

CMS' Upcoming COVID-19 Vaccine Mandate: What Healthcare Employers Need to Know Now

Related Professionals

James A. Byars
803.540.2051
jbyars@nexsenpruet.com

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On September 9, 2021, President Biden announced a new “COVID-19 Action Plan” designed to mitigate the continuing effects of the Delta variant by increasing the number of vaccinated individuals. The plan includes, among other things, an upcoming COVID-19 vaccination mandate for employees of most Medicare and Medicaid-certified facilities. Here is what providers need to know now:

- **Much is still unknown.** The Center for Medicare & Medicaid Services (“CMS”) is still developing the emergency regulations detailing the scope and requirements of the mandate. The agency has publicly stated that it expects to release an Interim Final Rule with a Comment Period regarding the regulations “in October.” We will know more about the mandate when those regulations are published; for now, we only know what was stated regarding the mandate in President Biden’s plan and CMS’ related press release.
- **Coverage:** The mandate will apply to employees of “most” health care providers that receive Medicare or Medicaid reimbursement, “including but not limited to hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies.” While the mandate is not expected to reach all CMS-certified providers, the true scope of the mandate will turn on how the regulations define coverage, which will likely be broad. It is likely, for example, that hospital-owned or operated physician practices will be covered by the mandate, but independent practices may not be.
- **Consequences:** For those providers covered by the mandate, compliance will be a condition of continued participation in CMS-governed reimbursement programs. The regulations are expected to define CMS’ enforcement priorities, including penalties and any other related consequences, in more detail.
- **Reasonable Accommodations:** Covered employers will be required to make available reasonable accommodations for medical and religious reasons in accordance with applicable law. Generally, medical accommodations are limited to those with disabilities that preclude the

employee from safely taking the COVID-19 vaccine, and health care provider certifications may be required to substantiate a need. Religious accommodations are limited to those employees with sincerely held religious beliefs that preclude them from taking the vaccine, and can often be more difficult to evaluate. Employers should implement forms for accommodation requests to ensure that adequate documentation supports the need for an accommodation while carefully limiting the nature of supporting information solicited.

- **Alternatives:** Unlike some prior federal mandates (as well as the separate, currently-pending mandate for employers of 100+ employees), the healthcare mandate is not expected to include a voluntary weekly testing option or other alternatives to mandatory vaccination. Only those employees who qualify for reasonable accommodations will be exempt from the vaccine requirement. For employees entitled to accommodations, employers will have to engage in an individualized interactive process with them to determine the alternative that best fits the needs of the business and the goals of protecting the employee and the public.
- **When it takes effect:** When the CMS issues the emergency regulations—expected before the end of October—there is expected to be a comment period before they take effect, and then there will likely be some period of time—likely 45-60 days—to reach compliance. However, CMS is encouraging covered providers to take action now to begin rolling out policies to ensure compliance by the deadline.

If you have questions regarding the scope or implementation of vaccine mandates, please feel free to contact an employment lawyer at Nexsen Pruet for assistance.