CLIENT ALERTS & INSIGHTS

How Will CMS' Interim Final Rule Implementing COVID-19 Vaccine Mandate impact Medicare and Medicaid Providers and Suppliers?

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On November 5, 2021, the Centers for Medicare and Medicaid Services (CMS) released an interim final rule that will require all healthcare workers of certain Medicare and Medicaid certified providers and suppliers (as listed below) to be vaccinated against COVID-19. The interim final rule requires the affected providers and suppliers listed below (the "Impacted Facilities") to establish and implement policies and procedures to ensure that all staff members receive their COVID-19 vaccination doses beginning on December 5, 2021 and any required second doses by January 4, 2022, subject to applicable exemptions.

The interim final rule's COVID-19 vaccine mandate directly applies to Impacted Facilities, which are regulated under CMS' Conditions of Participation (CoPs), Conditions for Coverage (CfCs), or Requirements (as applicable). The CMS' COVID-19 vaccine mandate may, however, have broader implications for other Medicare and Medicaid providers and suppliers that interface with Impacted Facilities because the interim final rule's COVID-19 vaccination mandate applies to all staff, including individuals who provide services under contracts or other arrangements.

As an interim final rule, interested parties have until January 4, 2022 to submit comments to CMS. However, the interim final rule will be enforced while CMS considers comments from the public.

Impacted Facilities

The interim final rule directly applies to eligible staff members of the following Medicare and Medicaid certified providers and suppliers:

- Ambulatory Surgical Centers (ASCs)
- Hospices
- Psychiatric residential treatment facilities (PRTFs)
- Programs of All-Inclusive Care for the Elderly (PACE)
- Hospitals (acute care hospitals, psychiatric hospitals, hospital swing beds, long term care hospitals, children's hospitals, transplant centers, cancer hospitals, and rehabilitation hospitals/inpatient rehabilitation facilities)
- Long Term Care (LTC) Facilities, including Skilled Nursing Facilities (SNFs) and Nursing Facilities (NFs), generally referred to as nursing homes

- Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs-IID)
- Home Health Agencies (HHAs)
- Comprehensive Outpatient Rehabilitation Facilities (CORFs)
- Critical Access Hospitals (CAHs)
- Clinics, rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services
- Community Mental Health Centers (CMHCs)
- Home Infusion Therapy (HIT) suppliers
- Rural Health Clinics (RHCs)/Federally Qualified Health Centers (FQHCs)
- End-Stage Renal Disease (ESRD) Facilities

Impacted Staff Members

The CMS interim final rule will impact staff members of Impacted Facilities, including:

- facility employees
- licensed practitioners
- students, trainees, and volunteers, and
- other individuals who provide care, treatment, or other services for the facility and/or its patients, under contract or other arrangement.

CMS requires Impacted Facilities to uniformly apply COVID-19 vaccination policies and procedures to all staff members listed above, regardless of clinical responsibility or patient contact, ***except*** for staff members who work remotely 100% of the time via telework. Other staff members that ***primarily*** provide services remotely via telework will be subject to the vaccine mandate.

Timeframe for Compliance

Impacted Facilities must adopt policies and procedures to implement the interim final rule to ensure that:

- all staff has received the first dose of a two-dose COVID-19 vaccine or a one-dose COVID-19 vaccine by December 5, 2021, and
- all staff has received the second dose of a two-dose COVID-19 vaccine by January 4, 2022.

Scope of Impacted Medicaid Providers and Suppliers

The interim final rule only directly applies to Medicare or Medicaid providers and suppliers that are Impacted Facilities. However, health care providers that are not Impacted Facilities may be affected to the extent they provide services at or to an Impacted Facility under a contractor or other arrangement.

Impacted Facilities must uniformly apply their COVID-19 vaccination policies to all staff members, including staff members of providers and suppliers that are not Impacted Facilities who work with Impacted Facilities and their patients or residents.

Accordingly, providers and suppliers that frequently work with or at Impacted Facilities - e.g., physician groups, durable medical equipment, prosthetics, orthotics, & supplies (DMEPOS) suppliers, institutional pharmacies - should anticipate COVID-19 vaccination mandates from their Impacted Facility partners.

Exemptions

Certain staff members may be eligible for exemption from the COVID-19 vaccination requirements under the interim final rule. The grounds for such exemptions generally include certain allergies, recognized medical conditions, or religious belief, observances, or practices. Impacted Facilities will ultimately be responsible for coordinating medical and religious exemption requests received from staff members and ensuring that such exemptions are only granted for legally required reasons.

Enforcement

CMS will issue interpretive guidelines for this interim final rule and has indicated that state surveyors will be assessing compliance among Impacted Facilities in future surveys. Impacted Providers that are cited for noncompliance may be subject to enforcement remedies imposed by CMS depending on the degree of noncompliance, but consequences can include civil monetary penalties, denial of payment for new admissions, and even termination of provider agreements.

Although the interim final rule will likely be subject to judicial intervention by affected industry stakeholders, Impacted Facilities and other Medicare and Medicaid that may be indirectly impacted, should begin preparing for the upcoming implementation dates (within the time frames set forth above).

Further Information

Please reach out to Benesch's Healthcare+ Practice Group for more information.

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