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New OSHA and CMS COVID-19 Vaccination & Testing Mandates

What Employers Need to Know

Insight — November 4, 2021

Today, the Department of Occupational Safety and Health Administration (OSHA) issued its Covid-19 Vaccination and Testing Emergency Temporary Standard (ETS) and the Centers for Medicare & Medicaid Services (CMS) issued its Interim Final Rule (the "Interim Rule"), nearly two months after President Biden issued two executive orders in conjunction with the Path out of the Pandemic, President Biden's COVID-19 Action Plan (collectively, the President's Action Plan"), providing new COVID-19 vaccination requirements. While there is some overlap between the standards, we will address the ETS and Interim Rule separately. We recommend that you contact your employment and healthcare attorneys for additional guidance.

Covid-19 Vaccination and Testing Emergency Temporary Standard

The ETS generally requires that employers with 100 or more employees require COVID-19 vaccination or a weekly negative test result as described in more detail below.

Who is covered by the OSHA ETS?

The OSHA ETS applies to employers with 100 or more employees with the following exceptions:

- Workplaces covered by the Safer Federal Workforce Task Force Covid-19 Safety: Guidance for Federal Contractors and Subcontractors;
- Workplaces that provide healthcare services that are subject to the requirements of the OSHA Healthcare ETS; and
- Public employers in states without OSHA-approved state plans.

The OSHA ETS also does not apply to the following employees of covered employers:

- Employees who do not report to a workplace where other individuals are present;
- Employees while working from home; and
- Employees who work exclusively outdoors.

Is the OSHA ETS a vaccine mandate?

No. If an employer does not wish to implement a mandatory vaccination policy, the OSHA ETS allows the employer to implement a policy that requires employees to choose either to be fully vaccinated or provide proof



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of weekly testing for COVID-19.

I have part-time employees and the number of employees I have varies widely. How do I determine if the OSHA ETS applies to me?

The ETS applies to employers with 100 or more employees at any time on or after the ETS goes into effect November 5, 2021. If an employer reaches 100 employees at any time during the period in which the ETS is in effect, the ETS will apply to that employer for the remainder of the time it is in effect, regardless of any subsequent fluctuation in the number of employees. For example, if an employer has 103 employees on the day the ETS becomes effective or at any time when the ETS is in effect and terminates 4 employees, the ETS will continue to apply to that employer. Similarly, if an employer has 93 employees on the day the ETS becomes effective, and ten days later hires ten employees, the ETS applies as of the date the employer reaches 100 employees and will continue to apply to that employer as long as the ETS is in effect.

Employers must count all employees across all of their U.S. locations to determine whether the ETS applies to them, regardless of an employee's vaccination status, when, or where they perform their work. Employers must also count all part-time workers toward the 100-employee threshold. However, independent contractors are not counted toward the threshold. The Department of Labor provided the following examples:

- If an employer has 75 part-time employees and 25 full-time employees, the ETS applies because there are 100 total employees;
- If an employer allows 100 of 150 employees to work from home full-time, the ETS applies because there are 100 total employees;
- If an employer has 102 employees and only 3 work in an office, the ETS applies because there are 100 total employees;
- If an employee has 150 employees who perform maintenance or installation services at customer homes from company vehicles, the ETS applies because there are 100 total employees;
- If a single company has 50 small locations, such as kiosks or concession stands, with at least 100 full time or part time employees in the combined locations, the ETS applies, regardless of the number of employees at each kiosk;
- If an employer has 80 permanent employees and 30 temporary employees supplied by a staffing agency, the employer counts only its own 80 employees and the ETS does not apply to that employer.

In many cases, joint employer principles apply where both employers are covered by the ETS; however, in other circumstances, only one employer counts a worker under the ETS. A few examples follow:

- **Franchisor / Franchisee Relationships:** Each franchise is a separate entity for purposes of the 100-employee threshold. A Franchisor would only count “corporate” employees, and the

Franchisee would count employees of each individual franchise separately.

- **Other Related Entities:** Some related entities may be considered a single employer for OSHA purposes if all safety matters are handled as one company. In that case, all entities make up one single employer and must be counted as one.
- **Staffing Agencies:** Staffing agencies who place employees with a host employer must count the jointly employed workers. The host employer does not need to count the employee for purposes of this ETS. This differs from other OSHA requirements and is specific to this ETS.
- **Multi-employer Worksites:** Each employer on a multi-employer worksite is required to count only its own employees, not the total number of workers at each site. However, each employer must count the total numbers of employees it employs regardless of whether and where employees report for work on a specific day.

When does the ETS go into effect?

The ETS imparts two important deadlines for employers and healthcare facilities:

December 5, 2021 – Employers must comply with all masking, notification, paid time off, and testing requirements outlined below on or before December 5, 2021. The Biden Administration, and OSHA, are calling on all employers to take these actions as quickly as possible.

January 4, 2022 – For employers that are requiring vaccinations, employers must ensure that their employees are fully vaccinated, meaning that employees have and have received either two doses of the Pfizer or Moderna vaccine or one dose of the Johnson & Johnson vaccine by January 4, 2022, unless they qualify for an exemption.

What are the first steps employers need to take to comply with the ETS?

To comply with the ETS, employers must take one of the following two actions:

1. establish, implement, and enforce a written mandatory vaccination policy which requires all current employees to be vaccinated and all new employees to be vaccinated as soon as practicable, with exemptions for (a) those for whom a vaccine is medically contraindicated, (b) those for whom medical necessity requires a delay in vaccination, or (c) 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; or
2. establish, implement, and enforce a written policy allowing any employee not subject to a mandatory vaccination policy to choose either to: (a) be fully vaccinated against COVID-19 or (b) provide

proof of weekly testing.

Employers may choose to implement different vaccination policies by location or type of business operation as risk and needs require. No employer covered by the ETS can prevent an employee from being vaccinated.

Can a disability create an exemption from the vaccination requirement?

When an employee cannot get vaccinated for COVID-19 because of a disability, the employee must let the employer know that he or she needs an accommodation. To request an accommodation, an individual does not need to mention the ADA or use the phrase “reasonable accommodation.” As part of determining whether an employee has a disability that would prevent them from getting vaccinated, the employer may request supporting documentation from the employee's medical provider.

What is considered a sincerely held religious belief?

What qualifies as a “religion?”

Sincerely held religious beliefs implicate Title VII of the Civil Rights Act of 1964. The EEOC's guidance broadly defines religion as beliefs which address fundamental questions about life, purpose, and death. Religious beliefs, practices, and observances include both theistic and non-theistic moral or ethical beliefs as to what is right and wrong, or which are sincerely held. The definition of religion protects beliefs and practices which the employer may be unfamiliar or beliefs that may have only one follower. However, certain beliefs do not fall under Title VII's definition of religion. Social, political, or economic philosophies, and well as mere personal preferences, even if strongly held, are not religious beliefs protected under Title VII. Similarly, ways of living, such as veganism, pacifism, or minimalism, are not protected religious beliefs.

Determining whether an employee's practice stems from a sincerely held religious belief turns not on the nature of the activity, but rather upon the motivation. Employers should review religious accommodation requests on a case-by-case basis as a certain practice by one employee may qualify as a sincerely held religious belief whereas an identical practice by another employee may not. For example, one employee might observe dietary restrictions for religious reasons while another employee adheres to the same dietary restrictions for health or environmental reasons. In this scenario, the employee whose practice is based upon sincerely held religious beliefs is subject to reasonable accommodation under Title VII whereas the employee who engages in the same practices but for secular reasons might not be subject to reasonable accommodations.

Thus, employers should be mindful that vague statements from employees requesting a religious accommodation such as, “I refuse to get the COVID-19 vaccine due to my religion” are insufficient and will require additional inquiry by the employer to determine whether the accommodation request is indeed based upon the employee's sincerely held religious belief.

How does an employer determine whether a belief is sincerely held?

Religious beliefs must be “sincerely held” in order to qualify for Title VII accommodations. The EEOC requires that employers should ordinarily assume that an employee's request for religious accommodation is sincerely held. However, if there is an objective basis upon which the employer may question the sincerity of the employee's religious belief, the employer may request documentation from the employee to assist in the employer's assessment of the employee's sincerely held religious belief, practice, or observance. Types of documents which may be requested from the employee include the following:

- Statements and explanations from the employee that address (i) the religion upon which the employee is basing his or her religious accommodation request; (ii) the length of time the employee has practiced the religion; and (iii) the specific tenets of the religion which require the religious accommodation.
- Written statements or other documents from third parties such as the employee's religious leader, practitioners, or other with whom the employee has discussed his or her beliefs or who has observed the employee's past religious adherence.

The employer should be mindful that while prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs—or degree of adherence—may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held.

What accommodations must be made?

If the employer determines that employee has a disability that would prevent the employee from being vaccinated or that the employee's religious objection is, indeed, a sincerely held belief, then the employer must determine whether permitting a reasonable accommodation would create an undue hardship on the employer. The EEOC has identified the following as possible reasonable accommodations: an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.

To prove an undue hardship, the employer will need to demonstrate how much cost or disruption the employee's proposed accommodation would involve (such as implementing mask-wearing, social distancing, or alternative working conditions). However, undue hardship is a high burden and requires something greater than simple hardship. Relevant factors to be considered include the identifiable cost in relation to the size and operating costs of the employer, the number of individuals who will in fact need a particular accommodation, and workplace safety. Only if the employer believes implementing reasonable accommodations would create an undue hardship on the employer may it refuse to permit accommodations.

What does my vaccination policy need to include?

Policies should be in writing and employers must include the following:

- requirements for COVID-19 vaccination;
- applicable exclusions from the policy (discussed above);
- information outlining how the employer will collect and determine an employee's vaccination status;
- provide for paid time and sick leave for vaccination purposes;
- procedures for notifying the employer of positive COVID-19 tests and the removal of COVID-19 positive employees from the workplace;
- information that must be made available to employees and how that information will be made available;
- the policies and procedures employed by employers allowing testing, and suspension of the test after a positive COVID-19 test or diagnosis for specific employees;
- mandatory face coverings for unvaccinated employees, including procedures for compliance;
- disciplinary actions that may be taken for failure to abide by the policy;
- the effective date, who the policy applies to, how the policy will apply to new employees, deadlines for compliance and enforcement, and procedures for compliance and enforcement.

We already have a vaccination policy in place. Do we need to re-write it?

Not necessarily, but employers must evaluate current policies to ensure that they satisfy all requirements of the ETS. Existing policies must be modified or updated to incorporate any required elements that are missing and must provide updated notification of the policy to all employees.

What notifications do we need to provide to employees?

Employers must provide employees with the required information related to its implementation of the ETS, including copies of all employer policies and the details of the employer's vaccination policy. Information related to the manner used to determine an employee's vaccination status, paid time off to receive vaccinations or to cover time spent experiencing side effects that prevent them from working, and the notification procedures that must be followed in the event of a positive COVID-19 test or diagnosis. Employers must also provide information to unvaccinated employees including policies and procedures related to testing, face coverings, and potential disciplinary actions. All information must be provided to each employee in a language and at a literacy level the employee understands – meaning that the employer may need to provide this information in different languages and at different literacy levels, depending upon its workforce.

Employers must also inform all employees about the requirements of 29 CFR 1904.35(b)(1)(iv) and section 11(c) of the OSHA Act, which protect employees from retaliation for engaging in activities protected by OSHA statutes or regulations, as well as laws that provide for criminal penalties for knowingly supplying false statements or documentation.

The ETS also requires employers to provide employees with information regarding the COVID-19 vaccine's efficacy, safety, and the benefits of being vaccinated. To meet this requirement, employers must provide the CDC's document, “Key Things to Know About COVID-19 Vaccines,” available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html (CDC, October 7, 2021), to each employee either electronically or in print. The CDC provides the document in several languages, but to the extent it does not exist in the language required for all employees, the employer must provide a translation to each employee in a language they understand.

How do we handle employees who are not vaccinated because of their protected status or refusal to be vaccinated?

After January 4, 2022, employers must ensure that any employees who have not been fully vaccinated and report to workplace where other individuals (coworkers, customers, or others) are present must:

1. be tested for COVID-19 at least once every seven days; and
2. provide documentation of the most recent COVID-19 test result to the employer no later than the 7th day following the date on which the employee last provided a test result.

Self-testing does not satisfy the testing requirement. Employees who do not normally report to a workplace where other individuals are present must be tested within seven days of entering such a workplace and provide the employer with documentation of the most recent COID-19 test result prior to entering the workplace.

Employers must also ensure that all unvaccinated employees wear a face mask while working indoors or while occupying a vehicle with another person for work purposes unless the employee is working alone in a room with floor to ceiling walls or windows and a closed door. Employees are also exempt from the masking requirement when wearing a respirator or facemask in accordance with other OSHA standards.

Are remote and hybrid workers covered by the ETS?

Fully remote workers are not covered by the ETS (but must be included in calculating number of employees as set forth above). Generally speaking, this will remove remote workers from the testing requirements. However, if a remote employee is going to report to a workplace with other individuals, then the remote employee must comply with the employer's vaccination or testing policies, including taking a COVID-19 test within seven days prior to returning to the workplace and providing documentation of that test result to the employer upon returning to the workplace.

Hybrid workers are generally covered by the ETS. However, the standards

they are subject to will depend on how often they report to the workplace. If an employer's policy provides for testing, then each employee who is not fully vaccinated that reports to a workplace where other individuals, such as co-workers and customers, are present at least once every seven days, then the employee must be tested for COVID-19 at least once every seven days and must provide documentation of their most recent COVID-19 test result to the employer no later than the seventh day following the date on which the employee last provided a test result. If the employee does not report to a workplace with other individuals at least once every seven days, then the employee must take a COVID-19 test within seven days prior to returning to the workplace and providing documentation of that test result to the employer upon returning to the workplace.

Are employees who are working outdoors covered by the ETS?

The ETS does not apply to workers who work "exclusively outdoors," but those employees must be included in the employer's headcount as set forth above. According to the ETS, for work to qualify as being performed exclusively outdoors, the following criteria must be met: (i) the employee must work outdoors on all days, (ii) the employee must not routinely occupy vehicles with other employees as part of work duties, and (iii) the employee works outdoors for the duration of every workday except for de minimis use of indoor spaces where other individuals may be present – such as a multi-stall bathroom or an administrative office – as long as the time spent indoors is brief, or occurs exclusively in the employee's home. Outdoor work does not include buildings under construction where substantial portions of the structure are in place, such as walls and ceiling elements that would impede the natural flow of fresh air at the worksite. Employees who do not meet these criteria are subject to the ETS standards.

Which COVID-19 tests are acceptable under the ETS?

In order for a test to be acceptable under the ETS, it must be a test for SARS-CoV-2 that is:

- cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the U.S. Food and Drug Administration (FDA) to detect current infection with the SARS-CoV-2 virus (e.g., a viral test);
- administered in accordance with the authorized instructions; and
- not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

COVID-19 tests can broadly be divided into two categories, diagnostic tests and antibody tests. Diagnostic tests detect parts of the SARS-CoV-2 virus and can be used to diagnose current infection. On the other hand, antibody tests look for antibodies in the immune system produced in response to SARS-CoV-2 and are not used to diagnose an active COVID-19 infection. Antibody tests do not meet the definition of COVID-19 test for the purposes of this ETS.

Diagnostic tests for current infection fall into two categories: nucleic acid

amplification tests (NAATs) and antigen tests. NAATs are a type of molecular test that detect genetic material (nucleic acids); NAATs for COVID-19 identify the ribonucleic acid (RNA) sequences that comprise the genetic material of the virus. Antigen tests indicate current infection by detecting the presence of a specific viral antigen. Antigen tests generally have similar specificity to, but are less sensitive than, NAATs.

Antigen tests are the only type of diagnostic tests that can be self-administered. To be a valid COVID-19 test under the ETS, an antigen test may not be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

What is the cost to the Employer?

Cost of vaccination

All covered employers are required to provide up to 4 hours of paid time off to allow their employees to obtain the vaccination, and, if needed, paid sick leave to recover from the side effects associated with the vaccine which may prevent them from working. Employers are not, however, obligated by this ETS to reimburse employees for transportation costs (e.g., gas money, train/bus fare, etc.) incurred to receive the vaccination. We recommend that you meet with your employment attorney to discuss how various state laws will apply to your workforce.

Cost of tests

Covered employers are not generally required to pay for or provide the tests unless they are otherwise required to by state or local laws or in labor union contracts. Some state laws or collective bargaining agreements will require employers to pay for tests, but the ETS does not. We recommend that you meet with your employment attorney to discuss how various state laws will apply to your workforce.

What if an employee contracts COVID-19?

If an employee receives a positive COVID-19 test or is diagnosed with COVID-19, the employer must be promptly notified of the positive test, regardless of the employee's vaccination status. Employees must also be removed from the workplace immediately. The ETS does not require Employers to provide paid time off to employees resulting from removal after a positive COVID-19 test or diagnosis, but other Federal, State, and local laws may require paid leave.

When can an employee who previously tested positive for COVID-19 return to the workplace?

An employee may return to work if they receive a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test (the most common screening test), or if the following three criteria are met: (1) at least ten days have passed since the first appearance of the person's symptoms; (2) 24 hours have passed since the person experienced a fever; and (3) the person's other COVID-

19 symptoms are improving.

What records can an employer accept as acceptable verification of vaccination?

Each covered employee must require that each vaccinated employee provide acceptable proof of their current vaccination status. The ETS identifies the following documents as acceptable proof of vaccination status:

- the record of immunization from a health care provider or pharmacy;
- a copy of the 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; or 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).

A signed and dated employee attestation may also be acceptable in instances when an employee is unable to produce proof of vaccination provided that the employee (i) attests to their vaccination status, including the type of vaccine administrated and the date and location of the vaccination, (ii) attest that they have lost or are otherwise unable to produce proof required by the ETS, and (iii) provide the attestation under threat of criminal penalty.

Do we have any reporting or recordkeeping requirements?

Employers must report all work-related COVID-19 fatalities to OSHA within 8 hours of learning about them and all work-related COVID-19 related in-patient hospitalizations within 24 hours of learning about them. Work-related events include those events that were the result of a transmission at the worksite.

Employers must also maintain records related to the examination and copying of an employee's COVID-19 vaccine documentation, employee test results, and positive tests. These records are considered employee medical records and must be maintained separately from an employee's personnel file and in secure place.

Do employers in States or localities that have banned vaccine mandates have to comply?

Yes. The ETS is specifically intended to preempt State and local laws, regulations, executive orders, and other requirements prohibiting vaccination mandates, testing and masking requirements, except under the authority of a Federally approved State Plan. In preparation for the release of the ETS, OSHA has threatened to revoke Federally approved State Plans in many states where OSHA has determined that the State Plans fail to maintain standards that are as effective or more effective than OSHA requirements. States have 30 days to adopt a new ETS, and three

states, Arizona, South Carolina, and Utah have failed to adopt OSHA's June 21, 2021 ETS. OSHA has since moved to revoke the State Plans of those three states, evidencing OSHA and the Biden Administration's commitment to the enforceability of the ETS.

Do we have to comply if there are challenges to the new rules?

While legal challenges are expected, employers should begin making plans for implementation of these policies as the potential fees are extensive.

What comes next?

The ETS is also being proposed as a permanent OSHA rule and is subject to the requirements of the OSHA act as a final rule. Accordingly, OSHA is seeking and accepting comment on all aspects of the ETS and how it should be adopted in its final form. Interested individuals and employers may submit comments and attachments, identified by Docket No. OSHA-2021-0007, electronically at www.regulations.gov/. After all comments are reviewed, a permanent rule will be implemented.

CMS Interim Final Rule

Coinciding with OSHA's ETS, the Centers for Medicare & Medicaid Services (CMS) has also issued its promised Interim Final Rule (the "Interim Rule") requiring staff working at health care facilities be vaccinated for COVID-19 as a condition for participation in Medicare and Medicaid.

What does the CMS Interim Rule require?

Employers must develop and implement policies and procedures requiring that all staff be fully vaccinated for COVID-19. This requires the administration of a single-dose vaccine or the administration of all required doses of a multi-dose vaccine.

Who is covered by the CMS Interim Rule?

Medicare and Medicaid-certified providers and suppliers including:

- Ambulatory Surgical Centers;
- Hospices;
- Psychiatric Residential Treatment Facilities (PRTFs);
- Programs of All-Inclusive Care for the Elderly (PACE);
- Hospitals (acute care hospitals, psychiatric hospitals, long term care hospitals, children's hospitals, hospital swing beds, transplant centers, cancer hospitals, and rehabilitation hospitals);
- Long-Term Care (LTC) Facilities, including Skilled Nursing Facilities (SNFs) and Nursing Facilities (NFs), generally referred to as Nursing Homes;
- Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs-IID);

- Home Health Agencies;
- Comprehensive Outpatient Rehabilitation Facilities (CORFs);
- Critical Access Hospitals;
- Outpatient Physical Therapy and Speech-Language Pathology Services;
- Home Infusion Therapy suppliers;
- Rural Health Clinics; and
- End-Stage Renal Disease (ESRD) Facilities.

Other health care providers such as Organ Procurement Organizations (OPOs) and Portable X-Ray suppliers are indirectly subject to the Interim Rule as they are under contract to other health care entities that are subject to the Interim Rule.

Who is not covered by the CMS Interim Rule?

Providers and suppliers that are not Medicare- or Medicaid-certified or other health care entities that are not regulated by CMS (such as physician offices).

Who is considered "staff" who must be vaccinated?

Staff which must be vaccinated for COVID-19 include facility staff, regardless of clinical responsibility or patient contact, who provide any care, treatment, or other services for the facility and/or its patients, including without limitation:

- Facility employees;
- Licensed practitioners;
- Students;
- Trainees;
- Volunteers; and
- Individuals who provide care, treatment, or other services for the facility and/or its patients under contract or other arrangement.

Individuals who provide services 100 percent remotely, such as fully remote telehealth or payroll services, are not subject to the vaccination requirement.

Are providers required to document staff vaccinations?

Yes. CMS requires employers to track and document the vaccination status of each staff member. Vaccine exemption requests and outcomes must also be documented. Acceptable forms of vaccination proof include:

- CDC COVID-19 vaccination record card (or a legible photo of the card);
- Documentation of vaccination from a health care provider or electronic health record; or

- State immunization information system record.

If the employee is vaccinated outside the U.S., a reasonable equivalent of the examples above would suffice. All documentation should be appropriately stored. While the employee may not have personal medical records on file with the provider, examples of appropriate places for vaccine documentation by the provider include a facility's immunization record, health information files, or other relevant documents. All medical records, including vaccine documentation must be kept confidential and stored separately from an employer's personnel files, pursuant to the ADA and Rehabilitation Act.

May an employee claim an exemption from the vaccine mandate?

Yes. As set forth above, employees who claim a disability or medical condition under the Americans with Disabilities Act (ADA) or Section 504 of the Rehabilitation Act (RA) or object to the vaccine based upon the employee's sincerely held religious belief, practice or observance under Title VII of the Civil Rights Act of 1964 may be exempted from the vaccine mandate. Employers must also comply with the Pregnancy Discrimination Act and the Genetic Information Nondiscrimination Act. We recommend that you contact an employment attorney to discuss these exemptions and accommodations.

When does the Interim Rule go into effect?

The Interim Rule will go into effect on November 5, 2021.

How soon must providers have their employees be vaccinated?

The Interim Rule has two phases.

Phase 1: Effective 30 days after the November 5, 2021 publication of the Interim Rule in the Federal Registrar (December 5, 2021), all employees must have received at least the first COVID-19 vaccine dose or have requested and/or been granted a lawful exemption. Providers must also have developed and implemented appropriate policies and procedures within this 30-day time period.

Phase 2: Effective 60 days after November 5, 2021 (January 4, 2022), all applicable staff must be fully vaccinated for COVID-19 (or have received the final vaccine dose), except those staff which have been granted exemptions.

How will CMS enforce the Interim Rule?

Additional guidelines will be published by CMS in the near future, which will provide for State surveyors to assess compliance with the Interim Rule among providers and suppliers. State surveyors will review the provider's staff vaccination records or exemption documentation. State surveyors will also conduct staff interviews to verify vaccination status as well as review the provider's policies and procedures as required by the Interim Rule.

What are the penalties for noncompliance with CMS's Interim Rule?

Additional guidelines will be published by CMS which will provide specific penalties and enforcement mechanisms available under federal law depending on the level of noncompliance. Some examples of enforcement mechanisms include civil monetary penalties, denial of payment for new admissions, or termination of the Medicare/Medicaid provider agreement.

What if an employee refuses to be vaccinated and does not qualify for an exemption?

Although the Interim Rule does not identify what actions a provider may take against a non-compliant employee, we anticipate that the provider will be able to terminate the employee, or place the employee on unpaid leave, so long as the employee is not refusing to comply because of a disability, sincerely held religious belief, or other protected status or exemption. Employers should consult legal counsel before taking any actions.

We will be hosting a webinar on Tuesday November, 9 2021 at noon MT. If you are interested in participating please register using this link. More details on the webinar will be coming out once they are available.

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