

## U.S. Supreme Court Upholds CMS Enforcement of COVID-19 Vaccine Mandate for Healthcare Facilities that Receive Medicare or Medicaid Funding

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### What You Should Know

- The U.S. Supreme Court upheld the CMS COVID-19 vaccine mandate for healthcare workers and others at facilities that participate in the Medicare and Medicaid programs.
- The Court lifted the injunctions in 24 states that had challenged the HHS Secretary's vaccination mandate, and CMS has provided new compliance deadlines for facilities in those states.
- Compliance deadlines for healthcare facilities in states that did not file an injunction, including New Jersey, are fast approaching.

### SCOTUS Decision & Background

On January 13, 2022, the U.S. Supreme Court upheld the Secretary of Health and Human Services (HHS Secretary) mandate that healthcare facilities participating in the Medicare and Medicaid programs require all employees, volunteers, contractors, and other workers to receive a COVID-19 vaccine unless the employee is granted a medical or religious exemption. Non-compliance would result in fines and termination of Medicare and Medicaid provider agreements.

In November 2021, acting through the Centers for Medicare and Medicaid Services (CMS) to combat the spread of COVID-19 infections, the HHS Secretary issued this mandate to protect the health and safety of Medicare and Medicaid patients being treated by healthcare providers in hospitals, nursing homes, ambulatory surgical centers, hospices, rehabilitation facilities and other facilities. Shortly thereafter, 24 states challenged the mandate and on December 2, 2021, CMS suspended the

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COVID-19 vaccine mandate for that group of states pending resolution of the injunctions sought in those states prohibiting its enforcement.

In a 5-4 decision, the Supreme Court found that pursuant to 42 U.S.C. §1302(a), Congress authorized the HHS Secretary to promulgate this type of requirement upon healthcare facilities participating in the Medicare and Medicaid programs in the interest of the health and safety of patients receiving care during a health emergency. Given the rampant spread of COVID-19, as a matter of public safety the majority reasoned that unvaccinated staff pose a serious threat to the health and safety of patients—particularly the elderly, disabled, or those in poor health—as it can lead to patients forgoing medically necessary treatments, staffing shortages, or disruption to patient care. The majority focused on the well-being of the patient.

While the dissent focused on the rights of healthcare facility staff members, the majority was not convinced that compelling staff members to choose between employment and involuntary vaccination prevented the implementation of a nationwide vaccine mandate on Medicare and Medicaid providers. In short, the majority agreed that the mandate was consistent with the fundamental principle of the medical profession: “first, do no harm.”

### Deadlines of Note

The Supreme Court was silent as to any dates or deadlines for compliance. As such, on January 14, 2022, CMS issued a memorandum to specifically address the new compliance deadlines for the 24 states that had filed for injunctions, and to reaffirm the previous deadlines for those states that did not.

The new deadlines apply to the following states: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wyoming. The deadlines do not apply to Texas, as Texas sought an injunction separately from the other states which is still pending resolution.

Healthcare facilities in these 24 states must demonstrate the following by **February 13, 2022**:

- Implementation of policies and procedures for ensuring all facility staff are vaccinated or have received an exemption, **and**
- Verification that 100% of staff have received at least one dose of the COVID-19 vaccine, **or** have a pending request for, or have been granted, an exemption, **or** have been identified as needing a temporary delay before receiving the vaccine.

Additionally, these same 24 states must demonstrate the following by **March 15, 2022**:

- Implementation of policies and procedures for ensuring all facility staff are vaccinated or have received an exemption, **and**

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- Verification that 100% of staff have received the necessary doses to complete the vaccine series (i.e., one dose of a single-dose vaccine or all doses of a multiple-dose vaccine series), **or** have a pending request for, or have been granted, an exemption, **or** have been identified as needing a temporary delay before receiving the vaccine.

Any state that fails to comply with the 100% standard by **April 14, 2022**, may be subject to enforcement action. Additional guidance is provided in the January 14 CMS memorandum. Guidance specific to provider types and certified suppliers is provided here.

For states that did not seek an injunction, the timeframes and parameters issued in the December 28, 2021 memorandum remain in effect. Those deadlines require implementation of policies and procedures for ensuring all facility staff are vaccinated, unless an exemption applies, along with:

- Verification that 100% of facility staff received at least one dose of the COVID-19 vaccine by **January 27, 2022**; and
- Verification that 100% of staff have received the necessary doses to complete the vaccine series (i.e., one dose of a single-dose vaccine or all doses of a multiple-dose vaccine series) by **February 28, 2022**.

### Next Steps

In light of the Supreme Court's holding and the CMS memorandum, healthcare facilities should stay apprised of all relevant deadlines and requirements for the vaccine mandate as applied within their respective state and should begin preparing for immediate implementation. Failure to comply could result in becoming ineligible for Medicare and Medicaid funding. Similarly, healthcare facilities in those states that are not affected by the holding should continue to ensure compliance as those dates approach.

We will continue to monitor all developments related to the COVID-19 pandemic and the compliance obligations of healthcare facilities and will keep you informed. Please contact the authors of this Client Alert with questions or to discuss your specific business circumstances.

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