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CMS Vaccine Mandate: New Deadlines

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On January 13, 2022, a divided Supreme Court vacated the injunctions that applied to CMS's vaccine mandate in 24 states, thereby allowing CMS to enforce its mandates in all states except Texas.¹

(https://www.supremecourt.gov/opinions/21pdf/21a240_d18e.pdf). Here are key points for providers seeking to comply with the mandate.

Deadlines for Compliance. The effective deadlines for compliance run from the date CMS issued its relevant compliance guidance to survey agencies. For facilities in states that were not subject to an injunction, CMS issued its guidance on December 28, 2021. (QSO-22-07-ALL, available at <https://www.cms.gov/files/document/qso-22-07-all.pdf>). For facilities in states that were subject to an injunction (i.e., 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), CMS issued its updated guidance on January 14, 2022. (QSO-22-09-ALL, available at <https://www.cms.gov/files/document/qso-22-09-all-injunction-lifted.pdf>). As set forth in the guidance, the deadlines are as follows:

Phase 1: Within 30 days after the relevant CMS guidance, covered facilities must implement policies to ensure that all facility staff receive at least the first dose of an approved vaccine unless the staff member has been granted a qualifying exemption, has a pending request for an exemption, or has a medical condition that temporarily delays vaccination as recommended by the CDC. (QSO-22-09-ALL).

- a. For facilities in states that were not subject to an injunction, the Phase 1 deadline is **January 27, 2022**. (QSO 22-07-ALL).
- b. For facilities in states that were covered by an injunction, the Phase 1 deadline is **February 14, 2022**.² (QSO-22-09-ALL).

Phase 2. Within 60 days from the relevant CMS guidance, covered facilities must ensure that facility staff complete a vaccination series unless the staff member has been granted a qualifying exemption or has a medical condition that temporarily delays vaccination as recommended by the CDC. (QSO-22-09-ALL).

- a. For facilities in states that were not subject to an injunction, the Phase 2 deadline is **February 28, 2022**.³ (QSO 22-07-ALL).
- b. For facilities in states that were subject to an injunction, the Phase 2 deadline is **March 15, 2022**. (QSO-22-09-ALL).

Facilities Covered by the CMS Mandate. The CMS mandate only applies

to the following facilities that are regulated by Medicare: ambulatory surgery centers (ASC); community mental health centers; comprehensive outpatient rehabilitation facilities (CORF); critical access hospitals (CAH); end-stage renal disease (ESRD) facilities; home health agencies (HHA); home infusion therapy suppliers; hospices; hospitals; intermediate care facilities for individuals with intellectual disabilities; clinics, rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services; psychiatric residential treatment facilities (PRTF); programs for all-inclusive care for the elderly organizations (PACE); rural health clinics (RHC)/Medicare federally qualified health centers (FQHC); and long-term care facilities. (FAQs re CMS Omnibus COVID-19 Health Care Staff Vaccinations, available at <https://www.cms.gov/files/document/cms-omnibus-covid-19-health-care-staff-vaccination-requirements-2021.pdf> ("CMS FAQ")). The CMS rule does not apply to other providers, including most physician groups even if they participate in Medicare or Medicaid.

Personnel Covered by the CMS Mandate. Covered facilities must ensure that all their staff are vaccinated regardless of clinical responsibility or patient contact unless they have been granted an exemption or they work completely remotely without contact with other staff. In addition to employees, the mandate applies to licensed practitioners with clinical privileges, students, trainees, board members, volunteers, and other vendors or contractors who provide care, treatment, or other services for the facility and/or its patients. For more information about covered personnel, see the CMS FAQs or our prior client alert, available at <https://www.hollandhart.com/cms-vaccine-mandate-for-healthcare-workers-resources-for-preparing-your-policies>.

Exemptions. Facility staff affected by the mandate may still obtain exemptions for medical conditions or sincerely held religious beliefs. Per the CMS guidance, facility staff seeking an exemption should submit their requests by the relevant Phase 1 deadline. Facilities should grant or deny the exemptions in advance of the Phase 2 deadline. In addition, vaccination may be delayed if a facility staff member has a medical condition that makes vaccination temporarily contraindicated per CMS guidance. For more information about exemptions, see the CMS FAQs or our prior client alerts, available at <https://www.hollandhart.com/cms-vaccine-mandate-for-healthcare-workers-resources-for-preparing-your-policies> and <https://www.hollandhart.com/evaluating-religious-exemption-requests-under-the-cms-covid-19-vaccine-mandate>.

Enforcement. CMS's enforcement tools depend on the nature of the facility. For nursing homes, home health agencies, and hospices, CMS may impose civil monetary penalties, deny payments, or terminate participation in Medicare and Medicaid. For other facilities (including hospitals and ASCs), the sole enforcement remedy is termination of Medicare and Medicaid participation. CMS has reaffirmed that its "primary goal is to bring health care facilities into compliance. Termination would generally occur only after providing a facility with an opportunity to make corrections and come into compliance." (QSO-22-09-ALL). CMS will investigate compliance through its usual survey process. According to the CMS guidance, CMS facilities that fail to maintain 100% compliance within

90 days after issuance of the relevant CMS guidance may be subject to enforcement. (*Id.*).

Status of Litigation. Procedurally, the Supreme Court's decision only terminated the injunctions that temporarily barred CMS from enforcing its vaccine mandate while the lawsuits challenging the mandates were pending. The cases now return to the courts in which they were pending for further proceedings. As a practical matter, however, the Supreme Court's decision likely means that the cases will be dismissed.

Relation to OSHA Requirements. In addition to the CMS rules, covered entities that are subject to OSHA⁴ should also be aware of any OSHA requirements. OSHA has withdrawn its Emergency Temporary Standard (ETS) for Healthcare Workers (see <https://www.osha.gov/coronavirus/ets>), and the Supreme Court struck down OSHA's "vaccination or test" mandate on January 13, 2022 (see https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf). Nevertheless, OSHA has continued to maintain that healthcare providers must take appropriate steps to ensure the safety of employees from COVID-19 infections under OSHA's general duty clause. (<https://www.osha.gov/coronavirus/ets>).

¹Texas remains subject to an injunction issued in a case that was not before the Supreme Court; accordingly, CMS is not currently enforcing the vaccine mandate in Texas. (QSO-22-09-ALL). However, the Supreme Court's decision likely means the Texas injunction will soon be lifted.

²Because 30 days falls on Sunday, February 13, 2022, CMS has stated that it will exercise its enforcement discretion to move the deadline to the next business day. (QSO-22-09-ALL fn.3).

³Because 60 days falls on Saturday, February 26, 2022, CMS will move the compliance deadline to the next business day. (QSO-22-07 fn.2).

⁴Some providers may not be subject to OSHA, including most government entities. (See <https://www.hollandhart.com/oshas-new-ets-are-public-hospitals-covered-1>).