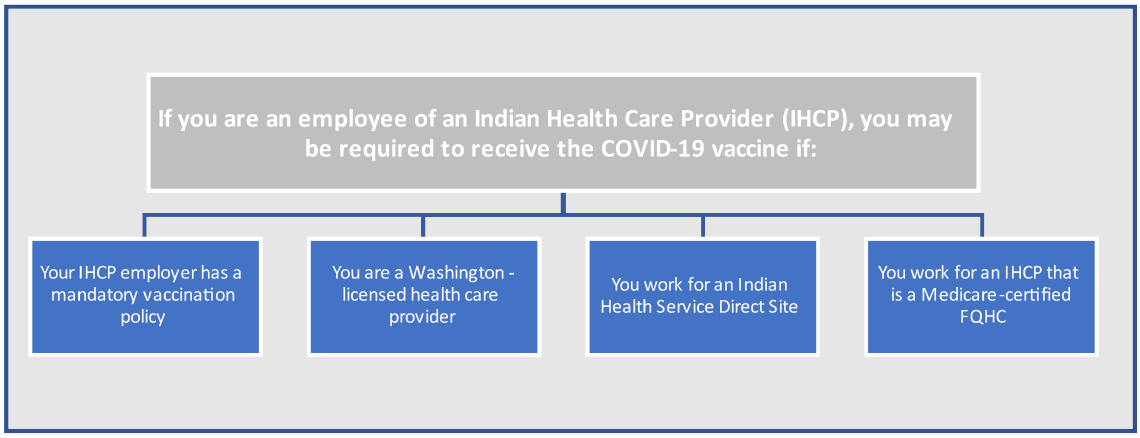
American Indian Health Commission

Washington Indian Health Care Provider Employer Vaccine Mandate - General Questions

Last Updated: 7/16/22

This guidance is intended to provide resources and information in response to frequently asked questions by Tribes, Indian health care providers (IHCP), and Tribal employees.* Tribal, federal, and state laws and policies may or may not have an impact on whether an employee of a Tribe or an Indian health care provider must be vaccinated. The legal landscape for mandatory employer vaccination is constantly changing. For these reasons, it is critical that Tribal and IHCP employers considering or implementing employer mandated vaccination policies consult their legal counsel on a regular basis.



TRIBAL AUTHORITY TO MANDATE EMPLOYEE VACCINATIONS

1. **Do Tribal employers/tribal entities have the authority to require their employees, regardless of whether they are tribal members or not, receive the COVID-19 vaccine?**

   Tribal nations possess the inherent power to mandate their employees be vaccinated. This regulatory power is derived from a Tribe's inherent sovereign power to protect self-government and control internal relations.[1] The sovereign authority of Tribes over employment matters extends to non-members.[2]

[1] Montana v. United States, 450 US 544 (1981). Knighton v. Cedarville Rancheria of Northern Paiute Indians, et al., 922 F.3d 892 (9th Cir., March 13, 2019).

[2] Knighton v. Cedarville Rancheria of Northern Paiute Indians, et al., 922 F.3d 892 (9th Cir., March 13, 2019).

Drafted by Heather Erb, AIHC Legal Counsel. *LEGAL DISCLAIMER: The information presented in this guidance is not legal advice, is not to be acted on as such, may not be current and is subject to change without notice. You should consult with your own attorneys when developing programs and policies.

2. **Are employees of Tribal health care providers working within the Tribal reservation subject to the Washington State Governor's Proclamation 21-14.1 requiring all health care providers be vaccinated?**

   Yes, if they are a Washington-licensed health care provider. According to the Washington Department of Health Guidance 505-160, "The proclamation extends to Washington-licensed health care providers wherever they practice since they hold a state-issued credential." However, Tribal employers are not required to verify or enforce employee compliance with the mandate. For questions regarding how Washington state will verify or enforce employee compliance, see question three below.

3. **Are Tribal employers required to enforce or monitor the Washington State Governor's Proclamation 21-14.1 requiring all health care providers be vaccinated?**

   No. Tribes are sovereign nations and cannot be required to enforce a State of Washington mandate. According to the Washington Department of Health Guidance 505-160, "The proclamation extends to Washington-licensed health care providers wherever they practice since they hold a state-issued credential. But the obligation for a health care setting operator to verify the vaccination status of health care providers engaged in work for them doesn't apply to tribal health care settings."

4. **How will the State of Washington verify a Tribal health care employee's vaccination status and enforce the Washington State Governor's Proclamation 21-14.1?**

   Tribal employers are not considered a health care setting under the **Washington State Governor's Proclamation 21-14.1.** However, the State of Washington provides that, "The proclamation extends to Washington-licensed health care providers wherever they practice since they hold a state-issued credential." According to the Washington Department of Health Guidance 505-160, if you are an employee who does not work for a health care setting included within the Governor's proclamation, you "must maintain your own proof and have it available should a lawful authority request it. Lawful authorities include, but are not limited to, law enforcement, local health jurisdictions, the Washington State Department of Health, the Washington State Department of Labor & Industries, and, for long-term care settings, the Washington State Department of Social and Health Services."

5. **Will the State of Washington suspend or revoke the credential of a Tribal employee who is a Washington-licensed health care provider if they do not receive the COVID-19 vaccine?**

   According to the Washington Department of Health Guidance 505-160, "The Department of Health, along with the boards and commissions that regulate health care providers, will follow their normal complaint and investigation processes regarding legal requirements for credential holders. Depending on the circumstances, this could include taking action against a provider's credential following a complaint."

Drafted by Heather Erb, AIHC Legal Counsel. *LEGAL DISCLAIMER: The information presented in this guidance is not legal advice, is not to be acted on as such, may not be current and is subject to change without notice. You should consult with your own attorneys when developing programs and policies.

FEDERAL VACCINE MANDATES

6. Does the Indian Health Service (IHS) COVID-19 vaccination mandate apply to employees working for an urban Indian health program or a Tribal 638 compact/contract facility?

No. The Indian Health Service QA for Employees specifies that the mandate applies to "All IHS employees, U.S. Public Health Service Commissioned Corps officers, contract staff, temporary employees, students, and volunteers who work, visit for official duties or provide direct care in a federally-operated IHS health care facility" and does not list urban Indian health programs or Tribal 638 compact/contract facilities. It also states that "federal employees at tribal and urban Indian organization facilities have to be vaccinated ***if*** the tribal or urban Indian organization has a mandatory vaccine policy for its employees."

7. Does the fact that a Tribe or Indian Health Care Provider receives Medicare or Medicaid reimbursement mean that the Tribe is required to mandate vaccines for their employees?

An Interim Final Rule with Comment Period was published on November 5, 2021.[3] A CMS Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule guidance document was also published.[4] The rule mandates vaccinations of eligible staff who are employed by certain types of providers (see CMS Table 1 below) participating in Medicare and Medicaid programs by January 4, 2022.

The CMS Mandate has been challenged by several states. The U.S. Supreme Court is currently set to hear oral arguments on January 7, 2022. After a recent 5th Circuit Court of Appeals decision[5], CMS is implementing its mandate, but it will only apply to states that are not involved in the litigation, (including Washington) pending the Supreme Court's final decision.

Legal challenges aside, this rule does NOT apply to the majority of Indian health care providers (IHCPs). CMS expressly states that the rule directly applies "***only*** to the Medicare and Medicaid-certified providers and suppliers listed" within the rule."[6] It is important to check with your legal counsel to determine if your facility may be considered one of the provider types listed on the table below (see pg. 5). In addition, please note that the rule does not apply to all Federally Qualified Health Centers (FQHCs), but rather, it applies only to FQHCs that are also Medicare-certified providers.[7] To check if your IHCP is an FQHC Medicare-certified provider, you can visit QCOR at

---

[3] Medicare and Medicaid Programs; Omnibus COVID–19 Health Care Staff Vaccination, 86 Fed. Reg. 212, 61555 (Nov. 5, 2021) (to be codified at 42 C.F.R. pts. 416, 418, 441, 460, 482, 483, 484, 485, 486, 491 and 494). https://www.govinfo.gov/content/pkg/FR-2021-11-05/pdf/2021-23831.pdf

[4] CMS Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule Basics, https://www.cms.gov/files/document/cms-omnibus-staff-vax-requirements-2021.pdf

[5] *See* Louisiana v. Becerra, No. 21-30734, 2021 WL 5913302 (5th Cir. Dec. 15, 2021).

[6] Medicare and Medicaid Programs; Omnibus COVID–19 Health Care Staff Vaccination, 86 Fed. Reg. 212, 61556 (Nov. 5, 2021) (to be codified at 42 C.F.R. pts. 416, 418, 441, 460, 482, 483, 484, 485, 486, 491 and 494). https://www.govinfo.gov/content/pkg/FR-2021-11-05/pdf/2021-23831.pdf

[7] CMS Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule Basics, https://www.cms.gov/files/document/cms-omnibus-staff-vax-requirements-2021.pdf

Drafted by Heather Erb, AIHC Legal Counsel. *LEGAL DISCLAIMER: The information presented in this guidance is not legal advice, is not to be acted on as such, may not be current and is subject to change without notice. You should consult with your own attorneys when developing programs and policies.

https://qcor.cms.gov/main.jsp.

Below is some general guidance for facilities who are subject to this mandate:

Facility Policy Requirements. Facilities must develop and implement a mandatory vaccination policy by December 4, 2021. The policy must require eligible staff to receive either the first dose of the two-dose COVID-19 vaccines from Pfizer and Moderna or the single dose of the one-dose COVID-19 vaccine from Johnson & Johnson prior to delivering care, treatment, or services.

Employee Paid Time Off. Per the requirements of the interim rule, facilities must provide reasonable time and paid leave for employees to receive the vaccines and recover from side effects.

Facility Compliance Monitoring. CMS will track compliance with this rule through survey and enforcement processes. Healthcare facilities who fail to comply with the requirements by December 4, 2021 will be given a warning and a chance to comply. CMS has stated it will utilize full enforcement authority in implementing this rule.

TABLE 1: Authorities for All Providers and Suppliers[8]

Provider/Supplier	Statutory Authority
Ambulatory Surgical Centers (ASCs)	Sections 1102, 1832(a)(2)(f)(i), and 1833 (i)(1)(A), and 1871 of the Act
Hospices	Sections 1102,1861(dd), and 1871 of the Act
Psychiatric Residential Treatment Facilities (PRTFs)	Section 1102 and 1905(h)(1) of the Act
Programs of All-Inclusive Care for the Elderly (PACE)	Sections 1102, 1871, 1894, and 1934 of the Act
Hospitals	Sections 1102, 1861(e)(9), and 1871 of the Act
Long Term Care (LTC) Facilities	Sections 1102, 1819, 1871, and 1919 of the Act
Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs-IID)	Sections 1102 and 1905(d)(1) of the Act
Home Health Agencies (HHAs)	Sections 1102, 1861(m), 1861(o), 1871, and 1891 of the Act
Comprehensive Outpatient Rehabilitation Facilities (CORFs)	Sections 1102, 1861(cc)(2)(J), and 1871 of the Act
Critical Access Hospitals (CAHs)	Sections 1102, 1820(e), and 1871 of the Act
Clinics, Rehabilitation Agencies, and Public Health Agencies as Providers of Outpatient Physical Therapy and Speech-Language Pathology Services (Organizations)	Sections 1102, 1861(p)(4), and 1871 of the Act
Community Mental Health Centers (CMHCs)	Sections 1102, 1861(ff)(3), 1832(a)(2)(J), 1866(e)(2), and 1871 of the Act
Home Infusion Therapy (HIT) Suppliers	Sections 1102, 1861(iii)(3)(D)(i)(IV), and 1871 of the Act
Rural Health Clinics (RHCs)/ Federally Qualified Health Centers (FQHCs)	Sections 1102, 1861(aa), 1871, and 1905(l)(2)(B) of the Act
End-Stage Renal Disease (ESRD) Facilities	Sections 1102, 1871, and 1881(b)(1)(A) of the Act

8. Does OSHA have a vaccine mandate that applies to Tribal employers?

[8] Medicare and Medicaid Programs; Omnibus COVID–19 Health Care Staff Vaccination, 86 Fed. Reg. 212, 61567 (Nov. 5, 2021) (to be codified at 42 C.F.R. pts. 416, 418, 441, 460, 482, 483, 484, 485, 486, 491 and 494). https://www.govinfo.gov/content/pkg/FR-2021-11-05/pdf/2021-23831.pdf

Drafted by Heather Erb, AIHC Legal Counsel. *LEGAL DISCLAIMER: The information presented in this guidance is not legal advice, is not to be acted on as such, may not be current and is subject to change without notice. You should consult with your own attorneys when developing programs and policies.

The short answer is not currently. The Department of Labor's Occupational Safety and Health Administration (OSHA) published an Emergency Temporary Standard (ETS) [9] on November 5, 2021, requiring all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a weekly negative test result. However, in January of 2022, the U.S. Supreme Court halted OSHA's vaccine-or-testing rule for private businesses with at least 100 employees.[10] In response, OSHA withdrew the ETS stating: "Notwithstanding the withdrawal of the [ETS], OSHA continues to strongly encourage the vaccination of workers against the continuing dangers posed by COVID-19 in the workplace."[11]

Legal challenges aside, it remains unclear whether and to what extent the ETS will apply to Tribes. Neither the ETS nor the OSHA written guidance has addressed whether the ETS applies to Tribal governments and/or tribal enterprises. OSHA has made statements indicating the ETS would not apply to Tribal governments but will apply to Tribal enterprises.[12] Some Tribes are likely to challenge any future assertions of OSHA regulatory authority in Indian country regardless of OSHA's opinions to the contrary. The federal circuit courts are split as to whether OSHA regulations apply to Tribes.[13] In addition to federal case law on OSHA in Indian country, Tribes may also want to review their codes and policies to determine whether the Tribe already requires their employers meet OSHA standards. If the ETS is revisited, the ETS may apply to these Tribes.

OSHA is required to conduct a Tribal Consultation pursuant to Executive Order No. 13175 to address the applicability of an ETS on Tribes.

---

[9] COVID–19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 212, 61402 (proposed Nov. 5, 2021) (to be codified at 29 C.F.R. pt. 1910, 1915, 1917, 1918, 1926, and 1928), https://www.govinfo.gov/content/pkg/FR-2021-11-05/pdf/2021-23643.pdf

10 Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety and Health Admin., 595 U.S. Nos. 21A244 and 21A247, slip op. (Jan. 13, 2022).

[11] https://www.federalregister.gov/documents/2022/01/26/2022-01532/covid-19-vaccination-and-testing-emergency-temporary-standard.

[12] Reese Gorman, New Vaccine Rules' Effect on Tribes Still Unknown, NORMAN TRANSCRIPT, September 13, 2021. https://www.normantranscript.com/news/new-vaccine-rules-effect-on-tribes-still-unknown/article_f2b3a5bc-14d6-11ec-93a2-67ea7b36352e.html

[13] WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 348 (7th ed. 2020) citing to Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir 1985); and Donavan v. Navajo Forest Product Industries, 692 F.2d 709 (10th Cir. 1982).

Drafted by Heather Erb, AIHC Legal Counsel. *LEGAL DISCLAIMER: The information presented in this guidance is not legal advice, is not to be acted on as such, may not be current and is subject to change without notice. You should consult with your own attorneys when developing programs and policies.