



Vaccine mandate stays; check providers' status and respond as needed

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Five months after the Supreme Court cleared the way for the federal health care employee vaccination mandate, chances for a reprieve are dwindling. To avoid possible penalties, make sure your eligible providers are either vaccinated or have undergone the proper process for exemption; also, be sure to keep your records in order.

After months of legal struggle, the Supreme Court cleared the health care worker vaccine mandate on Jan. 7, 2022 ([PBN 1/17/22](#)). Though physician practices are not among the facilities cited in the mandate, members of practice clinical staff may be required to immunize when they work in those facilities. In the guidance for hospitals, for example, CMS specifies that the requirement applies to "individuals who provide care, treatment or other services for the hospital and/or its patients, under contract or by other arrangement."

All deadlines for the full COVID-19 vaccination have passed, with Texas' March 21, 2022, deadline being the last. CMS considers employees to be fully vaccinated if they have had two Moderna or Pfizer shots, or one Johnson & Johnson shot, or if they have received "a [COVID] vaccine listed by the World Health Organization (WHO) for emergency use that is not approved or authorized by the FDA or... received a [COVID] vaccine during their participation in a clinical trial." (CMS does not currently require health care personnel to get boosters.)

CMS announced it would send surveyors around to check on compliance, although it remains unclear whether inspections have begun. Should non-compliance be found, the agency reserves the right to terminate some institutions from Medicare; however, CMS adds that its "primary goal is to bring health care facilities into compliance."

Chances of reversal low

Some stakeholders still hold out hope that the mandate will be reversed. The Attorneys General of 10 states have a petition before the Supreme Court asking for reversal on several grounds, including that CMS did not properly create its rule implementing the mandate and that the health care worker shortage in many places, especially in rural areas, has been exacerbated by the mandate, making it counterproductive.

Experts find these arguments unlikely to succeed, pointing out that some states have their own health care worker vaccination mandates that are even more stringent than CMS' but still have passed legal muster. Peter J. Glennon, founder of the Glennon Law Firm in Rochester, N.Y., points out that the New York state vaccine mandate, which does not even allow for religious exemptions, has survived a legal challenge via *Dr. A, et al., applicants v. Hochul* in the Supreme Court.

Also, vaccines among health care workers are on the rise, softening the impact of a mandate. A survey by the Kaiser Family Foundation, for example, finds that between the announcement of the CMS mandate in August 2021 and March 27, 2022, nursing facility staff vaccination rates increased nationally from 63% to 88%.

Keep tabs before CMS does

Aaron W. Tandy, partner and head of the employment law section at Pathman Schermer Tandy LLP in Miami, says that while the employees who resist inoculation have been the focus of mandate coverage, it's facilities that are covered by it — and they will be held responsible for adherence.

Recordkeeping is imperative, especially with the threat of CMS surveys. Mark F. Kluger, labor and employment lawyer and co-founding partner at Kluger Healey in Fairfield, N.J., says that may be easy in larger facilities that "are really used to vaccine recordkeeping from flu and MMR vaccine requirements" mandated by either state law or their own institutional standards; they can just add another field to those documents.

But Glennon warns that recordkeeping responsibilities must be clearly assigned — for example, "who's responsible to create the record, who's responsible to create the system, who's responsible to manage the system [and] who's responsible actually to gather the data." If assignments are unclear, the requirements might be mishandled.

Lisa Gingeleskie, Esq., a partner with Lindabury, McCormick, Estabrook & Cooper, P.C. in Westfield, N.J., suggests you start by naming specific proofs of compliance you will require, such as "record of immunization from a health care provider

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or pharmacy, a copy of the COVID-19 Vaccination Record Card [or] a copy of medical records documenting the vaccination," and maintain copies of those.

Proper process for non-vaccinators

Requests for exemption and accommodation must be submitted in writing "with sufficient details so that a decision can be issued," says Dominique Camacho Moran, a partner in the labor and employment practice of Farrell Fritz in New York City. "To minimize the risk of inconsistent decisions, practices may want to centralize the evaluation of exemption requests by designating a single individual or small team to consider the request and decide whether an exemption is warranted."

Moran advises creating a process for employees to request an exemption or temporary delay on religious or medical grounds based on applicable federal non-discrimination and civil rights laws and other protections, such as Title VII and the Americans with Disabilities Act (ADA).

"It's incumbent on the employees themselves to ask for that exemption," says Jacqueline Voronov, a labor and employment lawyer with Hall Booth Smith, P.C. in Saddle Brook, N.J. "The employer doesn't need to go chasing employees to confirm whether they want to seek an exemption. If an employee hasn't made a request for an exemption, the employer is within its rights legally to terminate their employment based on the employee's failure to abide by the mandate."

Nonetheless, you should notify your employees of the option and make sure your process is airtight, Voronov says. "The number one thing that usually comes back to bite employers is when they don't have written policies in place and they make things up as they go along," she says. "If rules are applied arbitrarily, an employee might say, you're only making me do this, you're not making somebody else in another protected class do it, so you're targeting me because of my protected characteristic. And that's when discrimination claims arise."

Voronov says the accommodation process under the mandate is similar to a typical ADA process ([PBN 6/8/20](#)). When an employee requests a religious accommodation, for example, the employer "has to assess whether the employee's asserted belief is a sincerely held religious belief or simply a personal choice; the latter would disqualify the employee from an exemption."

You would engage in an "interactive process" with the employee, which should be familiar to human resources professionals who have dealt with requested accommodations before. Finally, Voronov says, the employer must determine whether there is an accommodation that can be made without imposing an undue hardship on the facility.

If an employer has reason to doubt the belief, observance or practice is genuine, they can seek additional supporting information, but "they can't simply presume somebody is not a practitioner simply because they don't believe them," Tandy says.

If the accommodation is sought on medical grounds, "employers can ask for medical records and other information to identify the precise limitations resulting from the disability and the potential reasonable accommodation that could overcome the limitations," Tandy adds. If this passes, the employee still has to clear the undue-hardship barrier. Note: Employers are also not required to alter the essential functions of the job to provide an accommodation under ADA, Tandy says.

Can they sue?

This doesn't mean an employee dismissed for failure to comply won't come after you. A lawyer in Minnesota, for example, has filed what he says is the first in an intended series of lawsuits on behalf of workers fired by the Mayo Clinic, which terminated employees because they failed to observe the Clinic's own vaccination requirements.

Among the claims in the first complaint by ex-employee Shelley Kiel: that the Clinic told employees "it is anticipated that a small number of staff will have qualifying religious exemption"; that the basis for medical exemptions was too narrow; that the medical exemptions they did allow were "conditioned upon submission to invasive, supervised weekly testing"; and that "there was no case-by-case analysis or individualized interactive process to discuss Plaintiff Kiel's exemption request or possible accommodation."

But if you follow your protocol in good faith, you stand a good chance of getting support from the courts if a denied accommodation leads to a challenge, according to Kluger. "There are a couple of cases from Boston hospitals out of the First Circuit that have upheld the undue-hardship defense for denying exemption requests under Title VII," he says. "And those cases upheld the hospitals' determinations that granting religious exemptions was an undue hardship."

"I've been advising clients, and the First Circuit really laid out, that there's a difference between working in health care and working in other places," Kluger says, "and in the former case the public needs to have a sense of confidence that their health care workers are vaccinated — and allowing unvaccinated workers in health care tends to reduce public confidence that the health care system is safe."

Resources

- CMS, "External FAQ: CMS Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule," updated Jan. 20, 2022: www.cms.gov/files/document/cms-omnibus-covid-19-health-care-staff-vaccination-requirements-2021.pdf
- CMS, "Guidance for the Interim Final Rule -- Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination," revised April 5, 2022: www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfo/policy-and-memos-states-and/interim-final-rule-medicare-and-medicaid-programs-omnibus-covid-19-health-care

- CMS, "Guidance for the Interim Final Rule -- Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination," revised April 5, 2022: www.cms.gov/files/document/qso-22-07-all-revised.pdf
- Supreme Court decision, Dr. A, et al., applicants v. Hochul: www.supremecourt.gov/opinions/21pdf/21a145_gfbi.pdf
- "Nursing Facility Staff Vaccinations, Boosters, and Shortages After Vaccination Deadlines Passed," Kaiser Family Foundation, May 16, 2022: www.kff.org/medicaid/issue-brief/nursing-facility-staff-vaccinations-boosters-and-shortages-after-vaccination-deadlines-passed



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