



# Nursing Homes Must Mandate Staff Vaccinations or Risk Federal Funding

Insights

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President Biden just announced a directive to the Department of Health and Human Services to require nursing homes mandate the COVID-19 vaccine of all employees or lose Medicare and Medicaid funding. Responding to the proliferation of the highly transmissible Delta variant juxtaposed against the obligation to ensure the health and safety of the most vulnerable patients, the August 18 directive follows a trend of progressive efforts to combat vaccine hesitancy from healthcare workers in the industry's unique critical and acute care settings. Nursing homes should thus immediately begin preparing to comply with the new regulation, estimated to go into effect as early as next month.

## Public Policy Favors Efforts to Boost Vaccination Rates in the Healthcare Industry

Although this move marks the first time the administration has threatened withholding federal funds to increase vaccination rates, the objective should come as no surprise to the nation's nursing homes. Over the past month, as a result of mounting pressure from national healthcare organizations and societies amidst the recent Delta surge, the White House has become increasingly vocal and regulatory in boosting vaccine rates – specifically prioritizing efforts in the healthcare industry. This week's directive follows a developing pattern in the industry to require the vaccination (or submission to weekly testing) of medical personnel working in acute and long-term care. The Delta variant now accounts for 99% of new COVID-19 cases and, unfortunately, nursing homes are witnessing rising cases of the variant among residents. This is especially true where employee vaccination rates remain low.

Despite the short timeline to comply, the Centers for Medicare & Medicare Services (CMS) assures it will work collaboratively with nursing homes, employees, and unions to increase employee vaccination rates *before* the new regulation goes into effect. According to the CMS, of the 1.3 million employees of the approximate 15,000 nursing homes participating in Medicare and Medicaid, about 40% remain unvaccinated. Due to Delta variant, this number now threatens the past 18 months of slow but steady progress in decreasing COVID-19 rates in resident populations.

CMS officials are thus confident legal authority supports the new regulation, pointing to the Agency's obligation to act swiftly as it relates to the health and safety of nursing home residents. In fact, as demonstrated by the failed legal challenges to highly publicized employee vaccine mandates of hospital systems across the country, sound public policy supports widespread vaccination mandates

healthcare systems across the country, sound public policy supports widespread vaccination mandates of healthcare workers, especially in the acute care setting. The public policy is, therefore, just as strong in relation to nursing homes – where acuity rates are always high and where residents make up the nation’s sickest elderly populations, the most susceptible patients to deadly transmission of the virus.

## **So How Can Nursing Homes Prepare?**

First and foremost, you should begin preparing now, *prior* to the mandate taking effect. To avoid the most disruption to employee morale amongst the unvaccinated, it is critical you take the time now to address vaccine hesitancy and consider options to boost your workforce vaccination rate.

Accordingly, in this interim period before the regulation is implemented, you should determine whether to mandate the vaccine earlier or take another route to increase your number of vaccinated employees. As you likely know the dynamics and demographics of your employees best, it may behoove some employers in the industry to initially confront vaccine hesitancy with less intrusive non-compulsory measures. The goal is to most delicately, yet persuasively motivate those who have been hesitant to get the vaccine to do so prior to blindsiding with the CMS’s mandate.

For example, in an industry built on reason and science, healthcare workers in particular may be influenced by an educational campaign disseminating real facts and reliable information concerning the vaccine’s safety and efficacy. In helping your employees sort through confusing and contradictory information in a non-condescending manner, you create a comfortable space wherein many may change their minds on the issue. Further, in emphasizing the nature of the hard, yet rewarding work of nursing home employees in caring for the nation’s most vulnerable and ill, successful outreach may include underscoring the particularly deadly risk the Delta variant poses to the immunocompromised, their own patients.

Another potential “carrot” – as opposed to “stick” – method to combat vaccine hesitancy is to offer incentives for full vaccination. The most common incentives employers have offered include cash, gifts, or paid time off. Our recent analysis of applicable EEOC guidance provides instructive commentary, so you do not run afoul of discrimination laws and wage and hour issues should you pursue this route. Regardless of the incentive offered, you remain obligated to engage in the interactive process to determine whether you can accommodate employees with legitimate medical or religious reasons for not participating in an incentive program. Accordingly, alternative ways to earn the incentive may be watching a workplace COVID-19 safety video or reviewing CDC literature on mitigating the spread of COVID-19 in highly susceptible environments.

In focusing your efforts now to dispel vaccine hesitancy if common in your workforce, at the very least, you will have already initiated measures to hopefully allow your workforce to digest the looming regulation by the time the CMS does formally institute the vaccine mandate. Again, through educational outreach, explaining the pending mandate as per the CMS regulatory schema to continue receiving federal funding, perhaps the unvaccinated may begin to understand the importance of vaccines in caring for the critically ill.

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## Conclusion

We'll monitor the situation and provide updates as developments occur, so make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Healthcare Industry Team](#).

## Related People

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