

11.10.2021

CMS Emergency Regulation Requiring COVID-19 Vaccination

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Last week, the Centers for Medicare and Medicaid Services (CMS) issued an emergency regulation regarding mandatory vaccination for staff at certain health care providers. The regulation covers 21 types of providers including, but not limited to hospitals, hospice, certain long-term care facilities, psychiatric residential treatment facilities, home health agencies, certain clinics, and rehab agencies. However, the regulation does not directly apply to most physician practices. Moreover, the regulation has a two phase implementation process.

For phase one, the specified providers must require that all staff have received the first dose of a vaccination series or have requested or been granted an exemption by December 5, 2021. Specifically, the regulation affords individuals exemptions based on those already provided for in law, which would include exemptions for medical and religious beliefs or practices. Furthermore, the provider must have certain policies and procedures developed and implemented by the phase one deadline.

For phase two, the provider must have had all non-exempt staff complete the primary series (not including “booster” vaccinations) of the vaccine and have formally exempted unvaccinated staff by January 4, 2022.

Specified providers must understand the nuances of the regulation. For example, “staff” for the purposes of the rule includes employees, licensed practitioners (including medical staff members), students, trainees, volunteers, and contractors/vendors who provide care treatment or other services for the provider or patients. Additionally, this is not limited to onsite vendors or contractors. Moreover, this can include administrative staff, facility leadership, board members, housekeeping, and food services. Furthermore, providers will need to assess the frequency of presence, services provided, and proximity to patients and staff in determining to what degree individuals will be implicated by the regulation.

Likewise, providers need to recognize that the required policy and procedure must include the following components: (a) a process for all specified staff to receive the first vaccination prior to providing care or services; (b) a procedure for full vaccination (or exemption for individuals) prior to phase two deadline; (c) a process for implementation of additional precautions intended to mitigate transmission; and (d) a procedure for satisfying the documentation requirements. Moreover, it should be noted that the documentation requirements include recording the exemption process for individual staff.

Interestingly, while this regulation does not apply directly to most physician offices, physicians, and other clinicians with medical staff privileges at entities that are subject to the regulation, will be required by those facilities/entities to be vaccinated or granted an exemption.

Finally, while this regulation is subject to litigation, until the regulation is stayed by action of a court with jurisdiction, survey agencies will be conducting surveys, which will undoubtedly include these conditions of participation for the specified providers, and those specified providers will be subject to agency actions for failure to comply. Given the uncertainty of the intermediate and final rulings and the timing of any court action, it is advisable for the specified providers to begin planning and implementation.

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