



STATE OF DELAWARE  
**STATE COUNCIL FOR PERSONS WITH DISABILITIES**  
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The Honorable John Carney,  
Governor

John McNeal, Director  
SCPD

**MEMORANDUM**

DATE: October 29, 2021

TO: Corinna Getchell, Director  
Division of Health Care Quality

FROM: Terri Hancharick, Chairperson *Terri Hancharick*  
State Council for Persons with Disabilities

RE: 25 DE Regs. 319-357 [DHSS Emergency Orders (October 1, 2021)]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division Health Care Quality's (DHCQ) emergency regulations regarding Title 16 of the Delaware Administrative Code related to healthcare services throughout the Delaware community. The emergency regulations were published as 25 DE Reg. 319-357 in the August 1, 2021 issue of the Register of Regulations. Specifically, the emergency regulations apply to:

- § 3210 Nursing Homes Admitting Pediatric Residents (25 DE Reg. 319)
- § 3301 Group Home Facilities for Persons with AIDS (25 DE Reg. 321)
- § 3305 Group Homes for Persons with Mental Illness (25 DE Reg. 324)
- § 3310 Neighborhood Homes for I / DD (25 DE Reg. 326)
- § 3315 Family Care Homes (25 DE Reg. 328)
- § 3320 Intensive Behavioral Support and Educational Residence (25 DE Reg. 330)
- § 3330 Regulations Governing Dialysis Centers (25 DE Reg. 333)
- § 3335 Office-Based Surgery (25 DE Reg. 335)
- § 3340 Free Standing Emergency Departments (25 DE Reg. 337)
- § 3345 Personal Assistance Services Agencies (25 DE Reg. 339)
- § 4402 Regulations for Adult Day Care Facilities (25 DE Reg. 341)
- § 4403 Free Standing Birthing Centers (25 DE Reg. 343)
- § 4405 Free Standing Surgical Centers (25 DE Reg. 346)
- § 4406 Home Health Agencies--Aide Only (Licensure) (25 DE Reg. 348)
- § 4407 Hospital Standards (Construction, Maintenance, and Operation) (25 DE Reg. 350)

- § 4409 Prescribed Pediatric Extended Care Centers (PPECC) (25 DE Reg. 352)
- § 4410 Skilled Home Health Agencies (Licensure) (25 DE Reg. 354)
- § 4468 Delivery of Hospice Services (25 DE Reg. 357)

SCPD has the following observations.

Due to the widespread transmission of COVID-19, many vulnerable individuals have been significantly impacted. Although the availability of COVID-19 vaccines has helped mitigate some of the risk, the protocols related to health and safety should not be discontinued. To protect Delaware citizens from COVID-19, a comprehensive infection control and prevention program was developed based upon guidance from the Centers for Disease Control and Prevention (“CDC”) as well as other national organizations. These emergency orders build upon the emergency regulations published in the July 2021 Delaware Register of Regulations (25 DE Reg. 6-37).

The latest emergency regulations propose the following specific requirements related to COVID-19:

1. Before their start date, all new staff, vendors and volunteers must be tested in accordance with Delaware Division of Public Health (“DPH”) Guidance.
2. All staff, vendors and volunteers must be tested for COVID-19 in a manner consistent with DPH guidance.
3. The licensee must follow recommendations of the CDC and DPH regarding the provision of care or services to residents by staff, vendor, or volunteer found to be positive for COVID-19 in an infectious stage.

Furthermore, it requires that licensees amend their policies and procedures to include:

1. Work exclusion and return to work protocols for staff tested positive for COVID-19.
2. Staff refusals to participate in COVID-19 testing;
3. Staff refusals to authorize release of testing results or vaccination status to the licensee.
4. Procedures to obtain staff authorizations for release of laboratory test results to the licensee to inform infection control and prevention strategies; and
5. Plans to address staffing shortages and licensee demands should a COVID-19 outbreak occur.

Lastly, it requires that staff in the impacted health care settings either provide evidence of COVID-19 vaccination or undergo regular testing to prevent the transmission of COVID-19. Although employees will have the choice between getting vaccinated or getting tested, DHSS is urging employers to encourage employees to get vaccinated. Federal guidance allows employers to require vaccinations as long as employers comply with the reasonable accommodations requirement under the Americans with Disabilities Act (“ADA”), the Civil Rights Act of 1964, and “other Equal Employment Opportunity considerations.”<sup>1</sup>

The Emergency Orders are set to expire 120 days after September 30, 2021 with an option to renew the order for a period not to exceed 60 days.

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<sup>1</sup> EEOC Issues Updated COVID-19 Technical Assistance. (May 28, 2021). <https://www.eeoc.gov/newsroom/eeoc-issues-updated-covid-19-technical-assistance>

On August 12, 2021, Governor Carney announced the “Vaccination or Testing” requirement for long-term care facilities, health care facilities, and state employees.<sup>2</sup> This announcement and these regulations come after several announcements and actions taken by the federal government concerning “Vaccination or Testing” requirements. Not all of DHSS’s requirements will align with current and / or forthcoming federal guidance / requirements.

Those federal requirements consist of the following mandates.

- On September 9, 2021, President Biden signed an Executive Order requiring that *all* federal employees be vaccinated against COVID-19, subject to exceptions as required by law (such as reasonable accommodations under the ADA).<sup>3</sup> This Executive Order was extended to cover contractors that do business with the federal government.<sup>4</sup>
- On August 18, 2021, the Centers for Medicare and Medicaid Services (“CMS”), in collaboration with the CDC, announced it was developing an emergency regulation which would require that staff working within Medicare and Medicaid-participating nursing homes be vaccinated against COVID-19.<sup>5</sup>

On September 9, 2021, CMS announced it would develop an interim final rule this month which would expand the COVID-19 vaccination requirement to include not only Medicare and Medicaid-participating nursing homes but also Medicare and Medicaid-participating hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, among others.<sup>6</sup> Under the forthcoming rule, staff vaccinations will be a condition to continue participating in Medicare and Medicaid programs.

CMS is encouraging covered facilities to ensure its health care staff are vaccinated *now* to make sure they are in compliance when the rule takes effect.

Given the guidance and recommendations coming from the federal government, SCPD recommends that DHCQ revise its emergency regulations to require staff vaccinations for all impacted health care facilities, subject, of course, to exemptions under federal law (such as the ADA). In addition, believes that DHCQ should be encouraging or mandating vaccinations at these facilities.

Thank you for your consideration and please contact SCPD if you have any questions or comments

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<sup>2</sup> COVID-19 Vaccination and Testing Updates for Long-Term Care Facilities, Health Care Facilities, and State Employees. (August 12, 2021). <https://news.delaware.gov/2021/08/12/covid-19-vaccination-and-testing-updates-for-long-term-care-facilities-health-care-facilities-and-state-employees/>

<sup>3</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/>

<sup>4</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>

<sup>5</sup> <https://www.cms.gov/newsroom/press-releases/biden-harris-administration-takes-additional-action-protect-americas-nursing-home-residents-covid-19>

<sup>6</sup> <https://www.cms.gov/newsroom/press-releases/biden-harris-administration-expand-vaccination-requirements-health-care-settings>

regarding our observations or recommendations on the emergency regulations.

cc: The Honorable Molly Magarik  
Ms. Laura Waterland, Esq., DLP  
Governor's Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

25 DE Regs. 319-357 DHSS Emergency Orders 10-29-21