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Vaccine Mandate for Healthcare Providers

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On September 9, 2021, President Biden announced that the federal vaccine mandate for nursing facilities will be extended to most other healthcare workers. Unfortunately, the announcement raised more questions than it answered. Here is what we do and do not know so far; we may have to wait for the October regulations to learn the specifics. This article supplements our September 10 client alert “Vaccine Mandates Q&A” and focuses on the mandate applicable to healthcare workers.

Why the mandate?

The surge in COVID-19 obviously requires a more proactive response, but there is another important reason for the mandate. While acknowledging the benefits of vaccinations, many healthcare providers have been hesitant to impose a mandate out of fear that anti-vax employees would bolt to other employers without a mandate. After CMS mandated vaccines for nursing facilities, the American Health Care Association called on CMS to broaden the mandate to other healthcare workers to curb the anticipated exodus of nursing facility staff. (See https://www.ahcancal.org/News-and-Communications/Press-Releases/Pages/AHCANCAL-Reacts-to-Administration%E2%80%99s-COVID-19-Vaccination-Requirement-for-Nursing-Home-Staff.aspx). By making the mandate nearly universal, the Administration may limit the migration of healthcare workers away from the healthcare entities that mandate vaccinations and help stabilize the workforce at frontline facilities. To that end, the mandate may help healthcare facilities that have delayed imposing their own mandates.

To which healthcare workers will the vaccine mandate apply?

As discussed more fully in our prior client alert, President Biden's plan actually includes three separate mandates: (1) healthcare workers in Medicare- and Medicaid-certified facilities and perhaps others; (2) employers with more than 100 employees that are subject to OSHA; and (3) federal employees and contractors. Each mandate will have separate requirements, and a healthcare provider may be subject to more than one mandate. For example, a hospital with more than 100 employees may be subject to both the mandate for healthcare workers as well as the mandate for employers with more than 100 employees.

We do not know the specific scope of the healthcare worker mandate yet. The White House's website confirms:

> COVID-19 vaccinations [will be required] for workers in most health care settings that receive Medicare or Medicaid reimbursement, *including but not limited to hospitals, dialysis*

> *facilities, ambulatory surgical settings, and home health agencies. This action builds on the vaccination requirement for nursing facilities* recently announced by CMS, and will apply to nursing home staff as well as staff in hospitals and other CMS-regulated settings, including clinical staff, individuals providing services under arrangements, volunteers, and staff who are not involved in direct patient, resident, or client care. These requirements will apply to approximately 50,000 providers and cover a majority of health care workers across the country….

https://www.whitehouse.gov/covidplan/ (emphasis added). HHS's corresponding announcement suggests that the mandate may be limited to Medicare and Medicaid-participating "facilities":

> The Biden-Harris Administration will require COVID-19 vaccination of staff *within all Medicare and Medicaid-certified facilities* to protect both them and patients from the virus and its more contagious Delta variant. *Facilities across the country should make efforts now to get health care staff vaccinated to make sure they are in compliance when the rule takes effect*.
>
> The Centers for Medicare & Medicaid Services (CMS), in collaboration with the Centers for Disease Control and Prevention (CDC), announced today that emergency regulations requiring vaccinations for *nursing home workers will be expanded to include hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, among others*, as a condition for participating in the Medicare and Medicaid programs….

https://www.cms.gov/newsroom/press-releases/biden-harris-administration-expand-vaccination-requirements-health-care-settings (emphasis added). Based on the foregoing, we know the mandate will apply to:

- Hospitals
- Nursing facilities
- Ambulatory surgery centers (ASCs)
- Dialysis facilities
- Home health agencies

However, the CMS announcement links to the CMS website for "facilities," which also includes:

- Inpatient rehabilitation facilities (IRFs)
- Comprehensive outpatient rehabilitation facilities (CORFs)
- Federally qualified health centers (FQHCs)
- Rural health centers (RHCs)
- Durable medical equipment suppliers (DMEs)
- Hospices

- Clinical labs
- Ambulances

See https://www.cms.gov/Outreach-and-Education/Find-Your-Provider-Type/Facilities/Facilities-page. It is not clear which or whether all of these additional "facilities" will be covered by the mandate, but CMS's focus on "facilities" suggests that the mandate may *not* apply to medical groups or other entities that practice apart from a Medicare/Medicaid-participating "facility" as well as non-participating providers.

What is the deadline for healthcare workers?

CMS will publish an interim rule in October but there will almost certainly be some lead time to vaccinate staff. With that said, CMS has encouraged facilities that will clearly be covered (i.e., hospitals, nursing facilities, dialysis facilities, ASCs, and HHAs) to begin the vaccination process now:

> CMS is developing an Interim Final Rule with Comment Period that will be issued in October. CMS expects certified Medicare and Medicaid facilities to act in the best interest of patients and staff by complying with new COVID-19 vaccination requirements. Health care workers employed in these facilities who are not currently vaccinated are urged to begin the process immediately. Facilities are urged to use all available resources to support employee vaccinations, including employee education and clinics, as they work to meet new federal requirements.

https://www.cms.gov/newsroom/press-releases/biden-harris-administration-expand-vaccination-requirements-health-care-settings.

Will there be exceptions to the healthcare vaccine mandate for disability or religious concerns?

We do not know. OSHA and EEOC guidance as well as state and private mandates have generally recognized exemptions for disability and/or "sincerely held religious beliefs" under the ADA and Title VII. There will likely be a disability or medical exemption in order to align the mandate with Supreme Court precedent upholding vaccine mandates. The religious exemption may be somewhat less certain. The Religious Freedom Restoration Act of 1993 generally requires the federal government to have a compelling interest to enact any law that infringes on religion, but the need to curb the current COVID-19 crisis would seem to be compelling. The federal government may be concerned about the difficulty in assessing whether a belief is truly "religious" as opposed to political or medical, and whether there is a potential abuse of religious exemptions under existing mandates. With that said, this week a federal judge temporarily blocked New York's vaccine mandate for healthcare workers because it contained no religious exemption. It may be that CMS recognizes the exemptions but more clearly defines their terms and application.

Are there alternatives to vaccination, e.g., masking and/or weekly

COVID-19 testing?

We do not know, but it is unlikely, at least in the absence of a confirmed disability or religious exemption. Unlike the mandate for employers with more than 100 employees, neither the White House nor CMS referred to testing and/or masking alternatives in their announcements concerning the healthcare mandate, and existing mask mandates have apparently not satisfied the Administration's concerns in healthcare facilities.

What are the penalties for non-compliance?

We do not know; however, because the mandate is tied to participation in Medicare or Medicaid, it seems likely that penalties may range from civil fines to adverse action against a provider's participation in Medicare or Medicaid. The focus appears to be on ensuring that facilities comply; accordingly, the penalties are likely going to be assessed against the facilities rather than individual providers or employees.

Are vaccine mandates legal?

We will have to see. Arizona has sued the Administration over the employee mandate; other conservatives have also threatened litigation. As a general rule, the United States Supreme Court has long held that vaccine mandates are constitutional. *See, e.g., Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905). Earlier this year, a Texas court upheld a private hospital's vaccine mandate in part because employees subject to the mandate always have the freedom to terminate their employment. The fact that CMS has limited the scope of the mandate to those facilities that participate in Medicare and Medicaid likely strengthens the chances that the vaccine mandate will be upheld: it is easier for the government to impose conditions on those who choose to avail themselves of government programs. In all probability, healthcare providers are going to need to move forward with the mandate instead of hoping for an injunction or waiting for a lawsuit to resolve the issue.

What about state laws that prohibit vaccination mandates?

In the wake of threatened mandates, legislation has been proposed or passed in several states that would prohibit vaccine mandates or prohibit requiring proof of vaccination. At this stage, it is not entirely clear how such laws will impact the federal mandates, but we suspect the odds are in favor of CMS given the Constitution's Supremacy and Commerce Clauses as well as the fact that CMS tied the mandate to participation in Medicare and Medicaid.

What should I do now?

If you are a hospital, nursing facility, ASC, dialysis center, or HHA, you should probably assume the mandate is going to apply; you might as well begin planning for the new rule.

- Begin educating staff about your likely obligations even if you do

not know the specifics. You might encourage staff to get the vaccine while promising to update them as the situation develops.

- Review the CDC's guidance for Workplace Vaccination Programs, available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html. It provides helpful suggestions for establishing a successful program as well as educational resources for your staff.
- Review EEOC guidance concerning vaccines in the workplace, especially the guidance at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. Note, however, the guidance may need to be modified based on the new rules.
- If applicable, review the OSHA emergency standards applicable to healthcare entities, available at https://www.osha.gov/coronavirus/ets. The OSHA standards will be revised to include the new employer mandate. Remember that the OSHA standards may not apply to government entities or entities in states that have adopted their own OSHA standards. *See* https://www.hollandhart.com/oshas-new-ets-are-public-hospitals-covered-1.
- Consider whether to offer any incentives for employees who receive the mandate. The EEOC has generally approved such incentives.
- Consider how employees will receive the mandated vaccines. According to the White House press release,

  > To continue efforts to ensure that no worker loses a dollar of pay because they get vaccinated, OSHA is developing a rule that will require employers with more than 100 employees to provide paid time off for the time it takes for workers to get vaccinated or to recover if they are under the weather post-vaccination. This requirement will be implemented through the ETS.

  https://www.whitehouse.gov/covidplan/. The vaccination program may implicate other employee benefit or human resources considerations. Consult with your HR staff and advisors to ensure your program is compliant.

- Consider how you will confirm vaccination status. In general, employers may ask employees for proof concerning their vaccination status after which the employee's vaccination status will constitute confidential health information under the ADA. If the employer administers the vaccine, then HIPAA privacy rules will apply to the vaccination and the employer will need to obtain the employee's authorization or identify another HIPAA exception that allows for the use or disclosure of the employee's vaccination status for employment-related purposes. See our April 6, 2020, client alert “Disclosing Employee's COVID-19 Status to Employer.”
- Continue to monitor developments through industry

communications and news releases. We will continue to provide updates as we move forward.

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