

# Home Care Developments

**Poricanin**  
Practical Counsel. Industry Insight.

## New, Shorter, Quarantine Rules Released to Address Surging COVID Cases

On Friday evening, the New York Department of Health (DOH) issued an advisory through the Health Commerce System, shortening the isolation period for certain fully vaccinated health care workers and other critical workforce members.

As relevant to home care providers, the advisory states, "In limited circumstances where there is a critical staffing shortage," employers may allow a person to return to work after day 5 of their isolation period (where day zero is defined as either date of symptom onset if symptomatic, or date of collection of first positive test if asymptomatic) if they meet **all** the following criteria:

- The individual is a healthcare worker or other critical workforce member (home care workers are included)
- The individual is fully vaccinated,
- The individual is asymptomatic, or, if they had mild symptoms, when they return to work they must:
  - Not have a fever for at least 72 hours without fever-reducing medication
  - Have resolution of symptoms or, if still with residual symptoms, then all are improving
  - Not have rhinorrhea (runny nose)
  - Have no more than minimal, non-productive cough (i.e., not disruptive to work and does not stop the person from wearing their mask continuously, not coughing up phlegm), and
- The individual is able to consistently and correctly wear a well-fitting face mask, a higher level mask such as a KN95, or a fit-tested N95 respirator while at work. The mask should fit with no air gaps around the edges.

Individuals who are moderately to severely immunocompromised are not eligible to return to work under this guidance.

Employees in healthcare settings, including home care, "may allow workers" to participate and return to work in accordance with the above criteria, however, the employee "should be restricted from contact with severely immunocompromised patients (e.g., transplant, hematology-oncology, neonatal ICU) and "a respirator or well-fitting surgical facemask should be worn even when the individual is in non-patient care areas such as breakrooms or offices."

Individuals who return to work under these criteria "must continue to stay at home, take precautions to avoid household transmission, and observe other required elements of isolation while not at work until the end of the 10-day period."

Testing is not required.

Per the DOH, workers participating in this program "should be instructed" that: (1) They should practice social distancing from coworkers at all times except when job duties do not permit such distancing; (2) If they must remove their respirator or well-fitting facemask, for example, in order to eat or drink, they should separate themselves from

others; and (3) They should self-monitor for symptoms and seek re-evaluation from occupational health or their personal healthcare provider if symptoms recur or worsen.

---

## 1.6 Billion in Funding for Workforce Development and VBP Programs is Coming to NYS

### First-Phase Recipients Notified of Eligibility for Funds

Late last week, the Department of Health sent email notifications to all but four LHCSAs that were deemed eligible for federal Medical Assistance Program (“FMAP”) funds. As we had reported previously, the DOH is expected to receive a total of \$1.6 billion in funding over the next year, and these funds will be distributed to home care providers. In turn, home care provider recipients will be required to use the funds for designated purposes, with the first phase of funds having to be used for certain workforce retention and value-based payment programs. The first phase of the FMAP will be issued to the top billing 1/3 of LHCSAs (based on 2019 MLTC/MCO revenue). The DOH estimates that approximately 250 LHCSAs will receive this first phase of FMAP distributions.

The DOH has clarified some facets of the FMAP. First, the DOH is emphasizing that the initial distribution of FMAP funds, that will be issued to the approximately 250 agencies, is merely “phase one” of New York’s overall plan for the expected \$1.6 billion in FMAP funding from the federal government. This phase is focused on “transforming the long-term care workforce and achieving value-based payment readiness.” The other facets of the State’s plan will target workforce transportation challenges, supporting CDPAP growth, and expanding capacity for the provision of NHTD and TBI services.

For providers that were selected for the first phase distribution, the DOH will host a webinar at the beginning of January to describe the qualification requirements. The agencies that received letters from the DOH are *presumptive* awardees and, to secure their FMAP award, certain information must be provided to the DOH via a questionnaire that was also distributed by the DOH. If you have any questions about FMAP or how to complete the DOH survey, please don’t hesitate to reach out to us.

---

## NYS Paid Sick Leave Regulations Finalized

---

On December 22, 2021, the New York Department of Labor published the final State Paid Sick Leave Law (PSL) regulations in the State’s Register. Of significance, the Register contains the Department’s answers to questions about the PSL and sheds light on how the Department intends to interpret and enforce the PSL regulations.

Significantly, as provided by the DOL, employers may have a practice of cashing out unused paid sick leave for employees at the end of the year, provided that employees are given the option to either cash out unused paid sick leave or carry it over. Alternatively, an employer can choose to allow employees to carry over the sick leave as the only option, but employers cannot impose a “use it or lose it” policy upon employees for paid sick leave. Whichever policy the employer chooses must be in writing and distributed to employees. This is an important clarification because, on the face of the PSL statute, there was no right to cash out unused PSL. Employers who utilize PSL to satisfy wage parity should take note of this important point.

Also of interest, the DOL noted that it would publish an “employee attestation template,” which is likely to be similar to what New York City allows for employees covered by the City’s PSL. Note, an employer may not deny an employee leave while attempting to confirm the basis for the leave. However, if the employer discovers the request for PSL to be false or fraudulent, disciplinary action may be taken against the

employee. Employers are cautioned about taking any adverse action against employees on the basis of use of PSL, due to the potential of a retaliation claim. Lastly, of note, the DOL notes that documentation requests for absences of less than 3 days are necessary.

If you have any questions about the PSL, how it interacts with the NYC paid sick leave, the Wage Parity Law, or the Domestic Workers' Bill of Rights and other similar laws, please contact us. *Or, consider outsourcing your full paid leave management and compliance to Forework, our HR partner.*

---

## Supreme Court to Decide Whether Federal Vaccination Mandate Regulations are Lawful

The U.S. Supreme Court has scheduled expedited oral arguments on January 7, 2022, on OSHA ETS and the CMS vaccine mandates. The Court's decisions could decide whether the two vaccine mandates are lawful and, thus, whether covered employers must comply with them.

As our readers will recall, the OSHA ETS regulation applies to companies with 100 or more employees and requires employees to either vaccinate or test for COVID once per week as a condition of working on site at an employer's place of business. Separately, the CMS regulation requires covered healthcare providers (in New York, CHHAs) to vaccinate their staff. The CMS regulation does not allow covered employees to "test out" of the mandate. Both the CMS and the OSHA regulations allow for religious and medical exemptions.

The CMS and OSHA regulations have both been challenged in various federal district courts. As we have been reporting for weeks, given the number of lawsuits filed against these regulations, and the importance of the questions raised by the lawsuits, this issue was bound to make its way to the United States Supreme Court.

OSHA has announced that it will begin requiring covered employers to comply with the regulation's mandate as of January 10. The Supreme Court has not issued a stay on the enforcement of the OSHA regulation pending its decision, and it is unknown whether the Court will issue its decision in time for the January 10 compliance deadline set by OSHA. Thus, employers covered by the OSHA regulation should evaluate carefully whether to take a "wait and see" approach. New York home care providers will recall that the OSHA regulation most likely only applies to their fiscal intermediary personal assistants at this point in time, as their other employees are already covered by the stricter New York DOH vaccine mandate.

For employers covered by the CMS regulation, our readers will recall that the Fifth Circuit Court of Appeals lifted an injunction against the enforcement of the CMS rule for half of the states in the nation. As a result, the CMS regulation technically took effect in twenty-five states after that injunction was lifted (New York included). Nonetheless, CMS's self-imposed non-enforcement position seems to still be in effect. On December 2, CMS declared that it would not be enforcing its regulation, due to ongoing litigation. CMS has not revoked that stance and, thus, while the regulation is technically in effect, it appears to not be enforced. Covered providers should consult counsel about their current obligations under the CMS regulation in view of these litigation developments.

As employers await the decision of the Supreme Court, they should also be cognizant of any local and, now, City-imposed vaccination mandates that might already be in effect and which may require a greater level of compliance than the federal mandates under the CMS and OSHA regulations.

Please contact us if you have any questions about your current obligations as to the vaccination mandates for your workforce. We will continue to monitor these developments and report on any significant new requirements.

---

## Attorney General Issues New Batch of Wage Parity Subpoenas to Covered Providers

As most employers were preparing to leave town for the holidays, New York Attorney General's Office issued a new batch of wage parity subpoenas to licensed home care and fiscal intermediary providers in the downstate area. What is perhaps most notable is that the Attorney General had only recently withdrawn from the Governor's race, citing other "important" projects and initiatives that she would need to complete as the Attorney General. It will be interesting to see whether Ms. James's withdrawal from the race will expedite the conclusion of longstanding wage parity investigations at her office, and whether her office will make any changes in how it proceeds with the investigations of providers' wage parity compliance.

In other noteworthy wage parity news, New York's association of CPAs is noting difficulties with the wage parity certifications that will be required of all fiscal intermediary and LHCSA providers starting in June, 2022. Providers will recall that they will be required to utilize an "independent" financial auditor to certify to the providers' compliance with wage parity spending requirements. The association is contacting the State to report that CPAs cannot certify results in the manner being contemplated by the guidance issued by New York State. We are monitoring this situation and will advise of any changes to the wage parity certification process.

---

### Reminder: Minimum Wage Goes up on December 31, 2021

For Upstate and Long Island employers, the New York State minimum wage is increasing, effective with any work performed on or after 12 a.m. on December 31. Contrary to popular belief, the increase does not go into effect on January 1, 2022.

Employers should ensure that their payroll systems have been updated to account for this increase and its impact on overtime rates, the computation of the regular rate, spread of hours obligations, and other similar issues that are implicated with minimum wage workers.

If you have any questions about your wage and hour compliance, please contact Poricanin Law. *For ongoing assistance with HR and payroll management, please contact our preferred partner, Forework, at [www.forework.com](http://www.forework.com).* The New Year is a great time to implement compliant processes across your operations.



Visit our Website

STAY IN TOUCH  
[emina@poricaninlaw.com](mailto:emina@poricaninlaw.com)  
315.269.1125  
518.676.0192



# Poricanin

Practical Counsel. Industry Insight.

Your copy should address 3 key questions: Who am I writing for? (Audience) Why should they care? (Benefit) What do I want them to do here? (Call-to-Action)

Create a great offer by adding words like "free" "personalized" "complimentary" or "customized." A sense of urgency often helps readers take an action, so think about inserting phrases like "for a limited time only" or "only 7 remaining"!

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

[Unsubscribe emina@poricaninlaw.com](mailto:emina@poricaninlaw.com)

[Update Profile](#) | [About Constant Contact](#)

Sent by [emina@poricaninlaw.com](mailto:emina@poricaninlaw.com) in collaboration  
with



Try email marketing for free today!