CMS Medicare and Medicaid COVID-19 Vaccination Mandate:
Effective November 5, 2021, CMS promulgated final rules revising the requirements that Medicare and Medicaid certified providers must meet for participation in such programs. These rules establish COVID-19 vaccination requirements for staff at covered facilities.

Applicability to OMH system:
The CMS COVID-19 vaccination mandate, available at https://www.federalregister.gov/documents/2021/11/05/2021-23831/medicare-and-medicaid-programs-omnibus-covid-19-health-care-staff-vaccination, applies to specified Medicare and Medicaid-certified health care facilities. In the OMH system, this includes OMH-operated or -licensed hospitals and Comprehensive Psychiatric Emergency Programs (CPEPs), which should be in compliance with the CMS rule if they are in compliance with OMH’s vaccine mandate at 14 NYCRR Part 557. The CMS rule is also applicable to OMH-licensed residential treatment facilities (RTFs) for youth. The CMS rule does not apply to OMH-licensed facilities that are not certified by CMS, such as freestanding clinics, rehab and residential programs that are not operated by a hospital, even though those facilities may still bill Medicare and Medicaid. The rule applies to CMS-certified “community mental health centers,” but OMH does not believe that this type of CMS-certified facility operates in New York State.

Applicability to Personnel:
The CMS COVID-19 vaccination mandate applies to all Medicare and Medicaid-certified hospital and RTF staff, who provide inpatient or outpatient services to facility patients regardless of location, including treatment sites which may be off the hospital or facility’s main campus. OMH operated hospitals provide both inpatient and a variety of OMH-licensed outpatient programs and services. All staff thereof are covered by the mandate.

Additionally, the mandate is not limited solely to individuals who perform direct care functions. Under the mandate, vaccination is required for “all staff that interact with other staff, patients, residents, clients... in any location, beyond those that physically enter facilities or other sites of patient care.” Therefore, the mandate is applicable to any administrative staff, students, trainees, volunteers, housekeeping and food services staff who either physically work in the facility, or in any other location where they physically interact with facility staff who interact with patients. The mandate applies to all construction workers contracted by the Dormitory Authority or the Office of General Services (OGS) that report to OMH hospitals and OMH-operated outpatient and residential program settings. It also applies to all OMH contractors, Dormitory Authority and OGS staff that have offices within an OMH hospital.

Not subject to the mandate are individuals who provide services 100 percent remotely, such as fully remote telehealth or payroll services, and individuals who infrequently provide ad hoc non-health care services (such as annual elevator inspection, delivery, repair, or other maintenance services).

When determining whether to require COVID-19 vaccination of an individual, facilities should consider frequency of presence within the covered facility, services provided, and proximity to patients and staff. For example, a plumber who makes an emergency repair in an empty restroom or service area and correctly wears a mask for the entirety of the visit may not be an appropriate candidate for mandatory vaccination. On the other hand, a crew working on a construction project whose members use shared facilities (restrooms, cafeteria, break rooms) during their breaks, would be subject to these requirements due to the fact that they are using the same common areas used by staff, patients, and visitors.
Compliance with Fully Vaccinated Status and Boosters:
Consistent with CDC guidance, CMS will consider staff “fully vaccinated” if it has been 2 or more weeks since they completed a primary vaccination series for COVID-19, defined as having received a single-dose vaccine or all doses of a multi-dose vaccine. Boosters are NOT required by the rule.

The rule requires a first dose of the COVID-19 vaccination administered by January 27, 2022, and a second dose (where applicable) by February 26, 2022. Individuals may continue to provide services if they have received their first dose by January 27, 2022 and their second dose of a two-dose vaccination series by February 26, 2022, even though they are not yet “fully vaccinated.”

Vaccine Exemptions:
Facility staff must be able to request an exemption from these requirements based upon an applicable law, such as the ADA or Title VII. This includes requests for medical or religious exemptions. Providers must have a process for collecting and evaluating such requests, including securing any documentation provided by staff requesting an exemption, the facility’s determination, and any accommodations provided.

Medical Exemptions:

Requests for medical exemptions must contain all documentation confirming recognized clinical contraindications to COVID-19 vaccines which support the staff member’s request and must be signed and dated by a licensed practitioner, who is not the individual requesting the exemption, and who is acting within their respective scope of practice pursuant to State and local laws. Such documentation must contain all information specifying which of the authorized COVID-19 vaccines are clinically contraindicated for the staff member to receive, the recognized clinical reasons for the contraindications and a statement by the authenticating practitioner recommending that the staff member be exempted from the facility’s COVID-19 vaccination requirements based on such contraindication.

Religious Exemptions:

For additional information, see https://www.cms.gov/About-CMS/Agency-Information/Emergency/EPRO/Current-Emergencies/Current-Emergencies-page

OSHA Mandate:
The Department of Labor, Occupational Safety and Health Administration (OSHA) has also issued a new vaccination or testing requirement, called the COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS), available at: https://www.federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard. On December 17, 2021, a U.S. Court of Appeals overturned the stay of the ETS, allowing the implementation of this requirement. OSHA has indicated that it will provide a period for employers to come into compliance with the ETS. OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10, 2022 and will not issue citations for noncompliance with the standard’s testing requirements before February 9, 2022, as long as an employer is making good faith efforts to come into compliance with the standard.
The ETS applies to OMH providers who have 100 or more employees. The 100 employee threshold is calculated based on all employees across all U.S. locations of the employer. The ETS does not apply to those facilities covered by the CMS vaccination mandate discussed above or in any settings where employees provide health care services which are subject to the previous OSHA healthcare ETS issued in June 2021 and codified in federal regulations at 29 C.F.R. § 1910.502, even though the previous OSHA healthcare ETS did not require staff vaccination or testing.\(^1\) As a result of these applicability provisions, many OMH-licensed programs will not be subject to either OSHA ETS or the CMS mandate at this time. For example, OMH-licensed programs not operated by a hospital with fewer than 100 employees and that were exempt from the previous OSHA healthcare ETS by virtue of their screening and patient entry procedures, are not subject to any of these federal mandates.

For OMH providers operated by a municipality, county, or the State, note that the New York State Department of Labor enforces OSHA rules for public employers, however the rules must be affirmatively adopted by the Department of Labor before they become effective for public employers. This means that the new ETS will apply to public employers at a later date than it applies to private employers. For more information, please see https://dol.ny.gov/public-employee-safety-health.

Under the new ETS, employees who are not vaccinated are required to be tested every 7 days and provide results no later than the 7th day after the date on which the employee provided the previous result. If an unvaccinated employee is not tested, the employee must be removed from the workplace until providing a negative result. Unvaccinated telecommuting employees who have not reported for more than 7 days since their last negative test result must provide documentation of a negative test within 7 days of their return to the workplace. The negative test result must be provided upon return to the office. Employees who are partially vaccinated are also required to be tested weekly until they are fully vaccinated. Employees who do not report to a workplace where other coworkers or customers are present; who work exclusively from home; or who work exclusively outdoors are not required to demonstrate proof of vaccination or negative test results, however any such employees must be included for purposes of determining the size of the employer.

The new ETS requires employees to promptly notify employers when they test positive for COVID. Employers must immediately remove positive employees from the workplace until the employee receives a negative test, meets isolation guidance, or receives a recommendation from a healthcare provider to return to work. Employers must report work-related COVID fatalities within 8 hours and work-related COVID hospitalizations within 24 hours.

The new ETS provides for accommodations for disabilities and religion. Employers must keep track of those employees who are vaccinated and maintain vaccination and testing records as confidential records. The new ETS also requires unvaccinated employees to wear face coverings. Please note that additional state mask mandates may apply to employees regardless of vaccination status.

For additional information, see https://www.osha.gov/coronavirus/ets2.

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\(^1\) The previous OSHA healthcare ETS does not apply to non-hospital ambulatory health care settings where all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter the setting.