

Vaccine Considerations & Employee Benefits Update



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Mental Health Parity Comparative Analysis

- ▼ Effective February 10, 2021
- ▼ Applicable to any group health plan that offers mental health or substance use disorder (MH/SUD) benefits
- ▼ If group health plan imposes non-quantitative treatment limitations (NQTLs) on MH/SUD benefits, the plan must perform and document a comparative analysis of NQTLs on MH/SUD benefits vs. medical/surgical benefits
- ▼ Analyses must be available to agencies upon request, and agencies must request at least 20 per year
- ▼ DOL guidance:
 - ▼ [FAQs](#)
 - ▼ [Self-Compliance Tool](#)
 - ▼ [DOL's Webpage on MH/SUD Parity, which includes links to the regulations and additional guidance](#)

Mental Health Parity Comparative Analysis

- ▼ **Settlement Update: United Behavioral Health and United Healthcare Insurance Co. to pay \$15.6M and take corrective actions**
- ▼ ***Enforcing the mental health parity law is a very high priority for the Department of Labor and this administration...the secretary of labor views this as our top health enforcement priority for EBSA.***
 - Ali Khawar, the Acting Assistant Secretary of EBSA
- ▼ **Also an indication that DOL may use its authority to enforce requirements directly against the insurance company/service providers, in addition to employer health plan sponsors**

Transparency in Coverage Requirements

- ▼ Requires group health plans to disclose on a public website information about in-network and out-of-network provider rates, allowed amounts and billed charges, negotiated rates, and historical pricing for covered prescription drugs. Some portions of the information must be posted using machine-readable files.
- ▼ Overlapping rules under CAA
- ▼ DOL delayed effective dates

Transparency in Coverage Requirements

- ▼ **Rx Pricing**
 - ▼ Enforcement delayed pending issuance of additional guidance
- ▼ **Network Details**
 - ▼ Enforcement delayed until July 1, 2022 (from January 1, 2022)
- ▼ **Price Comparison Tool**
 - ▼ Enforcement delayed until plan years beginning on or after January 1, 2023
- ▼ **Advance Explanation of Benefits**
 - ▼ Enforcement delayed pending issuance of additional guidance
- ▼ **Insurance Cards**
 - ▼ Still effective for plan years beginning January 1, 2022 with “reasonable efforts” standard until additional guidance issued
- ▼ **Accurate Provider Directory Information**
 - ▼ Still effective for plan years beginning January 1, 2022 with “good faith” standard until additional guidance issued (which will be after January 1, 2022)

COVID Vaccines -- Where We Are

- ▼ August 23, 2021 – FDA grants full approval of the Pfizer Covid-19 vaccine for people age 16 and older
 - ▼ EUA still in effect for Moderna and Johnson & Johnson
- ▼ Employer Vaccine Mandates
- ▼ Vaccine Incentives & Surcharges
 - ▼ Delta Airlines
- ▼ Biden Administration's New Vaccine Requirements for Employers

Federal Vaccine Requirements for Employers

▼ **President Biden's *Path out of the Pandemic***

- ▼ Requiring COVID-19 Vaccinations for Over 17 Million Health Care Workers at Medicare and Medicaid Participating Hospitals and Other Health Care Settings
- ▼ Requiring Vaccinations for all Federal Workers and for Millions of Federal Contractors that Do Business with the Federal Government
- ▼ Requiring All Employers with 100+ Employees to Ensure their Workers are Vaccinated or Tested Weekly
- ▼ Requiring Employers to Provide Paid Time Off to Get Vaccinated

Federal Vaccine Requirements for Employers

- ▼ **Requiring COVID-19 Vaccinations for Over 17 Million Health Care Workers at Medicare and Medicaid Participating Hospitals and Other Health Care Settings**
 - ▼ CMS to require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement, including but not limited to hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies.
 - ▼ Builds on the vaccination requirement for nursing facilities recently announced by CMS and will apply to nursing home staff as well as staff in hospitals and other CMS-regulated settings, including clinical staff, individuals providing services under arrangements, volunteers, and staff who are not involved in direct patient, resident, or client care.

Federal Contractor Vaccine Requirements

- ▼ **Requiring Vaccinations for all Federal Workers and for Millions of Federal Contractors that Do Business with the Federal Government**
 - ▼ Executive Order to require all federal executive branch workers to be vaccinated.
 - ▼ Executive Order directing that this standard be extended to employees of contractors that do business with the federal government.
 - ▼ The Safer Federal Workforce Task Force ("Task Force") published its Guidance for Federal Contractors and Subcontractors ("Guidance").

Federal Contractor Vaccine Requirements

- ▼ By December 8, 2021,* **Covered contractors** must ensure that all **covered contractor employees** are **fully vaccinated** for COVID-19, unless the employee is legally entitled to an accommodation.
 - ▼ For most contractors, the requirements do not take effect until the next newly awarded contract or contract option entered into after October 15, 2021.
- ▼ Covered contractors may be required to provide an accommodation to a covered employee "because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance."
- ▼ **Fully vaccinated** – People are considered fully vaccinated for COVID-19 two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single-dose vaccine. There is currently no post-vaccination time limit on fully vaccinated status; should such a limit be determined by the Centers for Disease Control and Prevention, that limit will be considered by the Task Force and OMB for possible updating of this Guidance for an exception for employees with a negative COVID-19 test result.

Federal Contractor Vaccine Requirements

- ▼ A negative Covid-19 test result is not a substitute for proving vaccination status: "A covered contractor cannot accept a recent antibody test from a covered contractor employee to prove vaccination status." (Q&A No. 6.)
- ▼ The Guidance provides that covered contractor employees who have had a prior COVID-19 infection are still required to be vaccinated. (Q&A No. 5.)
- ▼ **No self-attestation** on vaccine status:
 - ▼ Covered contractor must review its covered employees' vaccination documentation.
 - ▼ Where an employee loses or does not have a copy of its vaccination card, the Guidance provides that "[a]n attestation of vaccination by the covered contractor employee is not an acceptable substitute for documentation of proof of vaccination." (Q&A No. 3.)

Federal Contractor Vaccine Requirements

- ▼ Guidance is broad and the vaccine mandate applies to employees that are "working on or in connection with a covered contract or working at a covered contractor workplace," which includes **remote workers** and others not directly working on a government contract (i.e., HR, billing, legal).
 - ▼ Remote – "An individual working on a covered contract from their residence is a covered contractor employee, and must comply with the vaccination requirement for covered contractor employees, even if the employee never works at either a covered contractor workplace or Federal workplace during the performance of the contract." (Q&A No. 11.)
- ▼ Small Business – "Yes, the requirement to comply with this Guidance applies equally to covered contractors regardless of whether they are a small business." (Q&A No. 14.)

Federal Contractor Vaccine Requirements

- ▼ The Guidance requires all individuals in covered contractor workplaces observe Centers for Disease Control and Prevention (“CDC”) guidance on masks and physical distancing.
- ▼ The Guidance requires covered employers to designate a person to coordinate workplace safety efforts.

Federal Contractor Vaccine Requirements

Key Definitions:

- ▼ **Covered contractor** – means a prime contractor or subcontractor at any tier who is party to a covered contract.
- ▼ **Covered contractor employee** – means any full-time or part-time employee of a covered contractor working on or **in connection with** a covered contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.
 - ▼ The phrase "in connection with" a covered contract is broad:
 - ▼ Work performed in connection with means "[e]mployees who perform duties necessary to the performance of the covered contract, but who are not directly engaged in performing the specific work called for by the covered contract, such as human resources, billing, and legal review, perform work in connection with a Federal Government contract." (Q&A No. 17.)

Federal Contractor Vaccine Requirements

Key Definitions:

- ***Covered contractor workplace*** – means a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract. A covered contractor workplace does not include a covered contractor employee’s residence.
- ***Federal workplace*** – means any place, site, installation, building, room, or facility in which any Federal executive department or agency conducts official business, or is within an executive department or agency’s jurisdiction, custody, or control.
- ***Fully vaccinated*** – People are considered fully vaccinated for COVID-19 two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single-dose vaccine. There is currently no post-vaccination time limit on fully vaccinated status; should such a limit be determined by the Centers for Disease Control and Prevention, that limit will be considered by the Task Force and OMB for possible updating of this Guidance for an exception for employees with a negative COVID-19 test result.

Federal Contractor Vaccine Requirements

Key Dates:

- ▼ **December 8, 2021 deadline to be “fully vaccinated”**
 - ▼ **Covered contractor employees must be fully vaccinated no later than December 8, 2021.**
 - ▼ **After that date, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract**
- ▼ **October 15, 2021: Covered contractor status depends on whether that federal contractor has a new contract with an effective date after October 15, 2021 or whether it has an existing contract with an option taking effect after October 15, 2021, and the government customer has added to such contract or option the FAR Council’s contract clause regarding compliance**

Federal Contractor Vaccine Requirements

The Guidance provides a **phased approach**:

- ▼ “*Contracts awarded prior to October 15 where performance is ongoing* – the requirements must be incorporated at the point at which an option is exercised or an extension is made.” (Q&A No. 12.)
- ▼ “*New contracts* – the requirements must be incorporated into contracts awarded on or after November 14.
- ▼ Between October 15 and November 14, agencies must include the clause in the solicitation and are encouraged to include the clause in contracts awarded during this time period but are not required to do so unless the solicitation for such contract was issued on or after October 15.” (Q&A No. 12.)

Federal Vaccine Requirements for Employers

- ▼ **Requiring All Employers with 100+ Employees to Ensure their Workers are Vaccinated or Tested Weekly**
 - ▼ The Department of Labor's Occupational Safety and Health Administration (OSHA) is developing a rule that will require all **employers with 100 or more employees** to ensure their workforce is **fully vaccinated** or require any workers who remain **unvaccinated to produce a negative test result on at least a weekly basis before coming to work**. OSHA will issue an Emergency Temporary Standard (ETS) to implement this requirement. This requirement will impact over 80 million workers in private sector businesses with 100+ employees.
- ▼ **Requiring Employers to Provide Paid Time Off to Get Vaccinated**
 - ▼ To continue efforts to ensure that no worker loses a dollar of pay because they get vaccinated, OSHA is developing a rule that will require **employers with more than 100 employees** to provide **paid time off** for the time it takes for workers to get vaccinated or to **recover if they are under the weather post-vaccination**. This requirement will be implemented through the ETS.

Federal Vaccine Requirements for Employers

- ▼ DOL/OSHA officials plans to issue the emergency temporary standard (ETS) in “weeks” (said several weeks ago)
 - ▼ OSHA will not provide stakeholders the opportunity to comment or provide input to the ETS prior to its release.
- ▼ When the ETS is published in the Federal Register, it will become **effective immediately** in states where OSHA has direct jurisdiction.
 - ▼ The 22 states with state OSHA plans will have 30 days to implement their own version of the ETS.
- ▼ Stakeholders will have an opportunity to comment on the ETS after it is published in the Federal Register. These comments will be used by DOL to help shape a proposed final rule that will replace the ETS.
- ▼ OSHA intends to issue the **final rule six months** after the release of the ETS

Federal Vaccine Requirements for Employers

- ▼ Indications from OSHA on substance of the ETS:
 - ▼ OSHA and federal agencies will work to ensure the ETS is consistent with the vaccination mandates imposed on federal contractors.
 - ▼ **The ETS testing/vaccination requirement will not extend to remote employees who are physically isolated from co-workers.**
 - ▼ Employers will need to provide employees with PTO or allow employees to use existing PTO to obtain vaccinations and recover from vaccination side effects.
 - ▼ The 100-employee threshold for coverage will apply to the company/employer, not just a single worksite.
 - ▼ **The procedures for handling employees who refuse to vaccinate or test will not be addressed by the ETS.**

Federal Vaccine Requirements for Employers

- ▼ **Expected to be addressed in the ETS:**
 - ▼ **Who pays for testing?**
 - ▼ **What are the procedures for how employers will verify vaccinations and tests?**
 - ▼ **What level of vaccination is required under the ETS (i.e., one shot, two shots, booster) and associated waiting periods?**

Federal Vaccine Requirements for Employers

- ▼ Enforcement?
 - ▼ Indications are for a **\$14,000 penalty per violation**
- ▼ Paid Time Off for Family Members to get Vaccinated?
- ▼ Testing for employees with religious or ADA accommodation?
- ▼ Unemployment implications?
- ▼ Tax Credits for Vaccination PTO?
- ▼ Constitutional Challenges?
 - ▼ TRO/Injunction?

Employer-Implemented Vaccine Requirements, Incentives & Surcharges - **SUMMARY**

- ▼ Employers generally may require vaccination and proof of vaccination
 - ▼ Subject to Title VII, PDA, and ADA accommodations
- ▼ Incentives & Surcharges related to health plan premiums must be part of a wellness program compliant with the HIPAA nondiscrimination rules
 - ▼ 30% limitation (combined)
 - ▼ Implications on ACA Affordability - **DOL FAQs confirm no special treatment: All participants treated as if they FAIL vaccination standard**
 - ▼ Reasonable Alternative Standards
 - ▼ *Activity-Only* → Must provide RAS (or waive standard) if o an individual for whom the standard is (i) unreasonably difficult to meet standard, or (ii) medically inadvisable to attempt to meet standard

Guidance on Employer Vaccine Requirements

▼ EEOC Guidance on Employer Vaccine Requirements

- ▼ EEOC FAQs on its COVID-19 page regarding employer vaccination requirements: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- ▼ EEOC acknowledges that employers **may require employees to be vaccinated and provide proof of vaccination**
 - ▼ If employer provides vaccine, incentive may not be so substantial as to be coercive
- ▼ **To adequately document the requirement for ADA purposes, the employer should have a written policy that specifies it is a qualification standard for employment that “an individual shall not pose a direct threat to the health or safety of individuals in the workplace.”**

Guidance on Employer Vaccine Requirements

- ▼ **Reasonable Accommodations (ADA/PDA/Title VII)**
- ▼ **ADA Confidentiality Requirements**
- ▼ **Caution: State/Local law restrictions on vaccine requirements**
 - ▼ **Prohibitions on businesses, employers**
 - ▼ **Vaccine mandate vs requiring vaccine documentation**

Vaccine Incentives & Surcharges

- ▼ **Incentive/Surcharge related to health plan premiums**
 - ▼ Delta Airlines
- ▼ HIPAA Nondiscrimination Rules prohibit treating individuals differently based on health factor ---- vaccination status
- ▼ Exception: **Wellness Programs**
 - ▼ Participatory vs. Activity-Only or Outcome-based health contingent wellness program



Five Requirements for Health-Contingent Wellness Programs

1.	Frequency of Opportunity to Qualify	Eligible individuals must be given an opportunity to qualify for the reward at least once per year
2.	Maximum Reward Size	May not exceed 30% of the total cost of employee-only coverage (50% in the case of programs designed to reduce or prevent tobacco use)
3.	Reasonable Design	Reasonable chance of improving the health of or preventing disease in participating individuals It is not overly burdensome, is not a subterfuge for discriminating based on a health factor, and is not highly suspect in the method chosen to promote health or prevent disease
4.	Uniform Availability	Must provide <u>reasonable alternative standards</u>
5.	Notice Requirements	Must disclose the options to qualify for the reward through reasonable alternative standards

Vaccine Incentives & Surcharges

- ▼ Opportunity to qualify at least once per plan year
 - ▼ Coordinate with Open Enrollment 2021?
- ▼ 30% limitation (combined)
- ▼ Implications on ACA Affordability – **DOL FAQs confirm no special treatment: All participants treated as if they FAIL vaccination standard**
 - ▼ 9.83% in 2021, 9.61% in 2022
- ▼ Reasonable Alternative Standards
 - ▼ *Activity-Only* → Must provide RAS (or waive standard) if o an individual for whom the standard is (i) unreasonably difficult to meet standard, or (ii) medically inadvisable to attempt to meet standard

When is a Reasonable Alternative Standard *Reasonable*?

- ▼ Reasonableness based on facts and circumstances
- ▼ Must satisfy the following:
 - ▼ Time commitment required must be reasonable
 - ▼ Educational program: plan must make educational program available or assist employee in finding such a program and may not require an individual to pay for the cost of the program
 - ▼ Diet program: plan is not required to pay for the cost of food but must pay any membership or participation fee
 - ▼ Accommodate requests of individual's physician
- ▼ Reasonable Alternative Standards for COVID Vaccine???
 - ▼ Consistent testing
 - ▼ Educational program or materials
 - ▼ Physician consultation
 - ▼ Waiver

Vaccine Incentive Wellness Program

- ▼ Is your vaccine program also a GHP?
 - ▼ Depends on structure
 - ▼ Who covers the cost?
 - ▼ How provided?
 - ▼ Related to health plan?
 - ▼ Integration with health plan
- ▼ Best Practices
 - ▼ Program should be in writing
 - ▼ Plan document / SPD
 - ▼ Communication is key



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