

Mandatory Employee COVID-19 Vaccination Required for Certain Medicare- and Medicaid-certified Providers

The Centers for Medicare and Medicaid Services (CMS) published an interim final rule with comment period (IFR or Rule) effective Nov. 5, 2021 that requires certain Medicare- and/or Medicaid-certified health care providers and suppliers ensure their workers are fully vaccinated for COVID-19 by Jan. 4, 2022. This includes physicians who practice in such providers.

The Rule defines “fully vaccinated” as at least two weeks since having received either a single-dose vaccine or the second of two doses of a multi-dose vaccine, which aligns with the Centers for Disease Control and Prevention (CDC) definition. This Rule does not require any booster or additional doses of a COVID-19 vaccine.

While certain federally permissible exemptions are allowed for individuals not getting vaccinated, there are no alternative policies that can be implemented by providers in place of a mandatory vaccination policy. This Rule does not allow employers or employees to opt for COVID-19 testing instead of getting vaccinated.

According to the IFR, the following Medicare- and Medicaid-certified providers and suppliers must ensure that all applicable staff—including employees, licensed practitioners, students, trainees and volunteers—are fully vaccinated for COVID-19:

- Ambulatory surgical centers
- Hospices
- Psychiatric residential treatment facilities
- Programs of all-inclusive care for the elderly (PACE)

- Hospitals (acute care, psychiatric, long-term care, children's hospitals, hospital swing beds, transplant centers, cancer hospitals, and rehabilitation hospitals)
- Long-term care facilities, including skilled nursing facilities and nursing facilities, generally referred to as 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
- End-stage renal disease facilities

The U.S. Equal Employment Opportunity Commission (EEOC) previously issued guidance that an employer may require vaccinations for all employees that physically enter a facility. This Rule expands on that scope and, with some limited exceptions, requires vaccinations of all staff—including employees, licensed practitioners, students, trainees and volunteers—who work at a Medicare- or Medicaid-certified facility listed above, even if they work offsite.

Unless individual workers qualify for an exemption to the vaccination requirement, applicable staff who are required to get vaccinated include volunteers, as well as staff and physicians employed at one of the above-listed facilities who interact with other staff, patients, residents, clients, or PACE program participants in any



location, even if the staff members do not physically enter the facility, clinic, homes, or other sites of patient care.

However, the vaccine mandate does not apply to individuals who only infrequently provide ad hoc non-health care services or provide services that are performed exclusively offsite and non-adjacent to any patient care sites. Also, individual workers who provide services exclusively remotely, such as fully remote telehealth providers or payroll service employees, are not subject to the vaccination requirements under this CMS Rule. Further, the Rule does not directly apply to certain other health care entities, such as physician offices or personal care providers, which are not “certified” to participate in Medicare and/or Medicaid.

Vaccine Exemptions

Employers may still be required to provide certain accommodations for workers, to the extent required by federal law, for requested and permitted vaccine exemptions due to a disability, medical condition, or sincerely held religious belief, practice, or observance. Federal exemptions may apply in circumstances where employers must comply with any anti-discrimination laws and civil rights protections, including the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, Title VII of the Civil Rights Act of 1964, Pregnancy Discrimination Act, and Genetic Information Nondiscrimination Act. This CMS Rule does not allow for workers to request or obtain an exemption to the vaccination requirement based on any state laws or other non-federal vaccination exemptions.

Record Keeping by Employers

Employers must maintain documentation of the facility’s compliance with this CMS Rule. This includes records of all vaccine exemption requests and outcomes for workers. These records must be kept confidential and stored separately from an employer’s personnel files, pursuant to the ADA and the Rehabilitation Act. This Rule requires record-keeping of employee vaccination status but does not require any additional data reporting for CMS compliance.

Deadlines

Phase 1: By **Dec. 6, 2021**, all applicable facilities covered by the Rule must ensure that its staff have received at least one dose of either a single-dose or multi-dose vaccine.

Phase 2: By **Jan. 4, 2022**, all applicable facilities covered by the Rule must ensure that their staff are fully vaccinated unless an individual worker was approved for a federally-permissible exemption. Although the definition of “fully vaccinated” includes a two-week period after receiving all primary doses, if a staff member has received all doses of a multi-dose series by Jan. 4, then the requirements are considered met even if the two-week post vaccination waiting period is not yet complete.

Enforcement

Compliance with this CMS Rule will be enforced by state survey agencies that will conduct onsite compliance reviews. Failure to comply may result in civil monetary penalties, denial of payments, or termination from the Medicare and/or Medicaid programs. According to the CMS, termination will generally be a last resort, after the provider is given an opportunity to make corrections to become compliant.

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