

New CMS Regulation Will Require Vaccination for Nursing Home Staff

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On August 18th, President Biden announced that his Administration will require nursing homes to mandate staff to be vaccinated against COVID-19 as a condition for facilities to receive funding from Medicare and Medicaid. This new requirement would apply to nearly 15,000 nursing home facilities, which employ approximately 1.6 million workers and serve approximately 1.3 million nursing home residents, according to the White House. The vaccine mandate is set to take effect this fall and will be issued as a CMS regulation.

Rationale Behind the New Regulation

In his announcement last week, President Biden explained the reasoning behind the new rule, “If you visit, live or work in a nursing home, you should not be at a high risk for contracting COVID from unvaccinated employees.”

The announcement also comes as the Biden administration continues its efforts to increase vaccination rates across the country and as the highly contagious Delta variant has caused a dramatic rise in COVID cases in recent weeks. Following the announcement of the vaccine mandate, the Biden administration advised that the CMS will work with nursing homes to ramp up staff vaccinations before the new regulation takes effect.

According to the CDC, the Delta variant now accounts for 98.8% of COVID-19 cases in the United States, leading to spikes in cases across the country. In Wisconsin, the Department of Health Services (DHS) confirmed 1,603 new cases on August 19th, 2021, compared to just 448 new cases on July 19th.

DHS also reported that in July people who were not fully vaccinated were nearly 3 times more likely to test positive from COVID-19 than those who were vaccinated. Additionally, the unvaccinated were hospitalized for COVID-19-related illnesses at a rate 3.7 times higher than people who are fully vaccinated.

In Wisconsin, approximately 86% of nursing home residents are vaccinated, while 62% of facility staff

are vaccinated according to data from the CDC. This places Wisconsin ahead of the national averages of vaccinations for nursing home facilities. According to CMS, nationally 82.8% of residents and 60.5% of staff are vaccinated.

Staffing Challenges Lie Ahead

Under the new vaccination rule, nursing home facilities must decide whether to impose the mandate or absorb the loss of federal funding. This choice leads to a difficult decision for nursing home facilities that already face high employee turnover. According to the American Health Care Association and National Center for Assisted Living (AHCA/NCAL), 94% of nursing homes and 81% of assisted living facilities surveyed are experiencing a staffing shortage. Nearly three fourths of the 738 facilities surveyed by AHCA/NCAL reported that their workforce situation has gotten worse compared to 2020. This trend has some industry leaders concerned that the forthcoming vaccine mandate will exacerbate the existing workforce shortage.

“Today’s abrupt news from the Biden administration creates more questions than answers,” said Rick Abrams, President and CEO of WHCA/WiCAL. Abrams acknowledged the serious risk that COVID presents to nursing home staff and residents, but explained, “Policy makers must also acknowledge that the ongoing long-term care workforce shortage is an immediate and critical threat to the health and wellness of long-term care residents, and if there is a mass exodus of nursing home caregiving staff who refuse to adhere to a government vaccine mandate, care quality could be at risk. Today’s decision by the Biden administration will have the unintended consequence of exacerbating the long-term care workforce crisis, by singling out a single healthcare setting—nursing care facilities—to enforce a rigid vaccine mandate.”

Abrams emphasized, “WHCA/WiCAL urges CMS and the Biden administration to reconsider this approach because the practical realities of such a policy create real and serious concerns about nursing homes’ abilities to ensure adequate staffing levels to meet the acuity levels of their vulnerable residents.”

While many nursing homes already have individual vaccine mandates in place, employers without an existing rule should educate employees about the forthcoming CMS regulation and put plans in place to vaccinate staff members. As we discussed in the *Milwaukee Business Journal’s* March 2021 Table of Experts forum, [A Shot in the Arm](#), the Equal Employment Opportunity Commission (EEOC) issued guidance that federal Equal Employment Opportunity (EEO) Laws do not prevent an employer from mandating COVID-19 vaccination of its employees. However, the EEOC cautioned that employers must still provide reasonable accommodations—that do not cause an undue hardship to the employer—to employees with disabilities or sincerely held religious beliefs which prevent them from being vaccinated.

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