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Labor & Employment Alert

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“It is time”: Rhode Island healthcare workers must be vaccinated by October 1

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We address employers’ questions about Rhode Island’s recently issued vaccine mandate for workers in healthcare facilities.



What’s the Impact

- / The Emergency Rule applies to health care facilities and health care providers, as defined by Rhode Island law.
- / The guidance addresses who must be vaccinated, how employers must handle proof of vaccination, and what exemptions/exceptions exist.

On August 10, 2021, Governor Dan McKee announced that healthcare workers in Rhode Island must be vaccinated against COVID-19 by October 1, 2021. On August 17, 2021, the Department of Health (RI DOH) issued an emergency rule, which became effective immediately, entitled “Requirement for Immunization Against Covid-19 for All Workers in Licensed Health Care Facilities and Other Practicing Health Care Providers” (the Emergency Rule). Read on for answers about who this rule affects and what affected businesses need to do, starting now, to comply with the rule.

What types of healthcare facilities does the Emergency Rule affect?

The Emergency Rule applies to any “health care facility” as defined in R.I. Gen. Laws § 23-17-2(8), as well as assisted living residences, adult daycare programs, and/or clinical laboratories. These include hospitals, nursing homes, and school-based health centers and many other healthcare providers.

Who must be vaccinated?

The Emergency Rule requires any person (i) who is employed (permanently or temporarily) by, or who volunteers with, a healthcare facility, **and** (ii) has or may have direct contact with a patient in that healthcare facility be vaccinated against COVID-19 by October 1, 2021. Furthermore, people who are not directly involved in patient care but, in the course of their employment, may potentially be exposed to infectious agents that can be transmitted from person to person – such as housekeeping staff, clerical employees, administrative staff, and maintenance staff – are also required to be vaccinated against COVID-19 by the deadline. Healthcare providers (defined below) who have privileges at, but who are not employed by, the facility must also be vaccinated by the deadline. Healthcare facilities must take heed that this is an extremely broad definition of “healthcare worker.” (Family members or friends who visit or otherwise assist in the care of a patient at a healthcare facility are explicitly excluded from the scope of the Emergency Rule.)

Importantly, the Emergency Rule also requires all healthcare providers — defined as “any person licensed by the [RI DOH] to provide or otherwise lawfully providing health care services, including but not limited to, a physician, dentist, nurse, optometrist, podiatrist, physical therapist, social worker, pharmacist, emergency medical service practitioner, or psychologist” — to be vaccinated against COVID-19, *provided* such person is either directly involved in patient care or potentially exposed to infectious agents that can be transmitted from person to person. The addition of this definition expands the scope of the Emergency Rule to capture licensed healthcare providers who do not provide services for licensed healthcare facilities, but who are still providing direct patient care or otherwise potentially exposed.

What do unvaccinated healthcare workers and healthcare providers need to do between now and October 1?

Healthcare workers at healthcare facilities falling under the scope of the Emergency Rule who are not vaccinated are required to: (i) wear a procedure mask or higher-grade mask (e.g., KN95 or N95) while working in the facility, and (ii) be tested at least two (2) times per week for COVID-19 via any COVID-19 test authorized by the FDA. Healthcare facilities must provide compliant masks at no cost to their workers. Affected facilities have only seven (7) days from August 17 — that is, until August 24 — to implement measures necessary to ensure compliance with healthcare worker testing requirements.

There is no similar grace period for the masks, so healthcare facilities should promptly ensure that they have an adequate supply and have completed any required medical evaluations and fit testing *before* requiring employees to wear respirators, including N95 respirators. Employers are

also advised to review their respiratory protection policies to ensure that those meet all OSHA requirements for respiratory protections and PPE.

Healthcare providers who are not otherwise categorized as healthcare workers who are not vaccinated are required to comply with the same mask requirement, although there does not appear to be a testing requirement for these individuals.

Do affected workers need to be vaccinated by October 1st?

Yes: The Emergency Rule requires that healthcare workers be vaccinated by October 1, 2021. In Rhode Island, under this rule, a person is considered "vaccinated" after receiving the final dose of the Pfizer or Moderna vaccine or a single dose of the Johnson & Johnson vaccine, as well as a person who has received all doses of any vaccine approved by WHO (including the Astra Zeneca vaccine) and/or by RI DOH (including the Novavax).

Can healthcare workers and healthcare providers simply attest that they have been vaccinated?

No: While many healthcare employers have allowed employees prove their vaccine status by providing copies of their vaccination cards, attesting to their status, or simply using the honor system, under the Emergency Rule, proof of vaccination must be entered into the Rhode Island Child and Adult Immunization Registry (the Registry). For individuals who are vaccinated in Rhode Island, proof of vaccination is automatically entered into the Registry, while those who are vaccinated outside of Rhode Island must complete a form and email the form to RI DOH to have their vaccination information entered into the Registry.

What should affected healthcare facilities do vis-à-vis healthcare workers and providers who are not vaccinated by October 1, 2021?

Healthcare facilities are required to deny any unvaccinated healthcare worker entry to the facility, absent a legal exemption (detailed below).

What are the consequences for healthcare facilities and healthcare providers that violate the Emergency Rule?

Healthcare facilities and healthcare providers that violate any provision of the Emergency Rule are subject to administrative action by RI DOH and any other action provided for under applicable laws and regulations (including R.I. Gen. Laws § 23-1-25), in addition to possible action against the professional and/or facility license.

Does this mean an employer may terminate an individual who is required to be vaccinated under the Emergency Rule, but who is not vaccinated by October 1, 2021?

Maybe. Employers must consider many factors as they comply with the new rule, which specifically includes an exemption for employees who are not medically able to get a COVID-19

vaccine. In addition, employers must also consider federal law requirements (such as those under the Americans with Disabilities Act (“ADA”) and Title VII of the Civil Rights Act (1964) (“Title VII”). Before initiating adverse employment action against an employee relating to the Emergency Rule, employers should consult with their employment counsel.

Are there any exceptions to the vaccine requirement set forth in the Emergency Rule?

Yes: The Emergency Rule provides that healthcare workers and healthcare providers will not be required to receive a COVID-19 vaccine if a medical exemption applies; however, employees who qualify for this exemption will need to continue to comply with the mask and testing requirements, as applicable, outlined above. Further, although not set forth in this rule, the Equal Employment Opportunity Commission has instructed employers to consider whether a reasonable accommodation to vaccine mandates must be provided under the ADA and Title VII for sincerely held religious beliefs. Such considerations must be made on a case-by-case basis.

This alert is just part of the overlapping web of issues facing employers as a result of the COVID-19 pandemic. Our Nixon Peabody team will continue to provide [updates](#) on other issues facing employers and solutions to assist them in navigating these turbulent times.

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