sup>

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<sup>1</sup> 86 F.R. 61402 and 61555.

<sup>2</sup> 29 U.S.C. ss. 651 to 678.

<sup>3</sup> There are no regulations defining “grave danger” or “necessity,” but these are understood to be high standards to meet.

<sup>4</sup> See U.S. Department of Labor, [COVID-19 and the Fair Labor Standards Act Questions and Answers](#).

<sup>5</sup> P.L. 89-97.

<sup>6</sup> 42 U.S.C. ss. 1302 (a), 1320a-7, 1395i, 1395hh (a) (1), and 1396r.

<sup>7</sup> 29 U.S.C. s. 652 (5); s. 101.055 (3), Stats.; and ch. SPS 332, Wis. Adm. Code. The OSHA standards must be adopted by states that have an OSHA-approved State Plan for public employees. Wisconsin does not have an OSHA-approved State Plan.

<sup>8</sup> Rulemaking procedures are subject to legislative oversight. [ss. 227.19 and 227.24, Stats.]

<sup>9</sup> U.S. EEOC, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) (updated October 28, 2021).

<sup>10</sup> 29 C.F.R. s. 1630.10 (a).

<sup>11</sup> 29 C.F.R. ss. 1605.2 and 1630.2 (p) and (r). The assessment of a “direct threat” to the workplace must include factors such as community spread, the nature and severity of the potential harm, and the work environment.