

Home Care Developments

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CMS also Mandates Vaccination for Healthcare Employees, but NY FIs and LHCSAs do not appear to be Covered by the CMS Mandate

On the same day that OSHA issued its emergency temporary standard (“ETS”) requiring vaccination of employees of companies with 100 or more employees, the Centers for Medicare & Medicaid Services (“CMS”) published its own regulation mandating the vaccination of employees of covered healthcare providers.

Per the CMS regulation, covered facilities must ensure that workers receive either the first dose of a two-dose vaccine or a single-dose vaccine, or otherwise request an exemption from such requirements, by December 5, 2021. Except for those workers granted an exemption or delay in vaccination per Centers for Disease Control (CDC) recommendation, all staff must be fully vaccinated by January 4, 2022. **There is no option to test weekly and opt out of vaccination under the CMS regulation.**

The CMS regulation applies to certified home health agencies, but notably does not apply to home and community-based services. Thus, it appears that the CMS regulation will not apply to New York’s LHCSAs or FIs.

OSHA ETS Impact on LHCSAs and CHHAs in New York

Last week, when the OSHA ETS was first issued, we provided a high-level overview of the requirements of the ETS. Since that time, we have received a number of questions regarding the impact of the OSHA ETS on LHCSAs and FIs.

OSHA’s ETS will not apply to New York’s healthcare workers, who are already covered by OSHA’s June 2021 ETS. Providers are reminded to review our alerts from this summer, where the earlier ETS’ requirements were discussed in detail.

More importantly, the stricter NY Department of Health regulations mandating vaccination, and which do not provide for a religious exemption or for a weekly testing option, will supersede the OSHA ETS standards. Thus, insofar as New York’s CHHAs and LHCSAs are concerned, the New York Department of Health regulation requiring vaccination continues to control the vaccination obligations of healthcare personnel in New York. The requirements of the OSHA ETS, concerning PPE, training, and recordkeeping, will apply in conjunction with the more employee-protective vaccination mandate that was passed by the Department of Health.

Insofar as the office employees of CHHAs and LHCSAs are concerned, such employees will also be covered by the stricter New York Department of Health regulations mandating vaccination which, again, do not allow for a religious exemption or for a weekly testing option. The recently published OSHA ETS regulations will apply

to New York's CHHAs and LHCSAs (assuming such companies have at least 100 employees) insofar as the recordkeeping requirements, education of employees, and paid time off requirements are concerned.

The vaccination obligations applicable to office employees who work strictly on FI matters will depend on joint employment and corporate structure considerations.

In summary, as between the New York Department of Health vaccination mandate that providers have been complying with since October 7, and the new OSHA ETS standard that was announced and is scheduled to take effect on December 5, 2021, the stricter and more employee-protective provisions of the DOH's vaccine mandate will "trump" the less employee-protective measures of the OSHA ETS. Otherwise, where the federal OSHA ETS requirements and New York's regulations can be reconciled and apply in tandem, they will.

OSHA ETS Faces Legal Challenges

Over the weekend, on Saturday, the federal Fifth Circuit Court of Appeals (which covers Texas, Mississippi and Louisiana) issued a temporary injunction, "blocking" the OSHA ETS from taking effect. The Court noted "grave statutory and constitutional issues" with the ETS. While the intent of the plaintiffs who commenced the litigation against the OSHA ETS was certainly to put the ETS on hold nationwide, the Court's order does not explicitly state that its injunction is being issued on a nationwide basis. Thus, at the moment, the Fifth Circuit's injunction does not appear applicable to New York.

In addition to the Fifth Circuit, a number of other federal court litigations have been commenced to block the ETS from taking effect. One of the lawsuits was filed by a coalition of 11 attorney generals from largely-Republican states, while other claims were filed by state representatives and private businesses.

We will probably see further rulings in the coming days and weeks from the federal courts, some following in the Fifth Circuit's footsteps and blocking the ETS, while others may rule that the ETS was lawfully promulgated and should proceed to take effect. With a patchwork of various legal rulings expected, there will ultimately be a unifying judicial order having the final say on this OSHA ETS matter. Whether that ruling comes from the multidistrict litigation panel (an assembly of federal judges that manages certain kinds of national litigation spanning several jurisdictions) or the U.S. Supreme Court remains to be seen.

At the moment, however, the outcome of the OSHA ETS is uncertain. For home care providers, in view of the NY DOH's strict vaccination mandate that has already been implemented, the OSHA ETS is, practically, only meaningful because of its potential to apply to CDPAP providers who are considered joint employers of the personal assistants. Moreover, once the RFO takes effect and FIs are definitively declared to be joint employers of personal assistants for all employment purposes, the OSHA ETS will certainly apply to CDPAP. For CHHAs and LHCSAs, however, as discussed above, the OSHA ETS has limited applicability.



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STAY IN TOUCH
emina@poricaninlaw.com
315.269.1125
518.676.0192



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Practical Counsel. Industry Insight.

Poricanin | 90 State Street, Suite 700, Albany, NY 12207

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