

# The COVID Crystal Ball

## *Predicting the Future for Employers*

February 1, 2022



# Today's Presenters



**Bill Wahoff**  
614.456.1654  
bill.wahoff@  
steptoe-johnson.com



**Jeff Tour**  
614.458.9887  
jeff.tour@  
steptoe-johnson.com



**Ashley Faulkner**  
304.598.8164  
ashley.faulkner@  
steptoe-johnson.com



# Group Health Plans Must Provide Free Over-the-Counter(OTC) COVID-19 Tests

- As of January 15, 2022, fully-insured and self-insured group health plans are required to reimburse participants for the cost of purchasing OTC COVID-19 tests, even if such tests are purchased without the involvement of a health care provider
- Section 6001 of the Families First Coronavirus Response Act (“FFCRA”) applies to OTC COVID-19 home tests approved by the FDA
- The FFCRA only requires such coverage during the public health emergency period
- To comply with the FFCRA, a group health plan must either:
  1. Provide reimbursement directly to the sellers of OTC COVID-19 tests, referred to as “direct coverage”
  2. Provide reimbursement to a participant, including a beneficiary, that submits a claim for reimbursement to the group health plan



# Group Health Plans Must Provide Free Over-the-Counter(OTC) COVID-19 Tests

- It is likely that most group health plans will need participants to submit claims in order to provide reimbursement because of the short implementation period
- Group health plans that provide reimbursement to individuals may implement the following safeguards to prevent abuse:  
Each participant, including each beneficiary, must be able to receive reimbursement for no more than 8 tests per month;
  1. A group health plan may take reasonable steps to ensure that an OTC COVID-19 test was purchased for the individual's own personal use, or use by a covered member of their family, by requiring an attestation that the test was purchased for personal use; however, the reasonable steps must not create significant barriers to obtaining these tests; and
  2. A group health plan may require reasonable documentation of proof of purchase with a reimbursement claim, including the UPC code from the test box and a receipt from the seller of the test.



# Group Health Plans Must Provide Free Over-the-Counter(OTC) COVID-19 Tests

- Some of these safeguards are likely more helpful than others
- Especially true for self-insured group health plans concerned about the cost of such a reimbursement program, including the possibility of abuse by participants



# OSHA ETS Update

- OSHA Emergency Temporary Standard (“ETS”) required employers with 100 or more employees to establish, implement, and enforce written mandatory vaccination or testing policies.
- On January 13, 2022, the Supreme Court of the United States blocked enforcement of the OSHA Vaccination and Testing Emergency Temporary Standard.
- On January 26, 2022, OSHA withdrew the vaccination and testing ETS as an enforceable emergency temporary standard.
- OSHA stated the Vaccination and Testing ETS will remain as a proposed rule and intends to finalize a permanent COVID-19 Standard.
- Employers covered under the remaining provisions of the Healthcare ETS, also withdrawn, are still subject to the recordkeeping and reporting provisions, and may have to comply with the CMS vaccine mandate if a covered entity, as well as the OSHA General Duty Clause.



# CMS Interim Final Rule Update

- CMS Interim Final Rule requires all eligible staff be vaccinated, regardless of clinical responsibility or patient contact.
  - Staff includes facility employees, licensed practitioners, students, trainees, and volunteers.
- The rule applies to almost all CMS-certified facilities that participate in the Medicare and Medicaid programs, regardless of clinical responsibility or patient contact.
- The rule does not provide for a COVID-19 testing alternative. All staff must be vaccinated unless they are entitled to an exemption.
- The CMS is enforceable in all states. On January 12, 2022, the Supreme Court lifted the injunction which blocked enforcement in 25 states.
  - States not blocked: Enforcement date for all staff to receive first dose was January 27, 2022; fully vaccinated by February 28, 2022.
  - States where CMS was blocked: Enforcement date for all staff to receive first dose is February 14, 2022; fully vaccinated by March 15, 2022.
  - Texas: first dose February 22, 2022; full vaccination by March 21, 2022.
- Noncompliance penalties include civil monetary penalties, denial of payment, and even termination from the Medicare and Medicaid program as a final measure.



# Federal Contractors Update


- Through Executive Order 14042, federal contractors were required to provide COVID-19 safeguards for workers, including mandatory vaccinations.
- U.S. District Court for the Southern District of Georgia issued a nationwide preliminary injunction, halting enforcement of the mandate. Other Courts have also issued preliminary injunctions.
  - The injunction is intended to enjoin only the vaccine mandate. Masking or physical distancing requirements of the Executive Order could still be enforced.
- The Government is currently not enforcing the Executive Order's requirements where the injunction is in place—all fifty states and DC.
- The Safer Federal Workforce Task Force could provide updated guidance to Federal Contractors as to face coverings and social distancing.





# Moving Forward

- Employers need to have a written COVID-19 Prevention and Control Plan in place
  - OSH Act requires all employers to provide “employment, and a place of employment, free from recognized hazards likely to cause death or serious injury or disease” (General Duty Clause)
  - OSHA and CDC strongly encourage vaccination of workers
  - Take practical measures to reduce risk of COVID-19 spread in the workplace



# Measures for Reducing COVID-19 in the Workplace

- Encourage vaccinations through training/posters
- Provide quality face coverings
- Continue physically distancing workstations
- Train employees on COVID-19 policy
- Remove COVID-19 positive or symptomatic employees away from workplace
- Provide COVID-19 Testing



# Mandatory Vaccination or Testing Policies?

- Employers can still require testing or vaccination
  - Must provide for exemptions for disabilities and sincerely held religious beliefs
  - Beware of state and local laws
  - Ensure that COVID-19 vaccination records are kept confidential and stored properly under ADA
  - Time spent on employer-required testing or vaccination during the regular day or shift is compensable

# Protecting Against Legal Liability



- COVID-19 is a recognized workplace hazard
  - Written COVID-19 policies may limit potential OSHA citations under General Duty Clause
  - Taking safety measures may limit exposure to tort claims from employees to pierce employer immunity
  - Avoid Title VII and ADA claims by providing applicable reasonable accommodations to mandatory policies
    - Use employee-completed documents for requests

# Questions?





These materials are public information and have been prepared solely for educational purposes. These materials reflect only the personal views of the author and are not individualized legal advice. It is understood that each case and/or matter is fact-specific, and that the appropriate solution in any case and/or matter will vary. Therefore, these materials may or may not be relevant to any particular situation. Thus, the presenter and Steptoe & Johnson PLLC cannot be bound either philosophically or as representatives of their various present and future clients to the comments expressed in these materials. The presentation of these materials does not establish any form of attorney-client relationship with the authors or Steptoe & Johnson PLLC. While every attempt was made to ensure that these materials are accurate, errors or omissions may be contained therein, for which any liability is disclaimed.