



## Human Resources Professional Interest Section Meeting

November 11, 2021

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## Today's Agenda

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- Welcome
- Upcoming Events
- Employment Law
- Section Discussion



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## Upcoming Events

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**Professional Interest Section Meetings / Professional Development:**

- November 17 - DSP Series Webinar: Seizure Management in Community-Based Settings (1-2:15 PM)
- November 18 - Complimentary Webinar: Motivational Interviewing: Becoming an Agent of Enduring (10-11:15 AM)

**Upcoming Member Forum and Board of Directors Meetings:**

- November 19 - Board of Directors Meeting only - Virtual
- December 17 - Member Forum / Board of Directors Meeting - Hybrid - location TBD

Registration for each meeting is available 3 weeks in advance. Recordings and materials will be available on the [INARF Member Portal](#) within 2-3 business days following each meeting.



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## Human Resources

### Employment Law

Kevin Stella, Hall, Render, Killian, Heath, & Lyman, PC

Liz Elias, Hall, Render, Killian, Heath & Lyman, P.C.



Professional Interest Section Meeting



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# Vaccine Mandates for Health Facilities

Overview of the CMS and OSHA Vaccine Mandates

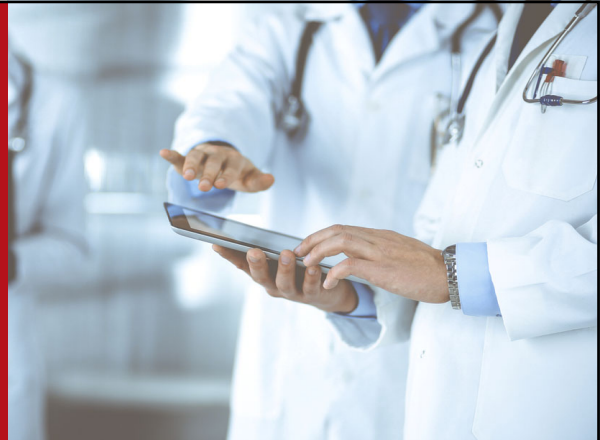
November 2021 / Kevin A. Stella and Elizabeth A. Elias

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## Presenters



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## Disclaimer



The information presented here today is general guidance on the new regulations. The exact applicability of these regulations is very fact-specific for each organization and should be vetted with legal counsel.

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## TODAY'S AGENDA

- 1.What Rule Applies to Me – The Decision Tree
- 2.OSHA Vaccine Mandate
- 3.CMS Vaccine Mandate
- 4.Questions

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## Decision Tree – Which Rule Applies to Me?

### What are the Rules:

- OSHA Healthcare ETS - June 2021
- CMS Vaccine Mandate - November 2021
- OSHA Vaccine Mandate - November 2021

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## Decision Tree – Which Rule Applies to Me?

### **Step 1:** Is the facility one of those identified in the CMS Vaccine Mandate?

- If YES, then the CMS Vaccine Mandate will apply, and the OSHA Vaccine ETS will not apply.\*
- If NO, then the CMS Vaccine Mandate does not apply.\*\*

\*Note: The facility might still be covered by the OSHA Healthcare ETS issued in June regardless of whether the CMS Vaccine Mandate applies.

\*\*Note: May be some unique cases where one part of a facility is covered by the CMS Vaccine Mandate, but other parts are not.

### **Step 2:** Does the *employer* have 100 or more employees?

- If YES, then *EMPLOYER* is covered by OSHA Vaccine ETS.
- HOWEVER, to determine whether a particular *WORKPLACE SETTING* can be excluded from coverage under the OSHA Vaccine ETS, move to Step 3.

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## Decision Tree – Which Rule Applies to Me?

### **Step 3:** Is the particular *workplace* covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors?

- If YES, then the OSHA Vaccine ETS will not apply to that *workplace*.
- If NO, then move to Step 4.

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## Decision Tree – Which Rule Applies to Me?

### **Step 4:** Is the *workplace* covered by the OSHA Healthcare ETS issued in June 2021?

(Note: OSHA's Healthcare ETS is setting-based, meaning that it may apply in certain employer *workplaces* but not others.)

- If YES, then the OSHA Vaccine ETS will not apply to that *workplace*.

Employers with employees in the *workplace* covered by the OSHA Healthcare ETS must follow the provisions of the OSHA Healthcare ETS while it is in effect, as well as the CMS Vaccine Rule if applicable to specific *workers*.

For *employers* who have some *workplaces* covered by the OSHA Healthcare ETS and other *workplaces* that are not covered by the OSHA Healthcare ETS, that may mean that the *employer* may have to comply with the OSHA Vaccine ETS for only some of its *workers*.

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## Decision Tree – Which Rule Applies to Me?

### **Key Notes:**

- Employees who do not report to a workplace where other individuals such as co-workers or customers are present; or who work from home; or who work exclusively outside are not covered by OSHA Vaccine ETS.
- Without further action from OSHA, the OSHA Healthcare ETS will expire on approximately December 21, 2021.
- If the OSHA Healthcare ETS expires, no clear guidance exists at this time regarding interplay between CMS Vaccine Mandate and OSHA Vaccine Mandate (for example, will facilities covered by CMS Vaccine Mandate have to offer paid leave?)

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# THE OSHA VACCINE ETS

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## **By December 6, covered employers must:**

- Have a COVID-19 vaccination policy in place OR implement a policy requiring weekly testing of unvaccinated employees
- Issue the policy to its workforce
- Require any unvaccinated employee to wear a proper face covering when indoors or in a vehicle with another person
- Require employees to report if they are COVID-19 positive
- Immediately remove COVID-19 positive employees from work
- Require employees to provide acceptable proof of their vaccination status as specified in ETS

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### **By December 6, covered employers must (cont'd):**

- Maintain records of each employee's vaccination status
- Maintain a roster of each employee's vaccination status
- Have process to review and grant proper religious and medical exemptions
- Report work-related COVID-19 fatalities to OSHA within 8 hours of learning about them
- Report work-related COVID-19 in-patient hospitalizations within 24 hours of learning about hospitalization

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### **"Acceptable Proof" of Vaccination Is:**

- Record of immunization from health care provider or pharmacy
- Copy of COVID-19 Vaccination Record Card
- Copy of medical records documenting vaccination
- Copy of immunization records from public health or state immunization system
- Copy of any other official documentation containing type of vaccine administered; dates of administration; and name of health care provider or clinic site
- Certain rules apply where employee cannot provide acceptable proof – see FAQ #4.A.

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### **By Jan 4, 2022, covered employers must:**

- Require employees who are not fully vaccinated to undergo weekly COVID-19 testing;
- Require such employees to provide documentation of the test results to the employer no later than the 7th day following the date of the employee's last test result; and
- For those who fail to do so, remove them from the workplace until the test result is provided.
- Note: Employer must NOT test employees for 90 days after they have tested positive for COVID-19.

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## **Mandatory Policy and Exemptions**

- Employers may elect to allow employees to choose a “test-out” option in lieu of getting vaccinated – requires weekly testing.
- This “test-out” option is not required.
- Must allow exemptions from vaccination for:
  - (i) those for whom a vaccine is medically contraindicated;
  - (ii) those for whom medical necessity requires a delay in vaccination; or
  - (iii) those legally entitled to a reasonable accommodation because they have a disability or sincerely held religious beliefs.

**Key Note:** Those granted an exemption are still required to undergo weekly COVID-19 testing AND must comply with the face covering requirements.

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## Testing

- Employers do not have to pay for costs associated with testing, though this could be required by other laws, regulations, or CBAs. (If covered by OSHA Healthcare ETS, would likely need to pay)
- Employees with granted exemption must be tested weekly (unless testing conflicts with their religious beliefs).
- Employees may not self-administer and read an over-the-counter test, unless observed by employer or authorized telehealth proctor.
- Employees who have completed entire primary vaccination by January 4 do not have to be tested, even if they are not yet 2 weeks out from their second dose.

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## Paid Time – Vaccination

- Employer must provide employees:
  - (i) a reasonable amount of time during work hours to receive each primary vaccination dose, and
  - (ii) up to four hours (including travel time) of paid time at the employee's regular rate of pay.
- Employers may not offset the four hours of paid time with the employee's accrued time off (e.g., vacation time, sick time, etc.)
- If employee elects to receive the primary vaccination outside of work hours, employers do not have to grant paid time to the employee.
- Employers must also provide employees with reasonable time off and paid sick leave to recover from side effects following the primary vaccination dose.

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## Paid Time – Recovery

### Employers . . .

- Must provide (i) reasonable time off and (ii) paid sick leave to recover from side effects following the primary vaccination dose.
- May require employee to use paid sick leave, OR if employer does not specify between different types of paid leave (e.g., has generic bucket of Paid Time Off for use for sick time, vacation time, etc.), then employer may require employees to use that leave.
- May set a cap on amount of paid sick leave for recovery, but it must be reasonable.
- OSHA presumes that up to two days of paid leave per dose would be in compliance

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## Paid Time – Recovery

### Employers . . .

- Cannot require employees to use vacation time, if it has a separate sick bank and vacation bank
- Cannot require employee to “go in the negative” on a sick bank, or to use advanced sick leave

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## Penalties

Failure to comply could result in fines of \$13,653 per violation for serious violations and ten times that for willful or repeated violations.

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## OSHA RESOURCES

General resource page found here:

<https://www.osha.gov/coronavirus/ets2>

Includes links to the following information:

- Sample policies and procedures
- Fact sheets
- Link to the ETS
- FAQs

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# THE CMS VACCINE MANDATE

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## CMS Vaccine Mandate

- On November 4, CMS released its Interim Final Rule (“IFR”) requiring COVID-19 vaccinations for individuals working in Medicare- and Medicaid-participating facilities, as well as individuals working in certain other settings involving face-to-face interactions with patients.
- The IFR specifies available medical and religious exemptions to the mandate, but contrary to what was previously published by CMS, testing is not an express exemption to the vaccine requirement.
- Facilities and other settings affected by the IFR are not required to ensure separate compliance with the vaccine rule also being issued by the Department of Labor’s Occupational Safety and Health Administration (OSHA) as the vaccination deadlines are the same for both rules

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## CMS Issues Vaccine Mandate for Health Facilities

- Effective date of **Phase 1** of the CMS IFR is December 6, 2021. Personnel subject to the mandate must have at least one dose of the COVID-19 vaccine by that date.
- Effective date of **Phase 2** of the CMS IFR, which requires individuals to have received the entire recommended vaccine course is January 4, 2022.
- Personnel subject to the mandate are not required to have completed the 14-day post-vaccination period generally recommended for full vaccine efficacy by the Phase 2 effective date.

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## Facilities/Suppliers Affected by the CMS IFR

Provider/Supplier
Ambulatory Surgical Centers (ASCs)
Hospices
Psychiatric Residential Treatment Facilities (PRTFs)
Programs of All-Inclusive Care for the Elderly (PACE)
Hospitals
Long Term Care (LTC) Facilities
Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs-IID)
Home Health Agencies (HHAs)
Comprehensive Outpatient Rehabilitation Facilities (CORFs)
Critical Access Hospitals (CAHs)
Clinics, Rehabilitation Agencies, and Public Health Agencies as Providers of Outpatient Physical Therapy and Speech-Language Pathology Services (Organizations)
Community Mental Health Centers (CMHCs)
Home Infusion Therapy (HIT) Suppliers
Rural Health Clinics (RHCs)/Federally Qualified Health Centers (FQHCs)
End-Stage Renal Disease (ESRD) Facilities

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## Personnel Subject to CMS IFR

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

CMS intends to interpret the last category very broadly and cites examples of administrative team members and Organ Procurement Organization team members as individuals subject to the IFR due to the potential for even incidental or irregular contact with patients.

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## CMS IFR Exemptions

- Medical Exemption: will require certification by a licensed practitioner (other than the individual requesting the exemption) operating within the scope of the practitioner's practice, identifying the specific, recognized clinical reasons for contraindications that form the basis of the exemption request.
- Religious Exemptions: governed by the ADA and Title VII as those laws require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice or observance, do not get vaccinated against COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business.
  - Facilities must have a process for handling those requests and be prepared to make "reasonable accommodations" for the personnel requesting this type of exemption.

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## CMS IFR Exemptions

- Remote Exemption: individuals who provide services solely on a remote and/or telehealth basis and who do not have direct contact with patients or with other staff who are required to receive the vaccine. In addition, the IFR's vaccine requirements exclude staff who provide support services exclusively outside of the affected setting, ***and who do not have any direct contact with patients or other staff who are required to receive the vaccine.***

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## CMS IFR Enforcement

- CMS will ensure compliance with these requirements through a survey and enforcement processes.
- Guidance is forthcoming to surveyors, but CMS said surveyors will review facility records and interview facility personnel.
- If a facility does not meet the IFR requirements, the facility will be cited by a surveyor and have an opportunity to return to compliance before additional actions occur.
- Penalties for non-compliance will depend on the severity of the noncompliance.

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## Preemption of Both Rules

- The White House said both of these rules will “preempt any inconsistent state or local laws, including laws that ban or limit an employer’s authority to require vaccination, masks or testing.”
- Many legal challenges already filed, including at least one case that has led to a stay of the OSHA vaccine mandate in the 5<sup>th</sup> Circuit (Texas, Louisiana, Mississippi)

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## Practical Takeaways

- Most individuals working in any capacity at most health care facilities are required to complete a vaccine course by January 4, 2022.
- The vaccine requirements in the CMS IFR and those issued by OSHA do not differ.
- Court challenges are anticipated, but it is unclear how long it will be before there is clarity about the legal validity of the CMS rule. Assume these will go into effect as scheduled.

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## What should you be doing now:

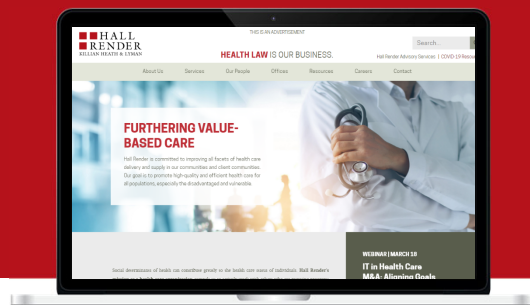
- Determine what rule(s) covers your organization
- Create timeline of key dates (e.g., if covered by CMS, employees must have first dose of vaccination by Dec. 6)
- Develop policies, procedures, and tracking process
- If covered by OSHA Vaccine Mandate, develop weekly testing process and/or submission of test results
- Develop communication strategies
- Develop exemption request process (this will include proper exemption forms)
- Establish the Expert Review Panel to review exemption requests

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## Human Resources

### Section Discussion

Angie Goens, LOGAN Community Resources, Inc.

Kelley Troutman, Kaiser Home Support Services



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# Thank you!

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