

MDS Alert

Covid-19: If You Have Whiplash from Vaccine Mandate News, You're Not Alone

Organizations based in Texas now have their own specific guidance.

While many large companies in myriad industries across the United States are still navigating the rules of vaccination requirements for their employees, the U.S. Supreme Court OK'd the Centers for Medicare & Medicaid Services' (CMS) healthcare vaccination mandate. Information surrounding COVID-19 changes rapidly; this was accurate at time of publication.

The major takeaway: Facilities that don't achieve a 100 percent rate of vaccination of employees within the dates set by CMS are noncompliant and will face enforcement actions.



Background: On Nov. 5, 2021, CMS published the Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule with Comment Period (IFC) in the Federal Register. Almost immediately, the IFC encountered legal challenges from states in district courts across the nation. On Nov. 30, the U.S. District Court for the Western District of Louisiana ruling blocked the CMS rule from implementation nationwide. However, the Fifth Circuit Court of Appeals lifted the injunction for 25 states and the District of Columbia on Dec. 15. That was swiftly followed by a challenge from the state of Texas, leaving 25 states where the injunction applied.

On Dec. 28, 2021, CMS offered impacted Medicare-and Medicaid-certified providers new survey guidance and Frequently Asked Questions (FAQs). In addition, the agency announced new compliance dates for the Medicare vaccination requirements in states affected by the mandate - and when to expect surveyors' enforcement to begin. With CMS' new compliance policies intact in 25 states and as the legal debate crescendoed, the Supreme Court heard oral arguments on the legality of the CMS rule on Jan. 7.

Now: On Jan. 13, the Supreme Court upheld the IFC in a 5-4 decision, backing CMS' vaccination mandate for employees working at organizations participating in Medicare and Medicaid. "We ... conclude that the Secretary did not exceed his statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule must ensure that their employees be vaccinated against COVID-19," notes the Supreme Court ruling.

This decision wasn't surprising to legal experts, especially since Medicare and Medicaid are funded by the federal government. The Court "reasoned that a core mission of HHS is to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their health and safety," say attorneys **Elizabeth Wylie, Paul Giancola, and Jessica Van Ranken** with law firm Snell & Wilmer in online analysis. And Medicare and Medicaid Conditions of Participation have "long included requirements to prevent the transmission of communicable diseases and infections," Wylie, Giancola, and Van Ranken note.

"According to the Supreme Court, requiring COVID-19 vaccinations fits 'neatly within' Congress's conferral of authority for healthcare providers receiving the federal funds," explain attorneys with Foley & Lardner in online legal analysis. "The Court emphasized that healthcare workers are routinely required to receive vaccinations (for example, they are required to be vaccinated against hepatitis B, influenza, and measles, mumps, and rubella)," the Foley & Lardner lawyers observe.

"We respect the ruling of the U.S. Supreme Court but remain concerned that the repercussions of the vaccine mandate among health care workers will be devastating to an already decimated long term care workforce. When we are in the

midst of another COVID surge, caregivers in vaccine hesitant communities may walk off the job because of this policy, further threatening access to care for thousands of our nation's seniors. We continue to ask that CMS and state surveyors show leniency during this critical time as well as consider a regular testing option for unvaccinated staff members to prevent worsening staff shortages," **Mark Parkinson**, president and CEO of the American Health Care Association (AHCA), said in a press release.

"Long term care providers have been relentless in encouraging staff to get vaccinated, and we have made considerable progress with 83 percent of nursing home staff now fully vaccinated. However, rampant misinformation has sowed doubt and concern among many on the frontlines. We must collectively address the root cause of vaccine hesitancy rather than penalize providers who are making valiant efforts," he said.

"Vaccines and boosters are the most powerful tools we have in the battle against COVID-19; they save lives," LeadingAge President **Katie Smith Sloan** says in a release.

CMS "is extremely pleased the Supreme Court recognized CMS' authority to set a consistent COVID-19 vaccination standard for workers in facilities that participate in Medicare and Medicaid," says CMS Administrator **Chiquita Brooks-LaSure** in a release. The "decision will enable us to fully implement this rule, and we look forward to working with health care providers and their workers to protect patients," she says.

"Allowing implementation of the rule that health care facilities require their workers to be vaccinated will undoubtedly save lives," says Health and Human Services Secretary **Xavier Becerra** in a release. "This is an important requirement to protect patients."



Keep on Top of Mandate Changes

If your agency operates in one of the states where the injunction was lifted in December, then you should proceed as planned, CMS indicates in a release. The SCOTUS decision "does not affect compliance timelines for providers in the District of Columbia, the territories, and the 25 states where the preliminary injunction was previously lifted," CMS reminds. The IFC due dates for getting your employees vaccinated still stand at Jan. 27 (Phase 1) and Feb. 28 (Phase 2) as previously established in the Dec. 28, 2021, says guidance to state survey agency directors.

However, if your facility is in one of the other states (minus Texas) - AL, AK, AR, AZ, GA, ID, IN, IA, KS, KY, LA, MS, MO, MT, NE, NH, ND, OH, OK, SC, SD, UT, WV, WY - and therefore now covered by the court decision, CMS has set out new deadlines in a Jan. 14 memo to state survey agencies.

Facilities in those states must have staff vaccinated with the first dose of the vaccine by Feb. 14 (Phase 1) and the second dose by March 15 (Phase 2). Facilities in Texas have 30 days and 60 days from Jan. 20, 2022, when QRS Memorandum QSO-22-11-ALL was issued.

"The 'wait and see' window has closed," judge attorneys with law firm Hall Render in online analysis. "The Court has clearly signaled that CMS's IFR is valid," they stress.

"At this point, the CMS rule is full speed ahead," says attorney **Robert Markette Jr.** with Hall Render in Indianapolis. "We are seeing staggered enforcement deadlines due to the various injunctions," Markette observes. "CMS is giving providers in states that had injunctions additional time. That is reasonable, as many of those providers took no action to begin implementing," Markette tells AAPC.

Watch out: Those staggered timelines may cause confusion, especially for companies that operate in states with different deadlines, Markette suspects.

"The Biden administration is appealing that injunction in the Fifth Circuit, the same circuit through which Louisiana and 13 other states made it to the Supreme Court," note attorneys **Colleen Faddick, Jennifer Evans, Michael Flood, and Colleen Guinn** with law firm Polsinelli in online analysis.

The only question about the CMS mandate now is "how many staff members will quit?" Markette asks.

"While most healthcare providers and staff recognize the importance of vaccinations, there will certainly be an additional loss of staff by healthcare providers as a result of the rules," notes consulting and accounting firm The Health Group in Morgantown, West Virginia.

Note: The SCOTUS decision is at https://www.supremecourt.gov/opinions/21pdf/21a240_d18e.pdf and the Jan. 14 memo is at <https://www.cms.gov/files/document/qso-22-09-all-injunction-lifted.pdf>. You can find the Jan. 20 memo (specifically for Texas) at <https://www.cms.gov/files/document/qso-22-11-all-injunction-lifted.pdf>.