



COVID-19 OSHA Vaccination and Testing ETS and CMS Mandatory Vaccination FAQs

Q 1. I am the owner of a small agency and have a practicing physical therapist who is requesting a religious exemption from the CMS mandatory vaccine mandate. Am I putting my company at risk by granting this exemption as he is potentially more likely to spread the virus according to published data?

A 1. Both CMS and OSHA recognize that vaccination is an optimal strategy to prevent the spread of COVID-19 infections. However, in order to accommodate religious and medical exemptions, both CMS and OSHA require alternate protective strategies, such as face masks and face coverings for individuals who are not vaccinated.

Q 2. So, whoever is requesting an exemption, we need to have it by 12/06, as well?

A 2. CMS requires the following during Phase 1 of their COVID -19 vaccination mandate. The effective date for Phase1 is December 6, 2021.

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“Phase 1, effective 30 days after publication, includes nearly all provisions of this IFC, including the requirements that all staff have received, at a minimum, the first dose of the primary series or a single dose COVID– 19 vaccine, or requested and/or been granted a lawful exemption, prior to staff providing any care, treatment, or other services for the facility and/or its patients. “

Q 3. My home health agency also does personal care and DME services under the same corporation. Those lines of business are not included in the provider types in the federal register standard. Do those staff members fall under the mandate since we are under the same corporation? The Personal Care Aides never report to the office, only to patient homes. DME staff work in same office building in a different area.

A 3. All employees of the certified home health agency are subject to the CMS COVID-19 vaccination mandates, unless the agency has set-up a “separate entity” for the other lines of service. “Separate entities” of the certified agency are not subject to the Medicare conditions of participation, and therefore, are not subject to the requirements of the CMS COVID-19 vaccination mandates. For more

information on “separate entity” see the Medicare State Operations Manual chapter 2, section 2183 [SOM - Exhibit \(cms.gov\)](#).

Q 4. My hospice rents a suite in a building that has several other tenants such as a mortgage company, social workers, etc. we share facilities such as restrooms and the break room. Are those people we share the office with need to be included as well?

A 4. The employees of the other businesses sharing space within the building of the certified agency are not agency employees or contracted individuals that provide services for the agency. The CMS COVID-19 vaccination mandate applies to i) Facility employees; (ii) Licensed practitioners; (iii) Students, trainees, and volunteers; and (iv) Individuals who provide care, treatment, or other services for the facility and/or its residents, under contract or by other arrangement by the agency to provide contracted.

Q 5. If a state requires that all health care workers, including home care, receive the vaccine and does not allow for a religious exemption, does the CMS rule mean that the state has to provide for religious exemptions for home health providers?

A 5. No, the CMS COVID -19 vaccination mandate rule preempts the applicability of any State or local law providing for exemptions to the extent that the law provides broader grounds for exemptions than provided for by Federal law and are inconsistent with the CMS requirements. However, if the state has more restrictive requirements than provided by this rule, the state mandates will take precedence.

Q 6. If an employee has an exemption, do we have to do any ongoing testing.

A 6: There is no COVID-19 testing requirement under the CMS COVID-19 vaccination mandate rule. There is a requirement for weekly COVID-19 testing under the OSHA Vaccination and Testing ETS for unvaccinated employees. OSHA does not require that employers pay for COVID-19 testing under the OSHA COVID-19 Vaccine and Testing ETS. Employers must follow the requirements of the OSHA COVID-19 Vaccine and Testing ETS for employees not subject to the OSHA COVID-19 Healthcare ETS.

Q 7: As a reasonable accommodation for CMS provider employees who are granted an exemption: who is responsible for paying for weekly Covid testing the employee or employer? Can an employer require that the employee pay for the weekly testing?

A 7. CMS is not requiring that employees be regularly tested, however, If the employer chooses to mandate testing as a reasonable accommodation for exempt employees, the testing and payment for the tests would need to be done in accord with Federal laws that protect employees under ADA and civil rights protections and take into consideration any state laws regarding mandatory testing. Employers will also need to take additional actions that protect unvaccinated employees. Below is from the EEOC’s [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](#)

G.5. What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self? (5/5/20)

[Accommodations](#) may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace.

Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or

increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular “marginal” functions (less critical or incidental job duties as distinguished from the “essential” functions of a particular position). In addition, accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

These are only a few ideas. Identifying an effective accommodation depends, among other things, on an employee’s job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (www.askjan.org) also may be able to assist in helping identify possible accommodations. As with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.

Q 8. Does either the CMS rule or OSHA vaccine ETS apply to personal assistants providing home care services under state consumer directed programs who may not be covered by state vaccination mandates?

A 8. The answer depends on who the employer is for the caregiver. Individual states vary on how these models are structured and classified. Therefore, the state would need to define the employment relationship between the caregiver and the agency. If the relationship is defined as the home health agency contracting with the personal care assistant then the CMS vaccine mandate would apply.

Q 9: Do HHAs need to follow both, OSHA and CMS? Can you please clarify this again?

A 9. Certified HHAs must comply with the CMS vaccine mandate. Additionally, if the certified agency has employees that are exempt from the OSHA COVID-19 Healthcare ETS these employees are subject to the requirements of the OSHA COVID-19 Vaccination and Testing ETS if the agency has 100 or more employees.

Under the OSHA COVID-19 Healthcare ETS, employees of a covered entity that provide services outside of the healthcare delivery area are not subject to the OSHA COVID-19 Healthcare ETS. For agencies that provide care in the home, employees exempt from the OSHA COVID-19 Healthcare ETS are typically the agency’s administrative staff. Therefore, it is possible that a certified agency will need to follow the OSHA COVID-19 Healthcare ETS, the OSHA COVID -19 Vaccine and Testing ETS, and the CMS COVID-19 Vaccination Mandate rule as they apply to their individual employees.

Q 10: Is weekly testing a suitable accommodation for those claiming religious and medical exemptions to CMS IFR mandate?

A 10. See response to question #7

Q 11. We are a certified healthcare agency, under CMS requirements, if an employee is granted an exemption from receiving the vaccine, is it required for the exempt employee to complete weekly covid testing?

A 11. See response to question #6.

Q 12. If I am a Medicare Certified home health agency with fewer than 100 employees and have staff who meet the exemption for the vaccine, is routine testing required of that staff after January 4, 2022?

A 12. The OSHA COVID-19 Vaccination and Testing ETS is the only OSHA mandate that requires routine COVID-19 testing. Employers with less than 100 employees are exempted from that ETS.

Q 13: Does CMS supersede OSHA if we participate in Medicare and Medicaid services?

A. The CMS Rule and OSHA ETs are separate and distinct requirements. Although there might be some overlap the CMS rule does not supersede the OSHA requirements.

Q 14. Are state DHS departments also creating their own COVID guidelines?

A 14. Yes, states and local governments are establishing rules around COVID -19 vaccination and testing requirements and restrictions. However, both OSHA and CMS maintain supremacy over state and local requirements where state and local requirements are less restrictive than the federal requirements under the CMS and OSHA vaccination mandates.

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“This IFC preempts the applicability of any State or local law providing for exemptions to the extent such law provides broader exemptions than provided for by Federal law and are inconsistent with this IFC. “

See Federal Register / Vol. 86, No. 212 / Friday, November 5, 2021 / page 61406 for a similar position from OSHA.

Q 15. We are a small private pay HHA. To save on costs (in CA - assume CA will want us to pay for testing/time), we were considering providing antigen tests and proctoring over Zoom with our staff. Would this be acceptable?

A 15. We believe this is acceptable if all other requirements are met. OSHA requires that the employee not both self-administer and self-read COVID-19 tests unless observed by the employer or an authorized telehealth proctor. Examples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens), proctored over-the counter tests, point of care tests, and tests where specimen collection is either done or observed by an employer. State requirements might differ and therefore it is important to know any state laws around self-testing for COVID-19.

Q 16. If an employee who provides direct patient care and is granted a religious or medical exemption, can they continue to provide direct patient care if extra precautions are taken per our policy?

A 16. Correct. See the following from the CMS Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule, Frequently Asked Questions.

How do accommodations work for staff members who meet the requirements for an exemption and are not vaccinated?

A. The regulation requires that facilities develop a process for implementing additional precautions for any staff who are not vaccinated, in order to mitigate the transmission and spread of COVID-19. Under

federal law, including the ADA and Title VII of the Civil Rights Act of 1964, individuals who cannot be vaccinated because of medical conditions or sincerely held religious beliefs, practice, or observance may be entitled to an accommodation. CMS encourages facilities to review the Equal Employment Opportunity Commission's website for additional information about situations that may warrant accommodations. In granting such exemptions or accommodations, employers must ensure that they minimize the risk of transmission of COVID19 to at-risk individuals, in keeping with their obligation to protect the health and safety of patients.

Q 17. How does the CMS requirement deal with contractors to perform services in the office such as twice/day cleaning?

A.17 The CMS Vaccination Mandate rule applies to employees, licensed practitioners, students, trainees, volunteers, and Individuals who provide care, treatment, or other services for the HHA and/or its patients, under contract or by other arrangement. When determining whether to require COVID-19 vaccination of an individual who does not fall into the above categories, providers should consider frequency of presence, services provided, and proximity to patients and staff. In light of the fact that the cleaning personnel are present in the office frequently and likely to have contact with staff while in the office, they would need meet the CMS vaccination mandate requirements.

Q 18. As a certified agency, if I hire a new employee for example after Jan 15th. Would that employee need to "fully vaccinated" since there is such a long time frame recommended between first and second vaccination.

A.18. When CMS was asked if there are different requirements for existing staff versus new staff, CMS responded with: No. Staff at all health care facilities included within the regulation must have received, at a minimum, the first dose of a two-dose COVID-19 vaccine or a one-dose COVID-19 vaccine by the regulatory deadline, or prior to providing any care, treatment, or other services for the facility and/or its patients." We are interpreting this to mean that new employees must be fully vaccinated or be exempt before providing any care, treatment or other services for the facility and/or its patients.

Q 19. We have several nurses wanting to seek religious exemption. Who determines if it is a legitimate request? How can a surveyor determine if it is legitimate exemption? I am having a hard time finding anything that would be a religious exemption.

A 19. The agency's policies and procedures should determine when a religious exemption applies. Decisions on whether a religious exemption should be granted can be guided by information on the Equal Employment Opportunity Commission's (EEOC) website [Section 12: Religious Discrimination | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](#)

Additionally, The Safe Federal Workforce website has a religious exemption template that agencies can use. [Request For A Religious Exception To The Covid-19 Vaccination Requirement - Template \(saferfederalworkforce.gov\)](#)

Q 20. We are a certified home health & hospice agency - if we contract some of our Medicaid long term support services (HCBS) out to a non-certified organization with less than 100 employees, would the non-certified agency be subject to the CMS mandate because of the services they do for us and are paid with Medicaid dollars by us.

A 20. If the agency providing the HCBS services is not a Medicare or Medicare certified provider they are not subject to the CMS Vaccination Mandate. Also see response to question # 3.

Q 21. What recourse do employees have if their employer denies their sincerely held religious belief request?

A 21. The EEOC enforces the requirements under the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964. If an employee believes their sincerely held religious belief is not honored, they may file a complaint with the EEOC.

[Filing A Charge of Discrimination | U.S. Equal Employment Opportunity Commission \(eeoc.gov\)](https://www.eeoc.gov/filing-charge-discrimination)

Q 22. Under the CMS mandate is the agency required to pay for testing of those that qualify for an exemption?

A 22. See response to question # 11

Q 23. If you are Medicare certified with less than 100 employees do the employees that have not been vaccinated that have a exemption have to be tested weekly?

A 23. The OSHA Vaccination and Testing Mandate ETS requires mandatory vaccination or testing and face covering for unvaccinated employees. This ETS does not apply to employers with less than 100 employees.

Q 24. Where can you find specific religious exemptions that are acceptable, when we are reviewing exemptions to deny or approve them for our employees?

A 24. See response to question # 19

Q 25. Does an organization that falls under CMS and OSHA ETS (Certified) start testing employees who are unvaccinated prior to Dec 6th when phase I begins? OR should this begin immediately? just for clarification.

A 25. If the employer has employees that are under the requirements of the OSHA Vaccination and Testing ETS, weekly COVID-19 testing for unvaccinated employees begins January 4, 2022.

Q 26. Clarification on the DME topic: For a home-based hospice agency, would we need to require that our contracted DME company's employees are vaccinated, even though DME providers don't fall under the CMS rule?

A 26. When the DME company (or any contractor of the hospice) is performing a service for the hospice where the contractor interacts with other staff or patients then they are subject to the requirements.

Q 27. Do you know the Cop for Inpatient Hospice Facilities?

The conditions of participation have been modified at 418.60 to include the addition of 418.60(d) COVID-19 Vaccination of Facility Staff. The Infection Control CoP at 418.60 applies to all hospices including the inpatient hospice facilities. None of the conditions of participation at 418.110 (applicable only to hospices providing inpatient care directly) have been revised.

Q 28. Again, just to clarify (sorry!!), we must receive an exemption request by 12/06, but have until 01/04/2022 to actually grant or accept the exemption?

A 28. Correct, below is from the Federal Register / Vol. 86, No. 212 / Friday, November 5, 2021 / page 61573.

Phase 1, , includes nearly all provisions of this rule including the requirements that all staff have received, at a minimum, the first dose of the primary series or a single dose COVID– 19 vaccine, or requested and/or been granted a lawful exemption, prior to staff providing any care, treatment, or other services for the facility and/or its patients. Phase 1 also includes the requirements for facilities to have appropriate policies and procedures developed and implemented, and the requirement that all staff must have received a single dose COVID–19 vaccine or the initial dose of a primary series by December 6, 2021.

Phase 2, effective January 4, 2022 , consists of the requirement that all applicable staff are fully vaccinated for COVID–19, except for those staff who have been granted exemptions from COVID–19 vaccination or those staff for whom COVID–19 vaccination must be temporarily delayed, as recommended by the CDC, due to clinical precautions and considerations). Although an individual is not considered fully vaccinated until 14 days (2 weeks) after the final dose, staff who have received the final dose of a primary vaccination series by the Phase 2 effective date are considered to have meet the individual vaccination requirements, even if they have not yet completed the 14-day waiting period.

Q 29. We only have 37 employees where do we fall under the CMS rule.

A 29. The CMS Vaccination Mandate rule applies to all Medicare and Medicaid certified providers regardless of the number of employees.

Q 30. How Many times a week does an unvaccinated staff seeing patients have to be tested using PCR in addition to the rapid test daily test.

A 30. The OSHA Vaccination and Testing ETS does not require PCR testing for COVID-19. The OSHA COVID-19 Healthcare ETS requires PCR testing under the section for Health screening and medical management (29 C.F.R. § 1910.502(l)) when testing is used to determine the COVID-19 status of an employee.