

## Special 2021 Legislative Session on COVID-19: TMA Executive Summary and Guidance V3 – 11/8/21

On Saturday October 30, 2021, the Tennessee General Assembly concluded a special session limited to COVID-19 legislation. The session, from start to finish, lasted less than three days and the legislation is expected to be signed by Governor Lee soon.

Some of the actions taken have caused confusion among businesses and health care workers due to conflicting federal vaccine mandates subsequently issued by the Biden-Harris administration.

1. A federal OSHA emergency temporary standard (ETS), effective November 5, requires businesses with 100 or more employees to adopt policies to require all employees to be vaccinated for COVID-19 or submit to weekly testing by January 4, 2022. A federal appeals court temporarily blocked the ETS on November 6 so compliance is up in the air until a final decision is reached.
2. On November 4, CMS issued an emergency regulation that requires COVID-19 vaccination of eligible staff at health care facilities that participate in the Medicare and Medicaid programs. Facilities must institute policies to comply by December 5. The emergency regulation, issued nearly two years into the pandemic, does not apply to most private doctors' offices, however, it does apply to doctors who have hospital privileges in Medicare or Medicaid certified hospitals and other facilities. There is no weekly testing but accommodations are allowed for certain medical and religious reasons.

The interplay of all of these actions will be dragged through the courts as preemption battles wage. TMA will report and demystify as the issues unravel. For now, physicians and health care workers should evaluate whether the federal mandates apply to them and their employees and wait for policies to be developed by their hospitals.

Below is a high-level summary of state provisions enacted during the Tennessee General Assembly's special session in October. You are strongly urged to read the laws that apply to your practice. Links are provided in the summary.

SB 9014/HB 9077

**Vaccine Mandates and Status** See TCA 14-2-101 and 14-2-102

- No state governmental entity can mandate that a person receive a COVID-19 vaccine.
- No state governmental entity can require that a private business or school require a person to show proof of a COVID-19 vaccine to gain entry or receive products or services. Because of faulty language in the definition of "private business," a private

physician's office would be able to choose to mandate COVID-19 vaccines for its employees or require proof of a vaccine in order to enter the practice or be treated by the practice.

- A private business such as a medical practice can mandate COVID-19 vaccines for its employees but there are consequences and virtually limitless exceptions allowed in the law. Medical practices would have to make exceptions to requiring proof of vaccine status for those who object to a COVID-19 vaccine for *any* reason, or for sincerely held religious reasons. Of course, valid medical reasons would also be an exception to a vaccine mandate. See TCA 14-3-101 for a possible consequence to employers.
- Private businesses are permitted to require proof of a negative test or COVID-19 antibodies.
- See also the exception for potential loss of federal funds at TCA 14-6-102.
- "Industry required masks," such as surgical masks during a medical procedure, used regardless of the risk of exposure to COVID-19 are allowed to be mandated by employers. This exception does not apply to masks or other face coverings mandated to reduce the risk of exposure to COVID-19.

#### **Face Coverings** See TCA 14-2-103

- State governmental entities and public schools cannot mandate face covering generally unless "severe conditions" exist and the face covering mandate is in effect for more no more than 14 days. If the "severe conditions" persist, face covering mandates can be renewed for 14-day periods. "Severe condition" is defined in the law.
- The prohibition on mask mandates does not appear to apply to private businesses like medical practices, or to prisons. A medical practice could implement a face covering requirement for its employees, visitors, and patients.
- There is a process before a face covering mandate can be implemented in specific schools for 14-day periods. The threshold is that the governor declares a state of emergency and the county has a rolling two-week average of 1,000 new infections per 100,000 residents.
- See also the exception for potential loss of federal funds at TCA 14-6-102.

#### **Unemployment Compensation** See TCA 14-3-101

- Employees who leave employment due to their failure or refusal to receive a required COVID-19 vaccine are eligible for unemployment benefits, even retroactive benefits.
- In addition to unemployment benefits, employees have a right to sue employers for violating this law.

#### **Quarantine** See TCA 14-4-101

- The State Commissioner of Health has the sole authority to determine quarantine guidelines for persons testing positive for COVID-19 and for closing private businesses and schools.

#### **Monoclonal Antibodies** See TCA 14-4-102

- Healthcare providers shall exercise independent professional judgement in determining whether to prescribe, offer or administer monoclonal antibodies for treatment against COVID-19.

#### **Mature Minor Doctrine** See TCA 14-4-103 and 14-1-101(12)

- The new law requires written parental consent for children under the age of 18 to receive a COVID-19 vaccine. There are exemptions for emancipated minors, minors the provider feels may be abused, and high school minors who have enlisted in the US military.
- TMA was successful in lobbying to limit the changes made to the doctrine during the special session to COVID-19 vaccines. The mature minor doctrine would still apply to COVID-19 *treatments* other than COVID-19 vaccines, so this is a very narrow exception.
- TMA attempted, but was not successful, to lower the age applicable under the doctrine to 16-year-olds instead of 18.

#### **Licensure Board Discipline** See TCA 14-4-104

- Licensing boards, like the Board of Medical Examiners and Board of Osteopathic Examination, may not discipline a licensee regarding the dispensing or prescribing of a medication for COVID-19 unless a specific rule is promulgated by the board. TMA interprets “medication for COVID-19” to apply to COVID-19 vaccines as well as other COVID-19 medications.
- This intentionally repeals a recently released policy issued by the Tennessee Board of Medical Examiners on misinformation and disinformation regarding COVID-19 vaccines.
- TMA interprets “medication for COVID-19” to also mean off-label treatments. A gray area is the prescribing of off-label prophylactic drugs for COVID-19. Based on the intent language in the law, TMA interprets this statute to prevent the discipline of a physician for prescribing an off-label prophylactic drug for COVID-19 *unless* the licensing board promulgates a rule specifically prohibiting such practice.
- TMA successfully lobbied against an effort to totally ban the licensing boards from disciplining physicians for COVID-19 related treatment.

#### **COVID-19 Liability** See TCA 14-5-101

- A physician cannot be found to be liable to a plaintiff based on a claim for loss, damage, injury or death from COVID- 19 unless the injured party can prove the injury was proximately caused by the defendant caused by gross negligence or willful misconduct using a clear and convincing standard of liability, and other procedural requirements. This language tracks a 2020 law that TMA helped pass to protect physicians from claims related to COVID-19 so medical practices could keep their doors open without fear of liability due to COVID-19 during the peak of the pandemic.
- Unfortunately, the law sunsets the COVID-19 liability law on June 23, 2022.

#### **Exemption from Provisions of the Law Based on Loss of Federal Funds See TCA 14-6-102**

- There is a “catch all” portion of the law where a private business, government entity, public university, federal contractors, and long-term care facilities can petition the state comptroller of the treasury for relief from the law if not having vaccine or mask mandates would result in the loss of federal funding or necessary to comply with federal contacting standards. TMA believes that due to a drafting error, medical practices can avail themselves of this process to obtain an exemption from some of the provisions of this law, notably prohibitions on vaccine mandates, *if* complying with this law would cause a health care provider or medical practice to lose federal funds, i.e., Medicare or TennCare payments.
- TMA is anticipating the release soon by the Biden-Harris administration of federal requirements on businesses with more than 100 employees, including health care employers, to mandate COVID-19 vaccines for employees which would be in direct conflict with the new Tennessee state law. As such, TMA is considering filing a “class” petition with the state comptroller to exempt all physicians from complying with state law that would cause medical practices to lose federal funds if they had to comply with the state law.

#### **Family Member Present for Hospitalized COVID-19 Patient**

- If a COVID-19 public health emergency has been declared, hospitals are prohibited from restricting a COVID-19 patient from having at least one family member present during the patient’s hospitalization as long as the family member(s) test negative for COVID-19 and not exhibiting symptoms of COVID-19 or other virus or communicable disease. The law defines “family member”.

#### **SB9012/HB 9075**

- Decreases the time from 60 days to 45 days a state of emergency may continue under an executive order or proclamation issued by the governor. See TCA 58-2-107(b)(2)

#### SB 9010/HB 9073

- Adds cash as a form of eligible collateral for purposes of the collateral required to be pledged to secure public deposits. Decreases the collateral pledge level for public deposits held by collateral pool banks.

#### SB 9009/HB 9072

- Authorizes elections of school board members to be conducted on a partisan basis. Authorizes a person seeking a position on any board in the county to campaign as the nominee or representative of a political party and authorizes political parties to nominate candidates for school board membership by any method authorized under the rules of the party or by primary election under Title 2 if at least one county primary board elects to conduct school board elections on a partisan basis. Establishes dates and qualifying deadlines for school board primary elections.
- Authorizes a county executive committee to direct the county election commission to hold a primary for school board offices to be elected in the regular November 2022 election.

#### SB 9008/HB 9071

- Allows the state attorney general to petition the Tennessee Supreme Court for the appointment of a temporary district attorney general if a district attorney general peremptorily and categorically refuses to prosecute all instances of a criminal offense without regard to facts or circumstances.
- It *requires* the Supreme Court to make such appointment if the Court finds the district attorney general has refused to prosecute according to law.
- It is believed that this law was passed in response to some district attorneys' publicly stated refusals to enforce certain abortion and restroom sign-posting laws as well as a preemptory measure in case some district attorneys refuse to enforce the laws passed during the special session.

#### SB 9013/HB 9076

- Authorizes county mayors (instead of county health officers), under advisement with county boards of health, to order rules and regulations to protect the general health and safety of the county, subject to the governor's emergency powers.
- Not limited to the COVID-19 pandemic.
- Requires the commissioner of health to appoint county health directors in writing. The appointee no longer has to be nominated by the county mayor.