

## PRIVATE PRACTICE SECTION



**American Physical Therapy Association**

### ***CMS Vaccine Mandate, OSHA Vaccine Mandate***

The two vaccine regulations that were released by the Executive Branch on November 4, 2021 were intentionally drafted so that the CMS regulation would be primary for healthcare providers. If your clinic is not included in the reach of the CMS vaccine regulations, but your business employs 100 or more people you will be impacted by the OSHA vaccine regulations. However, if your business is smaller than 100 employees, you will be impacted by any state or local vaccine regulations but not these two federal-level rules. Here is a brief overview of the regulations. The PPS State of Affairs will be updated and contain more detailed information.

#### **Centers for Medicare and Medicaid Services (CMS)**

Independent private practice physical therapy clinics are not included in the reach of these CMS' vaccine regulations. However, those PPS members who work in comprehensive outpatient rehabilitation facilities (CORFs), home health agencies, or rehabilitation agencies are covered by the CMS regulations, effective November 5, 2021.

CMS has made it clear that the regulation and the requirements "only apply to providers and suppliers regulated under the CMS Conditions of Participation (CoPs)" and CMS' "authority does not extend to certain facilities nor independent physicians/clinicians".

CMS' regulations require vaccination and do not include a testing option for unvaccinated staff.

- Two deadlines are included for facilities covered by this regulation:
  - o December 5, 2021: all eligible staff must have received the first dose of a two-dose COVID-19 vaccine or a one-dose COVID-19 vaccine prior to providing any care, treatment, or other services.
  - o January 4, 2022: all eligible staff must have received the necessary shots to be fully vaccinated – either two doses of Pfizer or Moderna or one dose of Johnson & Johnson.
- This guidance means that booster shots are not required.
- Exemptions from vaccination are allowed–based on recognized medical conditions or religious beliefs, observances, or practices.

#### **Occupational Safety and Health Administration (OSHA)**

If your clinic is not included in the reach of the CMS vaccine regulations, but you employ 100 or more people, effective November 5, 2021 you will be impacted by the OSHA Emergency Temporary Standard (ETS) that requires your employees to be fully vaccinated or subject to weekly testing for COVID-19.

- Determining if your business meets the threshold of 100 employees:
  - Calculation must include all employees across all of your U.S. locations, regardless of employees' vaccination status or where they perform their work.
  - Part-time employees count towards the company total, but independent contractors do not.
  - For a single corporate entity with multiple locations, all employees at all locations are counted for purposes of the 100-employee threshold.
  - Once an employer has come within the scope of this ETS, the standard continues to apply for the remainder of the time the ETS is in effect, regardless of fluctuations in the size of the employer's workforce.
  - Two or more related entities may be regarded as a single employer if they handle safety matters as one company, in which case employees of all entities making up the integrated single employer must be counted.
- OSHA provides two options for an employer of 100 or more employees:
  - Establish and implement a mandatory vaccination policy for all employees; or
  - Establish, implement, and enforce written policy allowing employees to choose either to: (1) be fully vaccinated against COVID-19 or (2) provide proof of regular testing for COVID-19 and wear a face covering at work.
- For those employees who decline to be vaccinated:
  - Requires diagnostic/screening tests
    - At least once every 7 days
    - Using FDA approved NAATs (nucleic acid amplification tests) or antigen tests (including at-home kits)
    - Pooling of tests is allowed. However, if the pooled test comes back positive, individual tests of all those in the pool must be administered.
  - Employers can make non-vaccinated employees pay for this testing.
  - A test may not be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.
  - Employers can select the testing scenario and logistics that is most appropriate for their workplace.
  - Non-vaccinated employees must wear face coverings.
- Record keeping and employer responsibilities
  - Employers must:
    - Preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated; and
    - Maintain a roster of each employee's vaccination status (e.g. fully vaccinated, partially vaccinated, exempt).
  - Written records or copies of vaccine cards of fully vaccinated employees which were collected prior to November 5, 2021 count as compliance with this recordkeeping requirement.
  - Keep a record of each test result for each employee.

- Maintain vaccination records, the vaccination roster and record of test results while the ETS is in effect.
- Notify employees about the ETS and its requirements, OSHA non-discrimination and retaliation provisions, and criminal penalties for knowingly supply false statements or documentation.
- Provide employees a copy of the CDC’s document, “Key Things to Know About COVID-19 Vaccines.”
- Report work-related COVID-19 fatalities within 8-hours and work-related COVID-19 in-patient hospitalizations within 24-hours.
- Accommodations:
  - Exemptions from vaccination policies are allowed—based on recognized medical conditions or religious beliefs, observances, or practices.
    - But those employees will be required to be tested and masked just like all other unvaccinated employees
  - Employers must support employees who seek to be vaccinated
    - Must provide reasonable time, including up to four hours of paid time, to receive each primary (non-booster) vaccination dose; and
    - Must provide reasonable time and paid sick leave to recover from side effects experienced following each primary vaccination dose.