

U.S. Supreme Court Allows Nursing Home Vaccination Mandate

Article

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The U.S. Supreme Court on Thursday allowed the federal government's COVID-19 vaccination mandate for health care providers to proceed. The rule requires nursing homes, hospitals, and certain other participants in the Medicare and Medicaid programs to vaccinate all non-exempt staff against COVID-19. The 100% requirement does not apply to staff who have a pending request for, or have been granted, a qualifying exemption for certain medical conditions or religious beliefs, or who have a temporary delay per CDC recommendations.

In a separate ruling, the Court blocked the enforcement of a broader rule from the U.S. Occupational Safety and Health Administration requiring companies with 100 or more employees to vaccinate or test their staff.

The health care mandate was announced in early November by the Centers for Medicare & Medicaid Services. A group of states led by Louisiana and another group led by Missouri obtained federal District Court preliminary injunctions blocking enforcement of the mandate. The Biden administration unsuccessfully moved for stays of the injunctions in the U.S. Courts of Appeals for the Fifth Circuit (Louisiana) and Eighth Circuit (Missouri). The Supreme Court heard arguments in an extraordinary session on January 7. Thursday's ruling grants the administration's request to stay both those injunctions while the state challenges are resolved in the Fifth Circuit and Eighth Circuit.

In allowing the mandate, the Court found that Congress had given the necessary authority for the mandate to the Secretary of Health and Human Services (which oversees CMS). The Court also reasoned that:

- Perhaps the most basic function of the HHS Secretary is to ensure that providers protect patients' health and safety, and providers have an obligation to "take steps to avoid transmitting a dangerous virus to their patients."
- The Medicare and Medicaid requirements of participation have long included infection prevention and control programs.
- Vaccination requirements for various diseases are common in health care.

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The majority opinion was *per curiam* (unsigned). Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Amy Coney Barrett dissented, arguing that the government did not have authority for the rule. Justice Thomas wrote that the government had not made a strong showing that Congress gave CMS broad authority “to force healthcare workers ... to undergo a medical procedure they do not want and cannot undo.”

The vaccine mandate does not apply to assisted living facilities.

Operators of Wisconsin nursing homes should carry out the vaccination program consistent with their policies and procedures that comply with CMS guidance. The CMS guidance for nursing homes is at [this link](#).

By January 27 nursing homes must have developed policies and procedures and have 100% of non-exempt staff received at least one dose of COVID vaccine. By February 26, 100% of non-exempt staff must have completed the vaccine series. Booster shots are not required.

In late December CMS announced that surveyors would begin surveying nursing homes for compliance January 27 and issue survey notices of non-compliance. For the January 27 initial-dose deadline, there will be no additional enforcement for homes that are above 80% staff vaccination and have a plan to reach 100% within 60 days. For the February 26 final-dose deadline, there will be no additional enforcement for homes that are above 90% vaccination and have a plan to reach 100% within 30 days.

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