

# North Carolina College Nursing Students and the Medicare and Medicaid Provider COVID-19 Vaccine Mandate



By: [Joelle Harvill](#)

On January 11, 2023, the Biden Administration renewed the COVID-19 Public Health Emergency. That means certain laws and regulations that were triggered by the Public Health Emergency will continue to be in effect as long as the Public Health Emergency continues. One of those things is the Medicare and Medicaid Provider COVID-19 Vaccine Mandate. This affects nursing students and their clinical rotations.

Nursing students in North Carolina are required to offer proof of various vaccinations for the clinicals based on the state's required childhood immunizations. College or high school students (or parents of minor students) can write a statement seeking a religious exemption. "Upon submission of a written statement of the bona fide religious beliefs and opposition to the immunization requirements, the person may attend the college, university, school or facility without presenting a certificate of immunization." North Carolina General Statute 130A-157.

What about nursing students for clinical rotations? That's more complicated because of a federal regulation that affects the facilities where most clinical rotations occur.

On November 4, 2021, the Centers for Medicare and Medicaid Services (CMS) issued an interim final rule (the "CMS Rule") requiring COVID-19 vaccination for staff at Medicare- and Medicaid-certified providers and suppliers. That rule has been challenged by multiple States' Attorneys General in two different lawsuits. The CMS Rule may eventually be overturned but that doesn't help if a student needs the clinical to graduate before then. So what does a nursing student do?

In fall 2022, it appeared medical facilities were relaxing their vaccination requirements. On November 17, 2022, Attorney Generals in 21 states filed a petition to end the COVID-19 vaccination requirement. The Biden Administration pushed back on that request, and on November 22, 2022, announced a new enforcement guidance by CMS reminding healthcare providers of COVID-19 vaccine requirements. Here is the latest guidance revision.

The CMS Rule includes students in the definition of "staff" required to be vaccinated. Students have never been considered staff before this rule which has led to some confusion. It also requires providers and suppliers to implement a procedure for "staff" to be able to request an exemption for the COVID-19 vaccination requirements based on Federal law for ADA disability, medical conditions, or sincerely held religious beliefs, practice, or observance.

Many of the larger colleges are aware that clinical facilities are required to have a procedure for students to seek an exemption and will have exemption forms from the facilities for the student to submit. Other colleges may not know of this requirement or ignore it. A nursing student should ask the college nursing program clinical coordinator for a contact at the clinical rotation facility site to request an exemption for the COVID-19 vaccination per the facility's procedure, as required by the CMS Rule. The clinical facility will most likely require testing and wearing of a fitted N95 mask as an accommodation for the request.

If you are a nursing student who has requested an exemption and are being passed around like a hot potato with no one willing to take responsibility for considering your request, we may be able to help. You can contact us at Envisage Law, (919) 755-1317.

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## [Envisage Attorneys Recognized for Outstanding Work](#)



Envisage Law is proud to announce that three of its attorneys, [William Pinna](#), [Anthony Biller](#), and [Adam Banks](#), have been recognized by their peers as leaders in their respective areas of practice. Envisage Law would also like to congratulate [James Lawrence](#) for his exceptional work on a groundbreaking case that has garnered national attention.

Envisage Law Partners William “Bill” Pinna and Anthony “Tony” Biller were both recognized by Best Lawyers in America. Best Lawyers is a rigorous peer-review survey comprising more than 12.2 million confidential evaluations by top attorneys, and unlike other awards, no participation fee or payment is allowed. These principles make the Best Lawyers in America Award one of the most highly regarded awards for clients and other professionals.

This marks the second time Bill has been identified for his outstanding work in Tax Law by Best Lawyers in America. With over 50 years of experience, Bill has assisted clients in navigating the complexities of tax, estate, corporate, and business law. In addition to his legal work, Bill has taught tax law at North Carolina State and Duke universities and served as Chairman of the North Carolina Property Commission for the North Carolina Department of Revenue.

For the fifth straight year, Tony has been nominated and received the Best Lawyers in America Award for his work in Litigation - Intellectual Property and Patent Law. As a former Army Airborne Ranger in the 82nd Airborne Division, Tony knows that hard work pays off. Tony has litigated hundreds of commercial disputes in federal and state trial and appellate courts across the country.

and has helped clients resolve and avoid even more disputes without costly litigation. He also has extensive experience assisting clients with their trademark and IP needs worldwide.

For the third year, Adam Banks has been selected as a 2023 North Carolina Rising Star. Only 2.5 percent of attorneys in North Carolina are included in this prestigious list of attorneys. Adam is a JAG officer with the North Carolina National Guard and has served in both Kuwait and Iraq. Adam regularly handles commercial disputes, unfair competition claims, construction defects, warranty claims, insurance coverage and bonding conflicts, and other commercial litigation. Adam and Tony, together with the other litigators at Envisage, also litigate civil rights and constitutional law claims.

These latest awards come after James Lawrence's national recognition for innovative work on a recent case. James served as lead counsel for independent journalist and former New York Times reporter Alex Berenson in his lawsuit against Twitter. A path-breaking case, Mr. Berenson's lawsuit led to his reinstatement on the platform, the first known reinstatement of its kind. Documents obtained as part of that lawsuit also demonstrate that actors in the federal government were actively involved in encouraging Twitter to censor its users. National outlets have reported on the case, including Revolver News, Breitbart, [The Wall Street Journal](#), and [The Atlantic](#). In addition, the outcome has been discussed on national podcasts such as [The Joe Rogan Experience](#) and TimCast.

The Envisage Law Firm was founded in January 2021 when the attorneys of Pinna, Johnston & Burwell, P.A. joined with Anthony Biller, PA, to create a full-service commercial law firm focused on civil litigation, business transactions, tax and estate planning, and commercial real estate.

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## **Protecting Your Brand Name with Trademarks: Questions & Answers**



## **Protecting Your Brand Name with Trademarks: Questions & Answers**

By [Anthony J. Biller](#), Partner

The reputation and favor that comes from a good name is something to be sought after, treasured, and guarded. Solomon says that if given a choice, he would choose the favor of a good name over gold, silver, and costly perfume; or, as Eugene Peterson poses, "it's better than a fat bank account." (Pro 22:1, Ecc 7:1) In short, names have value and are worth protecting. A name can authenticate, giving others confidence in the product where the name is displayed. A name properly used can safeguard against the deceit of another trying to counterfeit the message or product.

Similarly, there is value in giving honor to another's name. As Luke wrote of Cornelius, "an upright and God-fearing man, who is well spoken of by the whole Jewish nation (ESV, Acts 10:22). John identified Demetrius as having "received a good testimony from others." (ESV, 3 John 12) There is value in respecting the names of others and not trying to pass them off as our own, which could damage their (and our own) reputation. In addition to honoring a person or organization's name (Rom 12:10), kindness is foundational. (Pro 21:21). Ask yourself, how would you want another to treat your name? (Mat 7:12)

It is little wonder that businesses and organizations go to such extraordinary steps to protect their name and the reputation that comes with their name. In fact, the "life blood" of a trademark is "goodwill." The failure to transfer goodwill as part of a trademark assignment can invalidate the assignment.

Organizations and businesses want consumers and users of products to have confidence that when they see their name, the source of those products or services is understood. They want to make sure that their consumers are not being deceived by counterfeits or confused into believing someone or something is associated with them, when they are not. The laws of trademarks seek to protect these identity rights.

Trademarks are a name(s), a word, or a combination of words, letters, and numbers (or, in some cases, an image) that establish an identity for an organization. A trademark protects and contains their goodwill and helps build relationships with consumers or users. Trademarks are an identifier of source that enable customers to identify a company's goods or services by distinguishing them from others. Trademark law protects the identity or brand of an organization by discouraging others from selecting a confusingly similar name or logo. Trademark law provides legal protection for a brand and guards against confusion, counterfeiting and fraud.

Trademarks are different from copyright. Copyright protects against the copying of, creative expressions of original works such as literary works, audio creations, photography, video, and graphics. On the other hand, a trademark protects names (words), logos, and symbols used by providers of goods and services to identify the source of their goods and services. There is no such thing as global trademark law or a universal global trademark.

In most countries, trademark protection is obtained through registration at national and regional levels, making trademark rights generally national and country-specific. In the United States, it is not necessary to have a trademark registration to protect your rights, but it is recommended. When a business or organization seeks a global trademark strategy, they should understand each country's laws where they are doing business and obtain trademark rights in each country. While governments create trademark laws according to their policy goals, most countries have similar procedures and protocols for obtaining trademark rights. Many countries, to include the United States and the EU, have entered into a treaty, the Madrid Protocol, to make it easier for citizens of member countries to register and protect their trademarks in other member countries. Trademark acquisition is one area of law where having legal expertise from an attorney skilled in trademark law is necessary and critical.

## **U.S.A. Trademarks Q&A**

### **1. What sources of law govern trademarks?**

In the United States, the principal federal statute is the Lanham Act, codified as 15 U.S.C. (United States Code) Section 1051 and following. Federal law provides the primary source of trademark protection, although trademark is also governed by state laws. Federal trademark law offers the

most comprehensive source of protection.

## **2. What is a trademark?**

A trademark can be any word, phrase, symbol, or design (or a combination) used by a business or organization that identifies the origin of its goods or services. It's how customers or users recognize a business in the marketplace and distinguish it from its competitors. The word "trademark" can refer to both trademarks and service marks. A trademark is used for goods, while a service mark is used for services.

## **3. What does a trademark accomplish?**

- Identifies the source of goods and services.
- Provides legal protection for brands.
- Protects against source confusion and counterfeits.
- Preserves goodwill in the corresponding goods and services.

## **4. What makes an inherently strong trademark?**

Trademarks are supposed to tell a consumer "who" the good or service is, not "what" it is. An inherently strong trademark does this - immediately serves as a source identifier, i.e., tells the consumer the good/services comes from a particular source. Inherently strong marks are distinctive, creative and unique. The stronger your trademark is, the more easily others can be prevented from using it without permission. Weak trademarks can be difficult and costly to defend as they do not have the same legal protections as stronger trademarks. The analysis of what constitutes an inherently strong versus inherently weak trademark depends on the context of use, i.e., what goods/services are being used in conjunction with the mark. For example, "apple" is generic and unprotectable when used in conjunction with the fruit but is "arbitrary" and strong when used as the name of a computer.

## **5. What are the four categories of trademarks?**

There is a "taxonomy" of trademarks that governs which marks are inherently strong and immediately function as trademarks, which can acquire trademark significance, and which may never be given trademark protection. They are as follows, from inherently strongest to weakest: Fanciful (coined) trademarks are words invented for just this purpose. They only have meaning relative to a product or service. Examples are Qdoba for a restaurant, Pepsi for soft drinks, and PanOxyl for an acne wash. These can have the most robust protection.

Arbitrary trademarks are actual words but have no association with the goods or services they describe, as in the term "apple." The USPTO uses the example of an orchard trying to register the word "apple" as a trademark. Apple in that context couldn't be registered as it is generic, whereas Apple for computers is unique and arbitrary and thus serves as a trademark. Arbitrary marks also have strong protection.

Suggestive trademarks are words that "suggest" a product or service quality but don't state the quality of the goods or services outright. Suggestive marks require "sequential thought" to connect the mark to the goods/services. This is what the 7-11 trademark does for the convenience store, suggesting longer hours for convenience. Mustang is similar in that it suggests that their cars are speedy and strong. Coppertone for tanning lotion and London Fog for raingear are also suggestive marks. Suggestive trademarks are immediately entitled to trademark protection and are deemed "inherently" strong.

Descriptive trademarks immediately communicate an attribute or ingredient of the good or service, an intended benefit, geographic origins or anything else that immediately describes the good or service. Apple Cinnamon for potpourri, "Sharp" for televisions and American Airlines for transportation are examples of descriptive marks that are not inherently distinctive. Instead of telling the consumer "who" the mark is, they immediately convey information about the goods or services. Descriptive marks may, however, be protectable if they develop a "secondary" meaning over time, i.e., when consumers come to recognize that mark is not just a descriptor, but it is also telling the consumer "who" the product or service is. Perhaps the most famous "descriptive" mark is Budweiser, a beer originally made from a lager recipe from Budweis, Czechoslovakia.

Generic marks are never given trademark rights. They are the everyday name for goods and services. They do not indicate source; they indicate the genus of the good/service. Even if one could establish strength through use in the generic use, courts will not convey trademark rights as that would entail removing the word from normal lexical use. Examples include "apple" for the fruit, "bagel shop" for a bagel shop, and "ale house" for restaurants that serve beer.

#### **6. What is Acquired trademark strength?**

Acquired trademark strength is the consumer recognition and familiarity of a mark based on success in the marketplace. Even inherently weak marks can obtain substantial strength based on substantial commercial success in the marketplace.

#### **7. What is trademark infringement?**

Trademark infringement is the unauthorized use of a trademark or service mark on or in connection with goods and/or services in a manner that is likely to cause confusion, deception, or mistake about the source of the goods and/or services.

#### **8. Can trademark rights be established without registration?**

Yes, in the United States, it is not necessary to have a registration to protect trademark rights. In many other countries, a registration is required.

#### **9. What benefits does trademark registration provide?**

Trademark registrations create a presumption of ownership and trademark validity. They also create additional rights for purposes of enforcement, and in some jurisdictions, are necessary in order to enforce the trademark. Most major e-commerce and social media platforms have robust trademark infringement "take down" mechanisms that work much better if the complainant has a registered trademark.

#### **10. Who can apply for a trademark?**

In the United States, any trademark owner who uses a mark in commerce or who intends to use a mark in commerce may file an application to register a trademark. In most of the rest of the world, anyone who intends to use a mark within the particular jurisdiction within the next several years may apply and register a trademark.

#### **11. When should an attorney be consulted regarding trademarks?**

- When adopting a mark or expanding use into new countries, particularly to "clear" the mark against potential infringement, i.e. to make sure the mark will not potentially infringe the rights of others

- When applying to register a mark
- When you believe someone is infringing your mark or you are accused of infringement
- When your mark becomes successful, and you desire to “police” against third party encroachment against your brand through trademark watch services
- When licensing or otherwise entering into arrangements for others to use your trademark outside your immediate control

[Anthony Biller](#) is a founding partner of Envisage Law, where he devotes a significant portion of his time managing trademark assets for clients worldwide and engaging in intellectual property litigation across the United States.

unfoldingWord is a non-profit ministry whose mission is a Church in every people group with a Bible in every language. It equips Church leaders worldwide with open-licensed biblical resources and effective training, empowering them to disciple new believers and translate the Bible with excellence and efficiency.

Bruce Erickson is a consultant, writer, and student of IP law. After a 35-year career as a radio broadcaster, he served as IP Manager for unfoldingWord. He is an alumnus of Seton Hall School of Law where he received a Masters in Intellectual Property Law (MSJ).

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## **Envisage Attorneys Snag Several Prestigious Accolades**



**[Anthony “Tony” Biller](#):** Tony has again been recognized in the exclusive ranks of *The Best Lawyers in America* for intellectual property litigation and patent law. Tony advises large and small businesses on all issues related to innovation and branding. Tony’s expertise

is vast, and he has assisted numerous clients in identifying patentable innovations, registering IP rights, and resolving intellectual property disputes. Tony's *Best Lawyers* selection comes on the heels of his nomination as an alumni focus in the 45th edition of the Campbell Law School Alumni Association Spotlight. If you would like to read about Tony's transformation from an Army Ranger to a skilled litigator, the article is available [HERE](#).



**[Daniel Finch:](#)** Daniel was recognized this year by Business North Carolina Magazine, as one of Business North Carolina's Legal Elite, in the category of Tax and Estate Planning. Daniel's practice focuses on sophisticated estate planning, probate administration, and minimizing the taxable consequences of inheritable transfers. As a former administrator for Wake County, Daniel understands the many nuances of estate and guardianship law in North Carolina.

In addition to his extensive estate planning history, Daniel develops strategic tax minimization and tax planning concepts for businesses. Daniel represents numerous companies in responding to notifications from the IRS and NC Department of Revenue.



**[Adam Banks:](#)** For the third year in a row, Adam was selected as one of Super Lawyer's Rising Stars. The Rising Stars designation is limited to attorneys under the age of 40 who focus on a particular practice area. Only 2.5% of North Carolina attorneys receive this honor. Adam's practice focuses on construction and civil litigation. Adam's expertise also allows him to represent clients when they need a speedy resolution of employment conflicts, contract disputes, and problems with local municipalities.

The Envisage Law Firm was founded in January 2021 when the attorneys of Pinna, Johnston & Burwell, P.A. joined with Anthony Biller, PA to create a full-service commercial law firm focused on civil litigation, business transactions, tax and estate planning, and commercial real estate. To



schedule a consultation with one of our attorneys, please find our contact information [HERE](#).

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## **SHOULD EMPLOYERS MANDATE THE VACCINE? MAYBE NOT UNTIL OSHA CLARIFIES ITS GUIDANCE.**



## **SHOULD EMPLOYERS MANDATE THE VACCINE? MAYBE NOT UNTIL OSHA CLARIFIES ITS GUIDANCE.**

By: [Adam P. Banks](#), Senior Attorney

Last week, the CDC released [new guidance for fully vaccinated individuals](#). The highly publicized, and in certain circles controversial, the guidance provides that fully vaccinated individuals are no longer required to wear a mask or socially distance in most settings. In short, if you are fully vaccinated, you can resume activities that you did prior to the pandemic—a welcome return to normalcy.

Shortly thereafter, North Carolina Governor Roy Cooper followed suit, lifting mask requirements and eliminating restrictions on mass gathering, capacity, and social distancing, in most settings ([Link to Order](#)). Certain restrictions remain for schools, childcare facilities, and public transportation. Governor Cooper's order is explicit in that it does not inhibit private businesses from requiring their employees or guests to wear masks.

Employers face an interesting decision. Do they require their employees to get vaccinated, so employees and patrons can both take their masks off? Considering only the CDC's most recent guidance, you might conclude "sure, why not." However, recent guidance from the Occupational Safety and Health Administration (OSHA) complicates that decision.

In April 2021, OSHA released three new [FAQs](#) for employers struggling with the decision of whether to require employees to get vaccinated. The FAQs mainly address whether an adverse reaction to the vaccine is a "recordable incident." Businesses in certain higher-risk industries are required to maintain a log of work-related injuries and all businesses are required to report workplace incidents that result in a fatality or hospitalization. Recordable incidents are used to determine a business's recordable incident rate—the lower the better. The OSHA guidance is as follows:

**1. Are adverse reactions to the COVID-19 vaccine recordable on the OSHA recordkeeping log?**

**Yes**, the adverse reaction is recordable if it is:

1. Work-related,
2. A new case, and
3. Meets one or more of the general recording criteria in 29 CFR 1904.7 (e.g., days away from work, restricted work or transfer to another job, medical treatment beyond first aid).

**2. If an employer requires employees to receive the COVID-19 vaccine as a condition of employment, are adverse reactions recordable?**

**Yes**, if an employer's vaccination requirement is work-related, then adverse reactions are recordable.

**3. If an employer recommends but does not require, the COVID-19 vaccine, are adverse reactions recordable?**

**No**, unless the adverse reactions to *recommended* COVID-19 vaccines

1. Work-related,
2. A new case, and
3. Meets one or more of the general recording criteria in 29 CFR 1904.7 (e.g., days away from work, restricted work or transfer to another job, medical treatment beyond first aid)

A reasonable employer may easily conclude that OSHA's April 2021 guidance disincentivizes employers from requiring vaccination. Why would the employer require vaccination when they are "on the hook" for adverse reactions? If an employer mandates the vaccine, and their employee has an adverse reaction, the employer is required to record that incident, resulting in a higher recordable incident rate. Higher incident rates can lead to higher workers' compensation costs, fewer bidding opportunities, and increased OSHA inspections. The new CDC guidance for fully vaccinated individuals clearly incentivizes vaccination but does not address the disincentives built into OSHA guidance for employers.

In what seems like an attempt to clarify conflicting messages, OSHA updated its [website](#) to instruct employers to follow the new CDC mask guidance for fully vaccinated individuals. OSHA further states that the agency is "reviewing recent CDC guidance and will update" materials on their website accordingly. Does that mean adverse reaction to an employer-mandated vaccination will not be recordable? We don't know. It remains to be seen how and if OSHA changes its guidance, and how those changes will impact North Carolina employers.

**\*\*\* Update \*\*\***

On May 24, 2021, before the ink was dry on the previous post, OSHA updated its vaccine-related FAQ guidance ([Link](#)) replacing the previous three FAQs with the following:

**Are adverse reactions to the COVID-19 vaccine recordable on the OSHA recordkeeping log?**

**Answer:** DOL and OSHA, as well as other federal agencies, are working diligently to encourage COVID-19 vaccinations. OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination, and also does not wish to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR 1904's recording requirements to require many employers to record worker side effects from COVID-19 vaccination through May 2022. We will reevaluate the agency's position at that time to determine the best course of action moving forward.

For now, OSHA has simplified its guidance and removed any recordkeeping distinction between employers that mandate the vaccine and employers that recommend the vaccine. In all likelihood, North Carolina employers should not expect a requirement to record adverse vaccine reactions.

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## **Envisage Law Taps Former HHS Deputy General Counsel and FDA Chief Counsel to Lead Health Care and Life Sciences Practice**



Envisage Law, a full-service business law firm, today announced the hire of James Lawrence to lead the firm's Health Care and Life Sciences Practice. Lawrence joins Envisage after serving as a Deputy General Counsel in the United States Department of Health and Human Services and as Chief Counsel of the Food and Drug Administration.

The Research Triangle is a global hub for the health care and life sciences industries and is home to multiple world-class universities and hundreds of innovative companies. There is a significant need for counsel on regulatory, intellectual property, and commercial agreements.

"We are pleased to welcome James back from the Beltway to his hometown of Raleigh," said Envisage Partner William Pinna. "We are building a law firm of the future grounded in the traditions of the past. James' experience will help us meet our clients' needs and those of emerging and established health care and life sciences businesses in North Carolina."

"James and I have worked together for many years, on matters ranging from fighting international counterfeiting, to closing deals of various kinds, to taking cases to trial and up on appeal," added Envisage Partner Anthony Biller. "James shares our belief that technology is primed to fundamentally change the practice of law, and that lawyers can harness these forces to deliver greater value to their clients and the profession we serve."

Prior to serving in the federal government, Lawrence was a partner at an AmLaw 200 law firm. Before that, he served as general counsel of a drug company. Lawrence earned his Juris Doctor with honors from the University of North Carolina at Chapel Hill School of Law, where he served as an Articles Editor on the *North Carolina Law Review*. He graduated from North Carolina State University, magna cum laude, with a degree in Biomedical Engineering, and was elected to Phi Beta Kappa and the Tau Beta Pi National Engineering Honor Society.