

CMS Releases its Emergency Regulation Mandating Vaccination

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The Centers for Medicare & Medicaid Services (CMS) has released its [emergency regulation](#) which requires mandatory vaccinations for all workers of covered health care institutions. The regulation was released as part of President Joe Biden's September announcement that all U.S. health care workers must be vaccinated. For covered health care facilities, this regulation supersedes all other laws if contradictory, including state and OSHA regulations.

What health care facilities does it cover?

The regulation applies only to Medicare and Medicaid-certified provider and supplier types that are regulated by the CMS under the Medicare health and safety standards known as Conditions of Participation (CoPs), Conditions for Coverage (CfCs) or Requirements for Participation. [In a news release, CMS listed all of the covered facilities.](#)

What employees are covered?

The emergency regulation covers all employees of a covered facility, regardless of whether their positions are clinical or nonclinical. This covers students, trainees, volunteers and other facility employees. It applies to staff who may work off-site. However, it does not apply to employees who work 100% remotely and who do not have a single, direct contact with patients or staff.

What does the emergency regulation require?

- By December 5, 2021, covered health care facilities must require all employees to have received at least one dose of a COVID-19 vaccine.
- By January 4, 2022, all covered employees must be fully vaccinated.
- Covered health care facilities must also develop a process to review exemptions for a recognized medical contraindication or sincerely held religious beliefs, observances, or practices.

Does the emergency regulation provide for a testing alternative?

No. There is no weekly testing alternative. Employees must be vaccinated by the deadlines or be eligible for a medical or religious exemption, as required by Federal law. However, Long term care facilities are still expected to test facility residents.

How will it be enforced?

CMS will monitor covered health care facilities through a survey and enforcement process with state survey

agencies. It expects state survey agencies to conduct onsite compliance reviews. An onsite surveyor will monitor compliance by reviewing policies, procedures, and vaccination lists of staff. There are three enforcement mechanisms:

- First, CMS wants to work with its non-compliant facilities
- Second, if that non-compliant facility does not take steps in furtherance of vaccination, CMS would look at denying payments individually
- Third, as a last resort, CMS could terminate the facility from Medicare and Medicaid programs. However, CMS has said "termination would really only occur if, after providing a facility with an opportunity to make corrections and come into compliance, they chose not to do so."

Must covered employers follow the CMS rule or the recent OSHA ETS, or both?

If facilities participate in and are certified under the Medicare and Medicaid programs and are regulated by the CMS health and safety standards known as the Conditions of Participation (CoPs), Conditions for Coverage (CfCs), and Requirements for Participation, then they must abide by the CMS requirements.

If facilities are not certified under the Medicare and Medicaid programs, then the [Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors](#) or Occupation Health and Safety Commission's COVID-19 Vaccination and Emergency Temporary Standard would govern, if applicable.

Hospitals and long-term care facilities are expected to continue complying with their facility-specific data reporting requirements set forth in the emergency regulations issued by CMS in May 2020, August 2020, and May 2021, respectively.

The CMS regulation does not include mandatory COVID testing for unvaccinated staff members, but it states that individual facilities can mandate that procedure if they choose. The regulation's FAQ sheet directs covered health care facilities to look to the American Disabilities Act and Title VII of the Civil Rights Act of 1964 to see that individuals who cannot be vaccinated because of medical conditions or sincerely held religious beliefs, practice, or observance may be entitled to an accommodation.

If you have any questions regarding the emergency regulation, please contact [any member of the Barley Snyder Employment Practice Group](#).

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