



Rewards Policy Insider 2022-1



In this Issue:

1. [Supreme Court Blocks OSHA Vaccine Mandate](#)
2. [New York City Implements Private Employer Vaccine Mandate](#)
3. [Plans Must Cover Over-the-Counter COVID-19 Tests](#)

Supreme Court Blocks OSHA Vaccine Mandate

The U.S. Supreme Court on January 13 issued a stay of the Biden Administration's vaccine mandate for private sector employers with 100 or more employees.

However, it allowed the government to move forward with implementation and enforcement of a separate vaccine mandate for certain healthcare workers. The stay of the Occupational Safety and Health Administration (“OSHA”) mandate for large private sector employers will remain in effect until the courts resolve legal challenges to OSHA’s authority to impose such a mandate, including any appeals to the Supreme Court.

Background

The OSHA Emergency Temporary Standard (ETS) on COVID-19 Vaccination and Testing mandate was initially temporarily enjoined by the Fifth Circuit Court of Appeals in November 2021, but that was later reversed by the Sixth Circuit Court of Appeals. OSHA started enforcing the ETS on January 10, and was planning to fully implement enforcement on February 9. Because of the Supreme Court’s ruling, the OSHA ETS is now on hold for the indefinite future.

The Centers for Medicare and Medicaid Services’ (CMS) Omnibus COVID-19 Health Care Staff Vaccination interim final rule also had been stayed in 25 states due to a series of federal district court rulings. The Supreme Court has now lifted those stays, and CMS is free to implement and enforce the mandate in all 50 states. CMS has a two-stage implementation plan, beginning on January 27. The deadline for Phase II implementation is February 28, 2022.

A third vaccine mandate for federal contractors has also been enjoined by multiple federal district courts. That preliminary injunction was recently upheld by both the 6th and 11th Circuit Courts of Appeals. The Supreme Court so far has not ruled on the status of the federal contractor mandate.

Outlook

For employers, the Supreme Court’s intervention in these cases provides much needed clarification of their obligations to comply with the OSHA and CMS mandates. Those employers subject to the OSHA ETS will not have to comply with it for the immediate future, but those subject to the CMS mandate for health care workers must continue working toward the January 27 Phase I compliance deadline. As discussed below, some employers that otherwise would be subject to the OSHA ETS might still have to comply with the recently implemented New York City mandate.

This is still a complex and rapidly evolving situation. Employers should consult with legal counsel for assistance in determining which mandates apply to them and the relevant compliance deadlines.

New York City Implements Private Employer Vaccine Mandate

Effective as of December 27, 2021, New York City (NYC) requires most private-sector employers to require

workers to show proof of vaccination before entering the workplace. The requirement applies to private-sector employers with more than one worker in New York City.

Overview

The mandate does not require employers to terminate employees who are not vaccinated. They simply must exclude them from the workplace until they are vaccinated. Of course, that could lead to termination for workers who need to be in the workplace to do their jobs.

As required by federal law, the Order permits employers to provide reasonable accommodations for workers who are not vaccinated for medical or religious reasons.

For purposes of the mandate, a “worker” is anyone who works in person in NYC at a “workplace,” which is any location (including a vehicle) where work is performed in the presence of another worker or member of the public. A worker does not include anyone who works from home and does not interact in-person with coworkers or members of the public, or who enters the workplace only for a “quick and limited purpose.”

In the case of non-employee workers, such as contractors, the employer can ask the worker’s employer to confirm proof of vaccination in lieu of maintaining a separate record. However, the employer still must keep a record of the request and confirmation.

If, as of December 27, a worker has only received the first of a two-dose COVID-19 vaccine, the worker must show proof of receiving the second dose within 45 days of receiving the first dose.

Acceptable documentation will include CDC COVID-19 Vaccination Record cards, a New York City COVID Safe App, a New York State Excelsior Pass, or Clear’s digital vaccine card. Employers must maintain a copy of the documentation provided or other record of a worker’s proof, and this information must be treated as confidential.

A helpful set of frequently asked questions and other resources are available on the [NYC Department of Health’s website](#).

Plans Must Cover Over-the-Counter COVID-19 Tests

Beginning January 15, 2022, group health plans will be required to cover certain over-the-counter COVID-19 tests (“OTC COVID-19 tests”) that participants, beneficiaries, or enrollees (“participants”) purchase without an order or individualized clinical assessment by a health care provider. Previous guidance limited the requirement to cover at-home COVID-19 tests to

situations where a test was ordered by a physician. That guidance still applies to those situations.

Background

The new requirements for covering OTC COVID-19 tests without a physician's order are outlined in a set of frequently asked questions ("FAQs") issued by the Departments of Health and Human Services, Labor, and Treasury on January 10, 2022. The three agencies issued the FAQs in response to President Biden's announcement on December 2, 2021, that forthcoming guidance would clarify that plans will cover OTC COVID-19 tests during the ongoing public health emergency period.

As noted, the new requirement is effective beginning on January 15, 2022 and will continue until the COVID-19 public health emergency ends. The COVID-19 public health emergency has been in effect since January of 2020 and has been consistently renewed at 90-day intervals ever since. It is expected to be renewed again later this month, and probably again in April. The Department of Health and Human Services has indicated it will give at least 60-day advance notice before the public health emergency ends.

What is Required?

Plans will have to cover OTC COVID-19 tests that are FDA-approved for use without a physician's order without any cost-sharing, prior authorization, or other medical management requirements. The requirement only applies if the purpose of the testing is for the diagnosis or treatment of COVID-19. Plans do not have to cover OTC COVID-19 tests obtained for other purposes, such as mandatory school or employment-related testing.

Although not required, plans are strongly encouraged to provide "direct coverage" of OTC COVID-19 tests. Direct coverage means participants can obtain the tests from the pharmacy or other distributor without paying any upfront out-of-pocket costs.

Can Plans Limit Coverage?

Plans that provide direct coverage can take advantage of a safe harbor allowing them to limit reimbursements at \$12 per test for OTC COVID-19 tests obtained from non-preferred providers, even if the actual cost is more. In order to use this safe harbor, plans must provide direct coverage through its pharmacy network as well as through a direct-to-consumer shipping program and meet other requirements.

Plans are required to cover at least eight OTC COVID-19 tests per 30-day period (or per calendar month) for every individual enrolled in the plan (including the employee and any enrolled family members or dependents). Plans may count each test separately, even if multiple tests are sold in one package (e.g., if one package includes eight tests, it counts as eight tests and not one test package toward the quantity limit).

Plans may require participants to sign and submit a brief attestation and proof of purchase as part of a claim for reimbursement for OTC COVID-19 tests. However, plans must be careful to avoid "unreasonable" documentation or related requirements that delay participants' access to the tests or to reimbursement.

The FAQs clarify that plans can provide education and information resources relating to OTC COVID-19 tests to participants. However, any such information provided must make clear the plan's coverage of OTC COVID-19 tests, including how to obtain such tests directly from the plan or designated sellers and how to submit a claim for reimbursement. The information also must be consistent with the test's emergency use authorization.

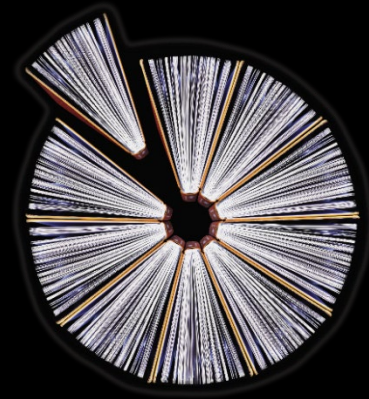
The FAQs are available [here](#). Also helpful is a new CMS guide for participants, titled "[How to get your At-Home Over-the-Counter COVID-19 Test for Free.](#)"

Visit the Archive

All previous issues of the Rewards Policy Insider are archived on Deloitte.com and can be accessed [here](#).

Don't forget to bookmark the page for quick and easy reference!

Upcoming editions will continue to be sent via email and will be added to the site on a regular basis.



Get in touch

Subscribe/Unsubscribe

This publication contains general information only and Deloitte is not, by means of this publication, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This publication is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional adviser. Deloitte shall not be responsible for any loss sustained by any person who relies on this publication.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited ("DTTL"), its global network of member firms, and their related entities (collectively, the "Deloitte organization"). DTTL (also referred to as "Deloitte Global") and each of its member firms and related entities are legally separate and independent entities, which cannot obligate or bind each other in respect of third parties. DTTL and each DTTL member firm and related entity is liable only for its own acts and omissions, and not those of each other. DTTL does not provide services to clients. Please see www.deloitte.com/about to learn more.

Deloitte is a leading global provider of audit and assurance, consulting, financial advisory, risk advisory, tax and related services. Our global network of member firms and related entities in more than 150 countries and territories (collectively, the "Deloitte organization") serves four out of five Fortune Global 500® companies. Learn how Deloitte's approximately 330,000 people make an impact that matters at www.deloitte.com.

None of DTTL, its member firms, related entities, employees or agents shall be responsible for any loss or damage whatsoever arising directly or indirectly in connection with any person relying on this communication. DTTL and each of its member firms, and their related entities, are legally separate and independent entities.

© 2022 Deloitte Consulting LLP

To no longer receive emails about this topic please send a return email to the sender with the word "Unsubscribe" in the subject line.