

Supreme Court gives go ahead to healthcare workers vaccine mandate



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The vaccine mandate covering healthcare workers took the same journey to the Supreme Court as the broader [OSHA ETS](#), but ended with a much different outcome. In a 5-4 decision, the Supreme Court lifted the injunctions blocking the Centers for Medicare & Medicaid Services' (CMS) vaccine mandate for healthcare workers opening the way for enforcement at healthcare facilities across the country.

The CMS vaccine mandate

CMS issued an emergency rule on November 4 requiring COVID-19 vaccination of eligible staff at healthcare facilities that participate in the Medicare and Medicaid programs, such as nursing homes, ambulatory surgical centers, hospices, and rehabilitation facilities. Like the other federal vaccine rules, the CMS mandate was promptly challenged and soon stayed first nationwide, then later trimmed to cover states in half the country. The challenge to the stay promptly headed to the Supreme Court.

Supreme Court lifts the stay on the CMS emergency rule

Healthcare employers who tuned into the Supreme Court's oral argument on January 7, 2022, came away with a sense that a majority of the court felt that the CMS rule was crafted to protect patients and operated like many other CMS rules of participation.

In fact, that did reflect the opinion of a majority of the Supreme Court. On January 13, the Supreme Court lifted the stay on the CMS emergency rule allowing for enforcement of the COVID-19 vaccination

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mandate. The court recognized that CMS has broad authority to condition participation in the Medicare and Medicaid programs on “requirements as [CMS] finds necessary in the interest of the health and safety of individuals who are furnished services.” Further, the court found that vaccine mandates are necessary to protect patient health and safety because “COVID-19 is a highly contagious, dangerous — and especially for Medicare and Medicaid patients — deadly disease.”

CMS enforcement guidance and timing

With the stay lifted by the Supreme Court, CMS is now free to enforce the mandate at covered facilities across the country.

Following the court’s decision, CMS issued a statement indicating that healthcare providers in the 24 states covered by the Supreme Court’s decision “will now need to establish plans and procedures to ensure their staff are vaccinated.” However, the statement did not include specific enforcement dates. CMS had previously issued [guidance for facilities in other states not covered by the stay](#) indicating that healthcare employers had until January 27, 2022, to ensure that covered staff receive the first dose of a COVID-19 vaccine and until February 28, 2022, as the date for the second dose.

As CMS begins enforcement of the vaccine mandate, the agency is fully aware of how the mandate may impact healthcare staffing. CMS has indicated that it will exercise its enforcement discretion so that facilities working in good faith to vaccinate their staffs do not have to fear significant enforcement action.

A refresher on the CMS vaccine mandate

Employers who were well-versed in the CMS mandate requirements when they were issued in November may now need a refresher to get into compliance-mode.

- **The vaccine mandate and exemptions** - The CMS rule is a vaccination mandate that applies to all eligible staff working at a covered facility, regardless of clinical responsibility or patient care, including staff who work in offsite locations, such as homes, clinics or administrative offices. The CMS rule does not include a testing option.

Healthcare facilities may, however, approve exemptions to the vaccine requirement for recognized medical conditions or religious beliefs, observances or practices. Facilities must establish and document a process for requesting, reviewing and evaluating exemption requests. Staff who previously had COVID-19 are not, however, exempt from the vaccine requirement.

- **Covered facilities and entities** - The CMS rule directly applies to the following categories of Medicare- and Medicaid-certified providers and suppliers: ambulatory surgical centers, hospices, psychiatric residential treatment facilities, programs of all-inclusive care for the elderly, hospitals, long-term care facilities, including skilled nursing facilities and nursing homes, intermediate care facilities for individuals with intellectual disabilities, home health agencies, comprehensive outpatient rehabilitation facilities, critical access hospitals, clinics, rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services, community mental health centers, home infusion therapy suppliers, rural health clinics/federally qualified health centers, and end-stage renal disease facilities.
- **Covered healthcare staff** - The CMS rule applies to all staff "regardless of clinical responsibility or

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patient contact." The rule is not limited to covered entity employees. All contractors or those staff with privileges at a facility must be vaccinated.

Individuals who provide services outside of the covered facility location, but in the presence of patients, clients, or other workers (e.g., home health, home infusion therapy, etc.), are covered by the vaccination requirement in the rule.

Individuals who provide services 100% remotely, away from patients, clients, and other employees, are not subject to the vaccination requirements. For example, the rule does not require fully remote telehealth or payroll services workers to be vaccinated.

- **Tracking and recordkeeping** - The CMS rule establishes specific requirements:
 - All staff COVID-19 vaccines must be appropriately documented by covered facilities:
 - All medical records, including vaccine documentation, must be kept confidential and stored separately from an employee's personnel files, pursuant to the Americans with Disabilities Act and the Rehabilitation Act.

Conflicting state rules prohibiting vaccine mandates

The CMS rule clearly indicates that it preempts any state laws that do not permit employers to mandate COVID-19 vaccinations. This means that covered employers operating in states that have anti-mandate rules will need to comply with the CMS rule.

Covered healthcare employers should prepare for compliance

With the stay lifted and enforcement looming, covered employers should dust off policies that they started months ago and prepare for compliance.

- Determine coverage under the CMS mandate
- Develop and implement a written policy stating the employer's requirements related to the CMS vaccine mandate
- Prepare a list of employees who are vaccinated and unvaccinated
- Develop a tracking mechanism to ensure compliance within the above described deadlines
- Inform employees of their responsibilities under the mandate and consequences for non-compliance
- Plan for further staff shortages if employees indicate refusal to vaccinate
- Develop and implement a policy to provide religious and medical exemptions to employees who request the same
- Develop accommodations for exempt employees, such as masking, telework, etc.

Additional information on the CMS mandate

For more information regarding the CMS mandate:

- [CMS Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule](#)
- [Supplement to \(and should be used in conjunction with\) QSO 21-07-ALL memorandum: Guidance for the Interim Final Rule – Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination](#)

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The McDonald Hopkins Labor and Employment Team is ready to assist employers with CMS Mandate compliance. Contact your McDonald Hopkins attorney for assistance or with any questions.



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