

Illinois Governor's Order Mandates COVID-19 Vaccine for Health Care Workers

By Christina M. Kuta

On August 26, 2021, Governor Pritzker signed Executive Order No. 87 (Order) that, among other provisions, mandates that Illinois health care workers be vaccinated against COVID-19.

To what health care workers does this Order apply?

"Health care workers" are defined as:

- Persons who volunteer for, are employed by, are contracted to perform services for, or are employees of entities contracted to perform services for a "health care facility"; and
- Are in close contact (fewer than six feet) with other persons in the facility for more than 15 minutes at least once a week on a routine basis (as determined by the health care facility).

A "health care facility" is defined as "any institution, building, or agency, or portion of an institution, building or agency, whether public or private (for-profit or nonprofit), that is used, operated or designed to provide health services, medical treatment or nursing, or rehabilitative or preventive care to any person or persons[,] but excluding any State-owned or operated facilities.

Health care workers excluded from this Order include:

- Any person who is employed by, volunteers for, or is contracted to provide services for any State-owned or operated facility; or
- Any person present at a health care facility for a limited period of time whose moments of close physical proximity to others on-site are fleeting (e.g., mail delivery persons).

What does this Order require health care workers to do?

- Become fully vaccinated against COVID-19.
- A health care worker is "fully vaccinated":
 - Two weeks after receiving the second dose of a two-dose series of a COVID-19 vaccine authorized for emergency use, licensed, or otherwise approved by the U.S. Food and Drug Administration (FDA); or
 - Two weeks after receiving a single-dose COVID-19 vaccine authorized for emergency use, licensed, or otherwise approved by the FDA.

What is the timeline for compliance with the Order?

- Health care workers must receive their first vaccine dose (for a two-dose vaccine) or the one vaccine dose (for a one-dose vaccine) no later than September 5, 2021.

- Health care workers must be fully vaccinated against COVID-19 within 30 days following administration of their first dose in a two-dose vaccination series.

What does the Order require while a health care worker is waiting to be fully vaccinated?

- Beginning September 5, 2021, health care workers must do the following until they are deemed fully vaccinated:
 - Be tested for COVID-19 at least weekly using a test that either has Emergency Use Authorization by the FDA or is operating per the Laboratory Developed Test requirements by the U.S. Centers for Medicare and Medicaid Services (IDPH recommends, but does not mandate, a PCR test); and
 - Provide proof or confirmation of a negative test result obtained from a testing facility if the testing was not conducted on-site at the health care facility where the health care worker performs services.
- As of September 5, 2021, health care facilities must exclude from the premises any health care worker who does not comply with testing requirements until they are fully vaccinated.

Are there any exemptions to the vaccine requirements?

- Vaccination is medically contraindicated, or the person is entitled to a reasonable accommodation under the ADA or similar laws; or
- Vaccination would require a person to violate “a sincerely held religious belief, practice, or observance.”
- A person exempt from vaccination must comply with the weekly testing requirement.

Does the Order leave unanswered questions?

- What about home-based medical services? The Order’s definition of health care facility and related examples, although not an exclusive list, suggest that businesses providing home-based health care services may be excluded from the Order. This would be a significant oversight, as the public health considerations leading to this Order arguably are present with home-based services.
- Can a health care facility require its health care workers to pay for COVID-19 testing whether it is conducted at the health care facility or not? The Order does not address this issue, although it appears there is no prohibition to requiring health care workers to fund their own testing.
- Can a health care worker just keep getting weekly tests in lieu of ever becoming fully vaccinated? The Order suggests full vaccination must occur within a specific time period, but it is not clearly written to exclude some interpretation that weekly testing could be a substitute for vaccination.

Despite these open questions, it appears that the overwhelming majority of health care business and those they employ or engage are impacted by this Order. How does a business deal with workers who refuse to become vaccinated? What is a sincerely held religious belief, practice, or observance? What documentation can a health care facility require as proof that the vaccine is medically contraindicated? These are just a sample of questions raised by this Order and related laws (e.g., ADA, HIPAA, state and federal employment regulations, etc.). Every situation is different and requires a thorough analysis to make sure health care workers are treated fairly while also ensuring health care facilities are complying with the law. Let us know what challenges this Order has created for your practice...we can help!

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