
Biden Administration Releases Rules on Vaccination Mandate for Health Care Providers

November 2021

Health care providers that participate in Medicare and Medicaid programs must require their staffs to be vaccinated against COVID-19 by January 4, 2022, according to an interim final rule (IFR) released on November 4, 2021, by the Centers for Medicare & Medicaid Services (CMS).

CMS's IFR differs from the Emergency Temporary Standard (ETS) issued by the Occupational Safety and Health Administration (OSHA) on the same day in two significant ways:

- CMS's IFR applies only to Medicare- and Medicaid-certified health care providers and suppliers; and
- CMS's IFR, unlike the OSHA ETS, does not offer providers the option of weekly testing for staff.

The IFR requires providers and suppliers to receive the first dose of vaccination by December 6, 2021, and to complete the vaccination procedures by January 4, 2022, unless the staff member receives an accommodation under federal civil rights laws.

This Aon bulletin is the second of two bulletins discussing the impact of the Biden Administration's vaccination mandate on employers. The first bulletin, [Biden Administration Releases Rules on Vaccinate-or-Test Mandate for Employers With at Least 100 Employees](#), addressed the impact of the ETS on employers with at least 100 employees and was published on November 5, 2021.

This Aon bulletin discusses:

- Providers Subject to the IFR
- Staff at Providers Subject to the IFR
- Vaccination Requirements and Procedural Requirements of the IFR
- Exemptions From the Vaccination Mandate
- Effective Date and Scope

Providers Subject to the IFR

The following providers are each subject to the IFR if they participate in Medicare and Medicaid programs:

- Ambulatory Surgical Centers
- Hospices

- Psychiatric residential treatment facilities
- Programs of All-Inclusive Care for the Elderly
- Hospitals, including 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 Facilities, including Skilled Nursing Facilities and Nursing Facilities, generally referred to as nursing homes
- Intermediate Care Facilities for Individuals with Intellectual Disabilities
- Home Health Agencies
- Comprehensive Outpatient Rehabilitation Facilities
- Critical Access Hospitals
- Clinics, rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services
- Community Mental Health Centers
- Home Infusion Therapy suppliers
- Rural Health Clinics/Federally Qualified Health Centers
- End-Stage Renal Disease Facilities

Staff at Providers Subject to the IFR

The IFR applies broadly to all employees, licensed practitioners, students, trainees, volunteers, and individuals who provide care, treatment, or other services for the facility and/or patients at the facility, under contract or through another arrangement. It also applies to any staff not performing direct care but who interact with patients or interact with staff who enter the facility or site of care for their job responsibilities. This can include administrative staff, facility leadership, volunteer or other fiduciary board members, housekeeping and food services, and others. The IFR applies to staff who work remotely but may have incidental or occasional contact with patients or come onsite to the facility without regard to frequency.

The IFR does not apply to staff who are 100 percent remote workers, i.e., who either always provide telehealth/telemedicine services outside of the facility setting with no direct contact with patients or other staff or always provide support services that are performed exclusively outside of the facility setting with no direct contact with patients or other staff. The IFR also does not generally require non-staff to be vaccinated to enter the facility. However, while the preamble explains that the IFR does not apply to personnel performing ad hoc services (such as elevator inspectors or delivery and repair personnel) it suggests that some non-staff personnel might be subject to the vaccine mandate when

they perform service of a longer duration during which contact with staff or patients is likely (such as a construction crew using shared facilities like restrooms).

Vaccination Requirements and Procedural Requirements of the IFR

The IFR applies vaccination requirements in two phases:

- **By December 6, 2021:** Staff receives first vaccine dose or requests an exemption.
- **By January 4, 2022:** Staff receives second dose (if applicable), except those who are exempted or those staff for whom COVID-19 vaccination must be temporarily delayed, as recommended by the Centers for Disease Control and Prevention (CDC), due to clinical precautions or considerations, such as those who were recently infected.

Though staff are not considered to be fully vaccinated until two weeks after receipt of the full primary vaccination series (one or two shots, as applicable), the IFR determines compliance for facilities based on the date of the final shot only. The IFR does not require staff to obtain a booster or additional dose to be deemed vaccinated, even if the staff member is within a class for which the CDC has recommended doses beyond the primary vaccination series.

Providers must document the vaccination status of staff and keep the documentation confidential in accordance with the confidentiality requirements for medical records under the Americans with Disabilities Act (ADA). Acceptable forms of documenting vaccination status include:

- CDC card (or legible photo of card);
- Documentation from a health care provider or electronic health record; and
- State immunization information system record.

The IFR requires that providers create written policies and procedures for requiring vaccination, tracking vaccination status, and processing accommodation requests from staff. Providers must also develop contingency plans to comply with the IFR in the event of staffing shortages, a change in the course of the pandemic, or responding to events such as natural disasters.

Exemptions From the Vaccination Mandate

Health care providers subject to the IFR must still adhere to federal civil rights laws and provide accommodations to staff. The relevant civil rights laws include:

- The ADA, protecting those with disabilities and medical conditions;
- Title VII of the Civil Rights Act of 1964, protecting those with sincerely held religious beliefs, observances, and practices;
- The Pregnancy Discrimination Act, prohibiting sex discrimination on the basis of pregnancy;

- Section 504 of the Rehabilitation Act, protecting those with disabilities in programs that receive federal assistance; and
- The Genetic Information Nondiscrimination Act, prohibiting discrimination on the basis of genetic information.

Providers subject to the IFR must have policies and procedures in place to accept, review, decide, and document accommodation requests from staff under these laws. If a staff member requests and receives an accommodation, they are exempt from the IFR and they do not need to be vaccinated, but the provider must ensure that they minimize the risk of transmission of COVID-19 to at-risk individuals.

Effective Date and Scope

The IFR applies immediately upon publication and does not have a sunset clause tied to the declaration of the Public Health Emergency by the Secretary of the Department of Health and Human Services. CMS believes that the provisions in the IFR may be made permanent.

CMS acknowledged that some states and localities have established laws that would prevent compliance with the IFR, such as those prohibiting employers from imposing vaccine mandates on employees. CMS intends the IFR to preempt inconsistent state and local laws as applied to Medicare- and Medicaid-certified providers and suppliers, consistent with the Supremacy Clause of the U.S. Constitution.

Resources

The IFR is available [here](#).

A list of frequently asked questions is available [here](#).

The CMS news release is available [here](#).



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