

CMS Vaccine Mandate Update

Related Professionals

Kamri N. Barber
803.540.2148
kbarber@nexsenpruet.com

Nikole Setzler Mergo
803.540.2042
nmergo@nexsenpruet.com

Practices

Employment & Labor Law

Health Law

Article

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On November 4, 2021, the Centers for Medicare & Medicaid Services (CMS) issued an extensive Interim Final Rule and Comment Period on the COVID-19 vaccination mandate for those healthcare providers receiving Medicare or Medicaid. ^[1] Pursuant to the 214-page guidance, CMS has outlined details of the mandate including, without limitation, which healthcare entities are covered employers (and which are not) and the scope of employees/staff/contractors providing services within the organizations who are subject to the rule. The below summary provides key highlights and note 2 contains a link to the actual rule: ^[2]

Q: What entities are covered under the guidance?

A: CMS has outlined four categories of Medicare and Medicaid- certified providers required to comply with the mandate. (See Interim Final Rule, p. 45-46). The categories of providers include: (1) residential congregate care facilities; (2) acute care settings; (3) outpatient clinical care and services; and (4) home-based care. Thus, in addition to nursing facilities, the following healthcare facilities are now explicitly covered under the Interim Final Rule:

- Ambulatory Surgical Centers (ASCs)
- Hospices
- Psychiatric residential treatment facilities (PRTFs)
- Programs of All-Inclusive Care for the Elderly (PACE)
- Hospitals (acute care hospitals, psychiatric hospitals, long term care hospitals, children's hospitals, hospital swing beds, transplant centers, cancer hospitals, and rehabilitation hospitals)
- Long Term Care (LTC) Facilities, including SNFs and NFs, generally referred to as nursing homes
- Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs-IID)
- Home Health Agencies (HHAs)
- Comprehensive Outpatient Rehabilitation Facilities (CORFs)

- Critical Access Hospitals (CAHs)
- Clinics, rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services
- Community Mental Health Centers (CMHCs)
- Home Infusion Therapy (HIT) suppliers
- Rural Health Clinic (RHCs)/Federally Qualified Health Centers (FQHCs)
- End-Stage Renal Disease (ESRD) Facilities

Q: Are physician practices covered?

A: No. The CMS vaccination requirement expressly states that it does not cover physician or dental practices or any non-healthcare setting such as assisted living facilities. (See Interim Final Rule, pp. 5, 145). It states, “This IFC directly applies only to the Medicare- and Medicaid-certified providers and suppliers listed above. *It does not directly apply to other health care entities, such as physician offices, that are not regulated by CMS.* Most states have separate licensing requirements for health care staff and health care providers that would be applicable to physician office staff and other staff in small health care entities that are not subject to vaccination requirements under this IFC.” Although the CMS vaccine guidance does not cover these specific entities, such employers may be subject to OSHA’s Emergency Temporary Standard (ETS) for 100+ employees, if applicable, also issued today.

- With that said, hospital-owned physician practices (directly or through a subsidiary network entity) are surely covered through either “facility employees” (depending on structure), “licensed practitioners” or “individuals who provide care, treatment or other services for the facility and/or its patients, under contract or other arrangement,” as those terms are delineated in the IFC, discussed below. As further clarification unfolds, we will provide it.

Q: What staff is covered?

A: CMS has provided a very expansive definition of the term “staff” for purposes of the vaccination mandate. (See Interim Final Rule, p. 47). Staff members subject to this mandate include those employed directly in the clinical setting, as well as those who work outside this setting, but who may interact with other staff, patients, clients, residents, etc. CMS has clearly stated the following individuals are required to comply with the rule:

- Facility employees
- Licensed practitioners
- Students
- Trainees
- Volunteers
- Individuals who provide care, treatment or other services for the facility and/or its patients, *under contract or other arrangement*
- Home-health employees

- Home Infusion Therapy employees
- Hospice employees
- PACE program employees
- Remote employees who, at any point, physically enter into a covered facility to interact with staff, patients, clients, etc.
- Administrative staff
- Facility leadership
- Board Members (volunteer and fiduciary)
- Housekeeping employees
- Food service employees

The IFC gives the following example, which is instructive on the breadth of scope regarding how they view the mandate's coverage: "a crew working on a construction project whose members use shared facilities (restrooms, cafeteria, break rooms) during their breaks would be subject to these requirements due to the fact that they are using the same common areas used by staff, patients, and visitors." (p. 50)

* CMS has noted that only *fully* remote employees (such as fully remote telehealth or payroll services) are not subject to the vaccination requirements.*

Q: What accommodations are available?

A: Employers are required, pursuant to Title VII and the ADA, to provide employees with the opportunity for medical or religious exemptions to the mandate. Employees requesting an exemption must provide the appropriate documentation and must articulate the reason(s) for the exemption. With respect to medical exemptions, CMS is requiring that the medical documentation clearly confirm any clinical contraindications to the COVID-19 vaccine. Additionally, the documentation must be signed and dated by a licensed practitioner who is not requesting the exemption and who is acting within the scope of their practice. (See Interim Final Rule, p. 54-55).

As to religious exemptions, the EEOC has issued extensive instruction on proper analysis of these accommodations and has, in its recent supplemental guidance, clarified that any request based on social, political, or personal views are not sufficient grounds for exemption. (See EEOC COVID-19 Technical Assistance, Section L).^[3]

Q: Must covered employers maintain vaccination records?

A: Yes. Employers must maintain vaccination records for all employees. These records must be kept confidential and stored separately from employee personnel files. (See Interim Final Rule, p. 52-53). CMS is permitting the following acceptable forms of proof of vaccination:

- CDC COVID-19 vaccination card (or legible photo of the card)
- Documentation of vaccination from a health care provider or electronic health record

→ State immunization information system record.

Q: What deadlines are imposed?

A: Staff members of covered healthcare facilities are required to receive the first shot within **30 days** of November 4, 2021, (December 5) and the second shot within **60 days** or by January 4, 2022. (See Interim Final Rule, p. 51). Thus, employees subject to these requirements must be fully vaccinated by **January 4, 2022**. CMS has noted that, although employees are not considered “fully vaccinated” until 14 days following the final dosage, employees will still be in compliance with the rule so long as they have received the final dosage by January 4, 2022.

In addition to the information provided above, the CMS Interim Final Rule and Comment Period provides comprehensive discussion on the vaccine requirements as it specifically relates to each covered entity.

Nexsen Pruet is prepared to assist with the drafting of policies, legally compliant exemption request forms, employee communication notices, legal analysis of exemption requests, and all other needs pertaining to compliance with the COVID-19 vaccine requirements. Please let us know if there is anything we can do to help.

[1] Biden-Harris Administration Issues Emergency Regulation Requiring COVID-19 Vaccination for Health Care Workers | CMS

[2] 2021-23831.pdf (federalregister.gov)

[3] What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission (eoc.gov)

[4] Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies | The White House