

SUPREME COURT REVIVES NATIONWIDE CMS VACCINATION MANDATE: A 4-STEP PRIORITY LIST FOR HEALTHCARE EMPLOYERS

Insights
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Immediately after blocking OSHA's "shot or test" ETS, the Supreme Court held yesterday that the CMS vaccine mandate can be enforced by a 5-to-4 margin. This effectively removes the [injunctions that had been blocking implementation of the CMS vaccine mandate for Medicare and Medicaid participants in about half of the country \(25 states\)](#). This Insight will review what the CMS mandate requires and provides a four-step priority list for covered facilities.

[Ed. Note: After it had initially granted a preliminary injunction against the mandate in Texas, a federal district court subsequently dismissed that separate lawsuit challenging the CMS mandate on January 19. This cleared the way for enforcement of the CMS rule across the rest of the country. As noted below, CMS has now issued compliance deadlines for covered Texas facilities.]

Is This the Final Word Regarding the CMS Mandate?

Technically, no. Yesterday's SCOTUS ruling was limited to deciding whether the rule can be enforced. The only issue before the Court was whether the injunction that was blocking enforcement of the rule should remain or be removed. The Court did not decide on the merits of the mandate – specifically whether CMS has the power to issue the rule.

As a practical matter, however, by determining the CMS Rule stands a good chance of surviving the challenges that resulted in it being blocked in 25 states, the Supreme Court

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seems to have all but eliminated the likelihood that the rule will be overturned. The states that challenged the authority of the Secretary of the Department of Health and Human Services to issue this rule might still continue their fight, but they now face a daunting challenge if they continue to argue that the rule is invalid.

Why Were There Different Standards State by State?

Prior to yesterday's SCOTUS decision, CMS had been blocked from enforcing its mandate in half of the states. After a previous nationwide stay by a district court in Louisiana was narrowed down to just those 25 states, CMS announced new deadlines for compliance for the jurisdictions that were no longer enjoined. It immediately began preparing for implementation and enforcement of this new rule, which was issued in early November.

Note: SCOTUS's decision lifted injunctions that had been issued in Missouri and Louisiana, covering 24 states. A separate injunction issued in Texas has not yet come before the Supreme Court. In view of SCOTUS decision, however, it seems very unlikely that the injunction in Texas will withstand a legal challenge. Texas facilities should therefore closely follow future developments and anticipate that the injunction in effect there is likely to be lifted soon. In the meantime, however, CMS has stated that "surveyors in Texas should not undertake any efforts to implement or enforce" the vaccination mandate.

What Does the SCOTUS Ruling Mean for Covered Facilities?

Unlike the OSHA ETS, the CMS Rule truly is a vaccination mandate. It does **not** allow employers to offer employees a weekly testing option, although it still provides for accommodations based upon medical reasons or sincerely held religious beliefs. The CMS mandate also applies to **all** staff, not just employees, in covered healthcare facilities. This includes licensed practitioners, students, trainees and volunteers. The mandate also applies to individuals who provide care, treatment, or other services for the facilities or their patients under contract or other arrangements.

[We explained the requirements of the mandate when it was first published.](#) The question now is when covered facilities must comply. CMS has confirmed SCOTUS' ruling "does not affect compliance timelines for providers in the District of



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Columbia, the territories, and the 25 states where the preliminary injunction was previously lifted." For providers in those states, the previously announced deadlines remain as follows:

- **By January 27, 2022**, CMS will expect covered facilities to have developed and implemented policies and procedures to ensure that all staff are vaccinated for COVID-19 *and that* 100% of staff have received at least one dose of the vaccination (or have a pending request for, or have been granted a qualifying exemption, or have been identified as being entitled to a temporary delay as recommended by the CDC).
- **By February 28, 2022**, those facilities must *also ensure* that 100% of staff have received the necessary doses to complete their vaccine series, or have been granted a qualifying exemption, or been identified as being entitled to a temporary delay as recommended by the CDC.

For the 24 states where injunctions were lifted by SCOTUS on January 14 (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), deadlines are now as follows:

- **By February 14, 2022**, covered facilities must have developed and implemented policies and procedures to ensure that all staff are vaccinated for COVID-19 *and ensure* that 100% of staff have received at least one dose of the vaccination (or have a pending request for, or have been granted a qualifying exemption, or have been identified as being entitled to a temporary delay as recommended by the CDC). **[Ed. Note: On January 20, CMS announced that the applicable deadline for covered facilities in Texas is February 22, 2022.]**
- **By March 15, 2022**, those facilities must *also ensure* that 100% of staff have received the necessary doses to complete their vaccine series, or have been granted a qualifying exemption, or been identified as being entitled to a temporary delay as recommended by the CDC. **[Ed. Note: On January 20, CMS announced that the applicable deadline for covered facilities in Texas is March 21, 2022.]**

CMS also stated that within 90 days of the issuance of its applicable updated guidance (dated December 28, 2021 or January 14 or 20, 2022, respectively), facilities that fail to maintain compliance may be subject to enforcement action.

For hospitals and certain other providers, CMS's sole enforcement remedy for non-compliance is termination of their ability to offer Medicare and Medicaid services. CMS has stated, however, that its primary goal is to bring healthcare facilities into compliance. According to the agency, termination would occur only after providing a facility with an opportunity to make corrections and come into compliance.

Before taking too much comfort in this language, employers should recognize that CMS has also **stated** that **"facility staff vaccinations rates under 100% constitute non-compliance under the rule."**

What Should Covered Facilities Do Dow?

Here is an immediate four-step priority list now that the CMS rule has been upheld:

- 1. Confirm Coverage** – Simply receiving Medicare or Medicaid funds does not, by itself, mean that a facility is covered by this rule, which applies only to certified providers. Certification involves an application and surveying process, adherence to conditions of participation, and being subject to periodic follow-up surveys. Thus, the first step is to determine whether this mandate applies to you. Check with your Fisher Phillips attorney for assistance.
- 2. Track Vaccination Status and Issue a Policy by January 27 (or February 14)** – If covered, the facility should determine and continue to track the vaccination status of its staff in order to comply with requirements described above. If you haven't already done so, covered facilities should also develop *policies* describing how you have implemented applicable tracking, compliance, recordkeeping, documentation, and training requirements. Additionally, you should ensure that you have implemented and promulgated procedures to ensure confidential consideration and responses to requests for accommodation. This must include additional COVID-19 precautions that will be applicable to individuals who are granted accommodations. And finally, you should prepare

for staff resistance and complaints related to these requirements. You should also be prepared for CMS inspections, which will likely begin in the coming weeks or months.

3. **Evaluate State Law Concerns** – Several states have passed laws or orders conflicting with the CMS Rule, including Florida, Texas, Tennessee, and Montana. Ordinarily, where there is a conflict between state and federal law, federal law will prevail, at least in part, but we do not intend to oversimplify the preemption doctrine. The takeaway is that covered facilities should at least prepare for further legal challenges concerning the impact of state law on the CMS Rule. As described above, the ramifications of not following the CMS Rule can be tremendous.
4. **Prepare for Accommodation Requests** – As employers who have already mandated vaccines are well aware, some employees will make requests for accommodations based on medical or religious reasons. Prompt and appropriate processing of those requests is crucial to complying with both the CMS Rule and other federal law. The importance of engaging with employees in the interactive process and documenting those efforts should not be minimized. Documentation of this *process* may be of equal importance to the decision that an employer ultimately makes. This process can take time and should be factored in to planning for the upcoming compliance deadlines.

Conclusion

As we have done throughout the pandemic, we will monitor these developments and provide updates as events warrant. 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 Group.