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Insights

CMS Issues Supplemental Guidance on Interim Final Rule on Vaccination for States Impacted by Recent Supreme Court Ruling

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On January 14, 2022 the U.S. Centers for Medicare and Medicaid Services ("CMS") issued **supplemental guidance** (the "Supplemental Guidance") for implementation of its Interim Final Rule – Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination ("CMS Rule").

Scope of Guidance

The Supplemental Guidance applies only to those states directly impacted by the U.S. Supreme Court's recent decision in ***Biden v. Missouri:*** 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. The CMS Rule remains under injunction in Texas. All other states remain subject to the guidance and timeframes previously issued on December 28, 2021. We released a client alert which discussed the recent Supreme Court decision on the CMS Rule, available **here**.

Compliance Timeline

The Supplemental Guidance applies a three-phased approach to implementation, with compliance benchmarks as follows:

February 14, 2022:
Covered entities must have policies and procedures developed and implemented to ensure all facility staff are vaccinated against COVID-19 and 100% of staff have either one dose of a COVID-19 vaccine, or have a pending request for, or have a pending exemption request or temporary delay as recommended by the Centers for Disease Control ("CDC"). Covered entities demonstrating that 80% or more of all staff have received at least one dose of the COVID-19 vaccine and that have a plan to achieve a 100% staff vaccination rate within 60 days may receive notice of non-compliance but would not be subject to further enforcement action.

March 15, 2022:
Covered entities must have policies and procedures developed and implemented to ensure all facility staff are vaccinated for COVID-19 and that 100% of staff have received the necessary doses to complete the COVID-19 vaccine series, or have been granted a qualifying exemption, or identified as having a temporary delay as recommended by the CDC. If less than 100% of all staff are vaccinated, exempted, or recommended for a temporary delay, the covered entity is non-compliant with the CMS Rule, and the covered entity will receive notice of non-compliance. Facilities demonstrating that 90%

or more of all staff are vaccinated, exempted, or recommended for a temporary delay, and that the facility has a plan to achieve a 100% staff vaccination rate within 30 days, the facility will not be subject to additional enforcement action.

April 15, 2022:
Covered entities must be in 100% compliance with all aspects of the CMS Rule, and failure to meet the compliance standard may result in enforcement action.

Next Steps

With the first compliance date only weeks away, facilities covered by this decision will need to establish or update plans and procedures to ensure their staff are vaccinated and to have covered staff receive at least the first dose of a COVID-19 vaccine by February 14, 2022. The Supplemental Guidance includes provider-specific guidance (e.g., hospitals, long-term care facilities, ambulatory surgery centers), so health care entities should review both the general summary and applicable provider-specific provisions. Covered entities should also consider taking the following steps when working toward timely compliance with the CMS Rule:

- Determine whether the CMS Rule applies to your organization. The CMS Rule applies to covered staff at specific health care facilities that are certified Medicare and Medicaid providers. Receiving Medicare or Medicaid funds, by itself, does not necessarily mean that a facility is subject to the CMS Rule.
- Understand which staff are covered and whether any exemptions apply. The CMS Rule casts a broad net and requires vaccination for "all facility staff, regardless of clinical responsibility or patient or resident contact[.]" This includes employees, licensed practitioners, students, trainees, volunteers, and other individuals who provide care or other services for the facility and/or its patients, including contractors. There are limited exceptions for staff who serve in certain, isolated roles (such as providing telehealth/telemedicine or other services exclusively outside of the facility with no staff/patient contact) and for staff who have been approved for a religious or medical exemption or granted a temporary delay in vaccination in accordance with CDC guidelines.
- Develop policies and procedures for tracking staff vaccination status and issue such policies by March 14. Such policies should include procedures for recordkeeping, procedures for consideration and responses to requests for accommodation to the vaccination requirement, and procedures for precautions for safety of all staff and staff who are exempted from the vaccination requirement, among other practices. Robust policies and procedures can help ensure the covered entity is adequately prepared to be in timely compliance with the CMS Rule and can demonstrate progress toward compliance in the event of a CMS compliance inspection.
- Facilities should be prepared to promptly process accommodation and vaccination delay requests, and all efforts to accommodate such requests should be thoroughly documented. Facilities may wish to consider policies and procedures for staff who are resistant to the CMS Rule and vaccination requirements, as well.
- Communicate clearly and consistently with facility staff about the next steps for compliance with the CMS Rule, including upcoming deadlines, new policies and procedures, and where staff members can direct questions and obtain additional information about the CMS Rule compliance plans and procedures.
- Continue to monitor all COVID-19 and CMS Rule related guidance for updates that may affect your organization.

Our attorneys will continue to monitor the legal and regulatory landscape surrounding the CMS Rule and other COVID-19 related standards. If you have questions about the CMS Rule or compliance obligations for your organization, please contact **Virginia A. Talley**, **Shelley M. Jackson**, or another member of our **Employment Law Practice**.

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