

Home Care Developments

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OSHA Regulation Requiring Vaccination of all Employees of Companies with 100+ Employees is Out. Is CDPAP Covered?

This morning, the Occupational Safety and Health Administration ("OSHA") released its highly anticipated emergency temporary standard ("ETS") requiring businesses with at least 100 employees to mandate that their employees get vaccinated against the coronavirus or wear a mask and test for COVID-19 on at least a weekly basis. **Personal assistants – to the extent they are deemed to be jointly employed by the consumer and the FI – would be covered by this ETS.**

We are currently reviewing the 490-page OSHA regulation and analysis, but here are some quick takeaways, as relevant to home care providers in New York:

1. The ETS applies to companies with 100 or more employees. Part-time and full-time employees "count" for purposes of determining if this threshold is met.
2. The ETS requires employees to be either fully vaccinated **or** to receive a weekly COVID-19 test in lieu of vaccination. The ETS defines what constitutes an acceptable COVID test, but notably a self-administered and self-read test is not acceptable unless observed by the employer or an authorized telehealth proctor.
3. The White House has announced that covered employers are not required to pay for or provide the COVID tests for employees who undergo weekly testing, unless they are otherwise required to by state or local laws or in labor union contracts.
4. Religious and medical exemptions from the vaccine mandate will be permitted.
5. Employees who are not fully vaccinated will be required to wear face coverings in work settings (e.g., office, car if traveling with a coworker). Religious and medical exemptions from the face covering requirement are permissible.
6. Employees who work from home and never come into the office "count" for purposes of determining the 100-employee coverage threshold. However, employees who work remotely full time and are not "exposed to any potentially infectious individuals at work" are exempt from the vaccine mandate. Employees who switch back-and-forth between telework and working in a workplace setting will be covered by this ETS.
7. Previously-infected employees who might have natural immunity to COVID are not exempt from the ETS.
8. Employers are responsible for determining the vaccination status of their employees. Employees will be considered "fully vaccinated" two weeks after the full required vaccine course is completed.
9. The ETS is in many respects similar to the DOH's regulation requiring vaccination of healthcare workers; recordkeeping and proof of vaccination standards are the same.
10. Covered employers must provide paid time off to employees to become vaccinated

and in the event that an employee experiences side effects from the vaccine. For New York providers, however, these obligations are already codified in the law and require paid time off to be provided in these circumstances. Thus, this paid time off requirement will not impose any **new** obligations on employers in New York State.

11. Healthcare employers who are covered by OSHA's earlier ETS for healthcare employers will not be required to comply with today's released ETS. However, as we previously noted, because the healthcare employer ETS is likely inapplicable to most LHCSA office settings, today's new ETS will apply.

12. Any employee who tests positive or is diagnosed with COVID must be immediately removed from the workplace until the employee receives a negative test result, receives a recommendation to return to work from their health care provider, or meets the CDC isolation guidance standards. These requirements would apply regardless of the employee's vaccination status.

13. The commentary to the ETS states, "For enforcement purposes, traditional joint employer principles would apply." Thus, to the extent the personal assistants are deemed to be jointly employed by the FI, those personal assistants who are working for FIs with 100 or more employees will be subject to the vaccine or weekly testing requirements.

14. The ETS will take effect 30 days from November 5, 2021, which is December 5. However, the requirement to conduct weekly tests for employees who are not vaccinated will not take effect until January 4, 2022. From December 5 until January 4, unvaccinated employees will be required to wear face masks in workplace settings.

For clients who have any questions or need assistance with preparing to comply with these requirements, please do not hesitate to reach out to us.



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