

Report on Medicare Compliance Volume 31, Number 2. January 17, 2022 CMS Vaccine Mandate Is Universal With Supreme Court Ruling; Surveys Are Provider Specific

By Nina Youngstrom

The Supreme Court has cleared the way for CMS to enforce its COVID-19 vaccine mandate nationally at hospitals and other facilities regulated by the Medicare conditions of participation, with state surveyors using guidance that has been at their disposal since Dec. 28. In a Jan. 13 decision, the high court ruled that HHS Secretary Xavier Becerra “did not exceed his statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule must ensure that their employees be vaccinated against COVID-19.”^[1]

Although the effective date of CMS’s Omnibus COVID-19 Health Care Staff Vaccination regulation^[2] has been delayed a bit by a legal standoff with 25 states, facilities now must ensure their employees and others have the first dose of the vaccine by Jan. 27 and the second dose by Feb. 28, unless they have a pending or approved medical or religious exemption or medically necessary delay in the vaccination.^[3] State surveyors are standing by with facility-specific guidance to evaluate compliance with the mandate.

“It’s in effect for the time being,” said Richelle Marting, an attorney in Olathe, Kansas. The decision lifts the preliminary injunctions that have been holding up the vaccine mandate in states that sued CMS. Marting expects providers in those states to have a difficult time rolling out the vaccine requirement by the first deadline and could face enforcement actions. But there’s talk that CMS may update guidance and give facilities in the states where the injunction was lifted by the Supreme Court decision more time to comply.

The question before the Supreme Court wasn’t whether the vaccine mandate was legal, said attorney Sandra DiVarco, with McDermott Will & Emery in Chicago. The question was whether the injunction should be stayed, and that question is decided based on whether the “underlying case has a likelihood of succeeding on the merits,” she explained. “That means the mandate is now enforceable in the entire country.” But the Supreme Court decision may not be the last word. “States could continue to challenge the mandate,” Marting said. In fact, it’s likely the 25 states will return to court to try to stop the vaccine mandate based on the merits of the case, DiVarco said. “This back and forth continues to have health care facilities and their employees on edge with uncertainty, particularly in areas with low vaccination rates,” Marting remarked.

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