

CMS Vaccine Rule Stands: Providers Caught Between Federal Mandate and Florida Restrictions

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Late last week, the U.S. Supreme Court lifted the stay of the healthcare worker vaccination mandate (CMS Rule) in 24 states where the CMS Rule had been stayed. The CMS Rule, issued by the Centers for Medicare & Medicaid Services (CMS) on November 5, 2021, is back in effect nationwide (except for Texas, where it remains stayed), while ongoing litigation over the validity of the CMS will go back to the Fifth and Eighth Circuit Courts of Appeals.

Notably, the Supreme Court's ruling did not affect healthcare employers in Florida and 24 other states where the CMS Rule had not been stayed. Florida's healthcare employers covered by the CMS Rule should continue preparing to meet the January 27, 2022 deadline for Phase 1 and the February 28, 2022 deadline for Phase 2.

What does the CMS Rule Require?

The CMS Rule requires most Medicare- and Medicaid-certified providers to ensure 100% of their staff is fully vaccinated for COVID-19, regardless of clinical responsibility or patient contact. This requirement includes providers ranging from hospitals to hospices and rural health clinics to long term care facilities, such as skilled nursing and assisted living facilities.

The CMS Rule includes two phases of implementation according to CMS guidance.

- **Phase 1**

By January 27, 2022, (i) covered providers must have developed and implemented policies and procedures to ensure all staff are vaccinated; (ii) all staff must have received at least one dose of the COVID-19 vaccine; and (iii) unvaccinated staff must have requested or already received a qualifying exemption to the vaccination requirements or qualify as someone identified as having a temporary delay to vaccination as recommended by the CDC due to clinical precautions and considerations.

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If a provider has achieved 80% compliance with the vaccine requirement in Phase I and has a plan to achieve 100% vaccination status (aside from exempt or CDC-delayed staff) within 60 days after the deadline, CMS will not take enforcement action against such providers.

- **Phase 2**

By February 28, 2022, in addition to the previously required development and implementation of policies and procedures to ensure all staff are vaccinated, (i) all staff of covered providers must have received all necessary doses of the vaccine (e.g., one dose of a single dose vaccine or all doses of a multiple-dose vaccine series), although they do not have to be “fully vaccinated” by the deadline, meaning they do not have to have received all necessary doses 14 days before the deadline; and (ii) unvaccinated staff must have been granted a qualifying exemption or qualify as someone identified as having a temporary delay to vaccination as recommended by the CDC due to clinical precautions and considerations.

If a provider has achieved 90% vaccination status by the Phase 2 deadline and has a plan to achieve 100% vaccination status (aside from exempt or CDC-delayed staff) within 30 days after the deadline, CMS will not take enforcement action such providers.

The CMS Rule also requires covered employers to implement processes for various tracking and recordkeeping requirements.

Are There Exemptions to the CMS Rule?

There is no testing exemption like there was under the now-stayed OSHA “vaccinate-or-test” ETS for large employers, but employers covered by the CMS Rule must comply with applicable federal civil rights laws.

Thus, covered employers must consider and offer reasonable accommodations for employees who request exemption from vaccination because of a disability, medical condition, or sincerely held religious belief, practice, or observance.

What is the Timeline for Compliance?

CMS has confirmed the January 27th (Phase I) and February 28th (Phase 2) deadlines remain in place for Florida and other states where the CMS Rule had not been stayed.

CMS has not issued any updated compliance dates for the 24 states where the CMS Rule had been stayed until the Supreme Court’s decision last week. After the stay was lifted, CMS issued a press release stating that providers in the 24 states where the stay of the CMS Rule was lifted, “*will now need to establish plans and procedures to ensure their staff are vaccinated and to have their employees receive at least the first dose of a COVID-19 vaccine.*” (emphasis added).

Failure to Comply

Failure to comply with the CMS Rule may result in CMS taking one or more actions against providers including, for example, (i) implementing a plan of action, (ii) imposing civil monetary penalties, (iii) denying payment, or (iv) terminating participation in Medicare and Medicaid.

The sole enforcement remedy for non-compliance for hospitals and certain other acute and continuing care providers, however, is termination from participation in Medicare and Medicaid. Historically, CMS will provide non-compliant providers an opportunity to make corrections and come into compliance prior to termination.

How Does the CMS Rule Impact Providers Operating in Florida?

CMS takes the position that any state law contrary to the CMS Rule is preempted by the CMS Rule. Florida's Attorney General acknowledges this possibility in the FAQs on the AG's website.

In response to the question, "What if my employer is mandated by federal law to impose a vaccine mandate?" the Attorney General responds that, "Florida is challenging all three federal vaccine mandates [including the CMS Rule]. Depending on how the court's [sic] rule, there may be effects on Section 381.00317 and whether your employer can be fined."

Therefore, at this time, providers in Florida are caught between the CMS Rule, which only allows exemptions for medical or religious reasons, and Section 318.00317, *Florida Statutes*, which requires any employer operating in Florida and mandating vaccination (which all providers must under the CMS Rule) to accept any of the following five different exemptions to the employer's "vaccination mandate:"

1. Medical reasons (including, pregnancy or anticipated pregnancy);
2. Religious reasons;
3. COVID-19 immunity;
4. Periodic testing at the employer's expense; or
5. Employee use of employer-provided personal protective equipment (PPE).

As a result of the apparent conflict between the CMS Rule and Florida's statute, providers operating in Florida could find themselves subject to the CMS Rule but faced with an employee claiming an exemption to the CMS Rule's vaccine mandate based on COVID-19 immunity, by agreeing to periodic testing, or by agreeing to wear PPE – all valid reasons for an exemption under Florida law but not a qualifying exemption under the CMS Rule.

To the extent an employee seeks and receives an exemption for a medical or religious reason, however, providers will be in compliance with both the CMS Rule and Florida law, although the Florida law appears to restrict an employer's ability under federal law to conduct an otherwise permissible inquiry into the nature of the claimed exemption and to request supporting documentation beyond the state-supplied forms, which could, in some cases, render a provider out of compliance with the CMS Rule in respect of a medical exemption.

As a result, it would be prudent for providers subject to the CMS Rule to consult with their employment counsel to fully grasp the risks presented by the potentially competing regulatory programs established by the CMS Rule and Florida law. As illustrated above, potentials for conflict exist, and providers should be aware of the same when implementing and enforcing their vaccination policies and procedures, and the potential consequence of their implementation strategy.

Lowndes will continue to provide updates as legal developments occur and remains available to answer questions in the meantime. Please contact any Lowndes Labor and Employment Law attorney to discuss and strategize about the approach that your business will follow as you navigate this federal regulatory and state statutory maze.