

Eli's Hospice Insider

COVID-19: With CMS Vaccination Mandate Approved By SCOTUS, Follow These 13 Steps To Compliance Success

Tip: You're office staff are covered too.

Medicare's staff vaccination mandate, newly greenlit by the U.S. Supreme Court, is complex. Without much time to get into compliance, hospices should start cracking now.

Wise hospices will take this advice from the industry's leading legal experts to minimize risk and maximize success under the Centers for Medicare & Medicaid Services' Interim Final Rule with Comment on COVID-19 vaccination:

1. Understand the requirements. Hospices' "biggest issue is not getting into the details enough to understand exactly what is required," believes attorney **William Vail** with law firm Polsinelli in Atlanta. For example, "the CMS Mandate only allows exceptions for medical and religious reasons," Vail explains. "But it also goes a bit further. There are really three flavors of medical exemptions: (1) Reasonable accommodations because the employee has a disability (as that term is defined under the Americans with Disabilities Act) that prevents them from becoming vaccinated; (2) The employee has a recognized clinical contraindication to the vaccines (such as a history of severe allergic reaction to a component of one or more of the vaccines); or (3) A temporary delay, as recommended by the [Centers for Disease Control and Prevention], is necessary because of clinical precautions - such as because the employee has recently had COVID-19." In reading the IFC and survey guidance, agencies might mistakenly believe that employees must have a clinical contraindication to qualify for a medical exemption, notes attorney **Robert Markette Jr.** with Hall Render in Indianapolis. But the ADA is clear that a disability as defined under the ADA law - which is very broad - also qualifies employees for exemptions and accommodations, Markette notes. "CMS doesn't have the authority to narrow an ADA definition," he says.

"Employers covered by the CMS Vaccine Mandate should pay attention to these details," Vail urges. (See box, 4, for where to find out the specifics.)

2. Know who's covered. Don't assume that employees not involved in direct patient care get a pass in CMS's rule. "Pay attention to the fact that 'staff' is broadly defined to include nearly anyone who comes into a covered facility to provide services or touches a patient being treated by a covered provider," Vail says.

Pretty much the only exempt employees are those who work 100 percent remotely. Even then, "facilities that employ or contract for services by staff who telework full-time (that is, 100 percent of their time is remote from sites of patient care, and remote from staff who do work at sites of care) should identify and monitor these individuals as a part of implementing the policies and procedures of this IFC, documenting and tracking overall vaccination status," CMS instructs in the rule. "But those individuals need not be subject to the vaccination requirements of this IFC," CMS allows. "Note, however, that these individuals may be subject to other Federal requirements for COVID-19 vaccination."

One-off service contractors such as elevator inspectors also are off the hook, CMS concedes in the rule.



3. Don't delay. Start your compliance efforts immediately, especially if you're in one of the 25 states where the CMS mandate was previously blocked. "I personally have been recommending agencies prepare for compliance sooner than

later," attorney **Eileen Maguire** with law firm Gilliland, Maguire & Harper in Indianapolis tells AAPC.

4. Strive for two policy characteristics. "Consistency and objectivity are keys to having a defensible ... appropriate exemptions process," advises attorney **Matt Wolfe** with law firm Baker, Donelson, Bearman, Caldwell & Berkowitz in Durham, North Carolina. The policy must treat all staff the same, and after determinations are made there should be a review to ensure decision-making "is being consistent across the requests," Wolfe says.

5. Detail your process in P&Ps. "Each organization will need to craft a policy and procedures that are customized to the organization's specific characteristics," Wolfe tells AAPC. "The exemption process should be set forth in writing and distributed to staff," he adds.

6. Finalize your exemption request form. Your process should come with a form used by all. It should include the requestor's name, justification for requesting the exemption, and any related documentation.

The form, or at least your agency's policies, should also include "a specific name and the contact information of a staff member who has been trained on how to confidentially process employees' exemption requests," Maguire counsels.

7. Don't forget agency response. Your agency's exemption request form also needs determination information. It "should include a section that explains how the employer responded to the request," Vail suggests. "Did the company grant or deny the request? If denied, provide a brief explanation."

"The decisions on the exemption requests and the bases should be documented," Wolfe notes.

8. Focus on physician form. The agency isn't the only one who is required to have a form. "Facilities must ensure that all documentation confirming recognized clinical contraindications to COVID-19 vaccinations for staff seeking a medical exemption are signed and dated by a licensed practitioner, who is not the individual requesting the exemption and is acting within their respective scope of practice based on applicable state and local laws," CMS spells out in its Frequently Asked Question set on the mandate. "This documentation must contain all information specifying which of the authorized COVID-19 vaccines are clinically contraindicated for the staff member to receive and the recognized clinical reasons for the contraindications. Additionally, a statement by the authenticating practitioner recommending that the staff member be exempted from the facility's COVID-19 vaccination requirements is also expected."

Watch out: "I have seen several forms from physicians that failed to include" the specific vaccine information and the specific clinical contraindication, Markette relates. "Many docs just say, 'The patient should not receive the vaccine for medical reasons,'" he says. "Providers need to be sure to follow up with physicians to obtain all of this information," he urges.

CMS specifically tasks surveyors with checking that the required information is included in the documentation, Markette warns. (See box, below, about surveyor processes related to the mandate.)

9. Decide by committee. Consistency and fairness may be easier to prove with committee-based decisions. "A competent committee should be assigned to review each exemption request," Wolfe advises.

10. Consider anonymizing the process. "If possible, the names of the requestors should be removed so there cannot be any claim of bias," Wolfe recommends.

11. Don't neglect accommodations. The exemptions process isn't over when your agency grants (or denies) a request. "Each employee requesting an exemption is entitled under federal law to an individualized interactive process," Maguire explains. "This means, after granting an exemption, the employer and employee should explore all additional precautions (accommodations) that may be available for that particular employee to be able to perform his or her job safely as an unvaccinated individual under CMS' rule," she says.

"CMS has provided examples of additional precautions (accommodations) that should be explored with each qualifying employee, such as reassignment to non-patient care areas, with PPE, if available [and] telework, if available," Maguire offers.

Given the staffing shortage, many agencies will want to keep their exempted field staff providing direct patient care. They may institute additional precautions/accommodations, such as periodic testing, Markette notes. Or many agencies may feel that their current infection control (IC) practices, which have proven to prevent transmission, will suffice as accommodations, he offers.

Another option: If your staffing situation permits it, you may consider an alternative. "While CMS did not list unpaid leave as an additional precaution (accommodation), hospices should consider unpaid leave before termination if no other accommodations are available," Maguire recommends. "Courts have found that unpaid leave may be an acceptable accommodation."

Make sure you don't frame any accommodations you offer - testing or otherwise - as "punishments" for not getting vaccinated, Markette stresses. Retaliation for exempted employees is illegal under anti-discrimination laws.

12. Defer to the EEOC. Markette's clients have been asking how strict they need to be in processing exemption requests, he reports. Keep in mind that agencies are still subject to the ADA, Title VII of the Civil Rights Act, and other federal laws governing discrimination in the workplace, he points out.

"CMS encourages facilities to review the Equal Employment Opportunity Commission's Compliance Manual on Religious Discrimination for more information on religious exemptions," the agency says in its FAQs.

The same should go for disability-related exemptions, Markette says. "After the ADA was modified, the EEOC has taken the position that employers should not spend a lot of time on the question of whether the employee is disabled, but focus on the issue of accommodation," he says.

Agencies that try to put their own restrictions on exemptions protected by federal law may find themselves facing an EEOC investigation and a discrimination lawsuit, Markette warns.

Tip: "Hospices will be on the safest possible ground by offering broad, unscrutinized religious exemptions, consistent with ... our First Amendment," advises attorney **Brian Daucher** with Sheppard Mullin in Costa Mesa, California.

13. Don't leave education out of your P&Ps - or documentation. The CMS guidance to surveyors issued at the end of December includes a duty not required specifically in the IFC, Markette notes - education on vaccinations.

The vaccination mandate rule notes that "this IFC does not expressly require COVID-19 vaccine counseling or education," but "we anticipate that some providers and suppliers will conduct such activities as a part of their procedures for ensuring compliance with the provisions of this rule."

But CMS' guidance to surveyors regarding HHAs instructs them to "determine if [unvaccinated staff] have been educated and offered vaccination" and to "request to see [the] employee record of the staff education of the HHA policy and procedure regarding unvaccinated individuals." The same goes in the hospice survey guidance on the mandate.

"Providers will likely educate their staff about the vaccine policy and procedure" anyway, Markette allows. "But this is now an official part of the survey," he warns.

That means "agencies will need to be sure they document efforts to educate staff about the vaccine," he advises. And "agencies may want to document their efforts to address vaccine hesitancy more generally, because it seems that CMS is expecting agencies to attempt to convince personnel who raised objections to getting vaccinated to drop their objections and receive the vaccine," he suggests.