

THE SUSPENSION OF ENFORCEMENT OF THE NEW CMS VACCINE MANDATE AND WHAT THIS MEANS FOR CMS COVERED FACILITIES

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The CMS Final Rule

On December 2, the Centers for Medicare and Medicaid Services (CMS) suspended enforcement of its COVID-19 vaccine mandate for covered facilities. To understand how we got here, some brief background is important.

On November 4, 2021, CMS released its Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule (CMS Final Rule). The rule was a COVID-19 vaccination mandate that applied to Medicare and Medicaid-certified providers and suppliers and required these facilities to mandate full vaccination of their eligible staff by Jan. 4, 2022.

Several states challenged the enforceability of the rule, arguing that President Biden's enactment of the CMS Final Rule violates federal procedure and the U.S. Constitution. In November, multiple federal courts granted injunctions that blocked enforcement of the CMS Final Rule. Most recently, on November 30, a federal court in Louisiana blocked enforcement of the CMS Final Rule nationwide, citing a "need for uniformity" in its ruling.

CMS Suspends Enforcement of the CMS Final Rule

CMS suspended its enforcement of the COVID-19 vaccine mandate on December 2, saying simply, "[T]here are court-ordered injunctions in place prohibiting enforcement." CMS asserted that it remains, "[c]onfident in its authority to protect the health and safety of patients in facilities certified by the Medicare and Medicaid programs."

What Does this Mean for Providers and Their Staff?

As the litigation proceeds through appellate courts, covered CMS facilities are left to speculate what this could mean for providers, their staff, visitors and third party vendors in the future. There are presently no compliance obligations for Medicare and Medicaid-certified providers under the CMS Final Rule. However, companies still have the right to mandate that their employees be vaccinated against COVID-19 as long as they provide exemptions for persons with religious accommodations and/or applicable disabilities.

What Does this Mean for Visitors to Long-Term Care Facilities?

Regardless of the enforceability of the CMS Final Rule, a long-term care facility may not require a resident's visitor to show proof of a negative COVID-19 test or vaccination prior to entering the facility. Why? CMS provides that a resident has a right to make choices about his or her life while in a long-term care facility, which includes the individuals who the resident allows to visit. Therefore, if a resident is aware of the risks associated with visitation from an unvaccinated visitor, the visit may proceed so long as it occurs in a manner that does not place other residents at risk. A resident must be allowed to receive visitors as he or she chooses.

So how can you ensure the safety of a long-term care facility when a resident requests a visit with an unvaccinated guest? To ensure that a visit from an unvaccinated visitor does not place the resident or other residents at risk, the facility may screen visitors to:

1. confirm the visitor has not tested positive for COVID-19 within 72 hours of coming to the facility (without requiring proof of a negative test);
2. is not showing symptoms of COVID-19; and
3. does not meet the criteria for quarantine according to CDC guidelines, *i.e.*, has not recently come in close contact with someone who has COVID-19.

Further, once admitted to the facility, the visitor should be required to wear a face covering or mask and maintain social distancing in all public areas outside the resident's room. Visitors should wear face coverings when around other residents regardless of vaccination status.

What Does This Mean for Third-Party Vendors?

Regardless of the enforceability of the CMS Final Rule, the rule does not require facilities to ensure vaccination of third party vendors who infrequently provide non-health care services or services that are performed exclusively offsite. With that said, facilities must ensure third party vendors providing services near resident care does not place any resident at risk. Accordingly, if a facility does not require vaccination of third-party vendors, it should, at a minimum, follow the screening guidelines listed above for unvaccinated visitors.

What Now?

Guidance from the various government agencies and courts grappling with COVID-19 policy and vaccination mandates is amended, updated or suspended on a regular basis. As a result, this guidance changes on a regular basis. Businesses should continue to monitor the latest developments on COVID-19 compliance to ensure they are abreast of current compliance obligations and risks. We will keep you updated as these changes take place.

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Practice Area Contact

Alana K. Ackels

Katie Beaird

Thomas L. Case

Sydney A. Shimkus

John D. Smart

Jay M. Wallace