

CMS Downshifts on Expectations for Covered Healthcare Provider Staff COVID-19 Vaccination

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CMS released guidance for surveyors that provides leeway in surveying for compliance with the November 2021 interim final rule with comment that imposed a vaccination mandate for most staff at certain covered provider types.

IN DEPTH

Healthcare providers impacted by the November 2021 interim final rule with comment (IFR) that effectively imposed a vaccination mandate for staff may be surprised by the Centers for Medicare & Medicaid Services (CMS) Quality and Safety Oversight Group memorandum issued October 26, 2022 (QSO-23-02-ALL) ([updated QSO memo](#)), which provides surveyors with newfound flexibility in determining levels of noncompliance with the IRC. This shift in approach is attributed to national efforts to attain a high level of vaccination and relatively low levels of hospitalization and death from Sars-CoV-2, the virus that causes COVID-19.

For hospitals, critical access hospitals, ambulatory surgery centers, hospice providers and other covered providers other than long-term care facilities and skilled nursing facilities, surveyors may now cite noncompliance at less than a “condition” level absent “egregious noncompliance.”

While the new guidance from CMS continues to identify a less than 100% vaccinated staff or lack of even one vaccination-related policy as “noncompliance,” surveyors are instructed to look for egregious noncompliance and absence of “good faith” efforts to comply before citing a condition-level finding, the type of which would trigger the need for a plan of correction and follow-up survey activity. “Egregious noncompliance” is described as a circumstance...

- ...such as a complete disregard for the [CMS vaccination mandate] requirements...more than 50% of staff being unvaccinated (unless exempted, or temporarily delayed), and/or policies and procedures have not been implemented as required.

For long-term care facilities and skilled nursing facilities, the updated QSO memo provides that facilities that are noncompliant but have “implemented a plan to achieve” a 100% staff vaccination rate would not be subject to an enforcement action. Surveyors are instructed to cite the level of

severity and scope for noncompliance for Tag F888 (pertaining to vaccination compliance and related requirements) at severity level 1, with a scope of widespread, or “C.” Similar to the way in which the terms are defined for hospitals and other provider types, egregious noncompliance is described as “a complete disregard for the requirements” or “more than 50% of staff being unvaccinated” and without having requisite policies and procedures in place.

Surveyors for all covered provider types are instead pointed toward a more wholistic approach that considers, regardless of staff vaccination compliance, a facility’s...

- ...infection prevention and control practices...such as proper use of personal protective equipment, transmission precautions which reflect current standards of practice, and/or other relevant infection prevention and control practices that are designed to minimize transmission of COVID-19.

Prior guidance, detailed in our prior [On the Subject](#), included a much more stringent approach, and over time, in conjunction with state healthcare vaccination mandates, was sometimes identified as one of the bases for covered providers’ decisions to terminate unvaccinated staff (examples [here](#) and [here](#)) to avoid threats to their provider agreements due to noncompliance.

Covered providers should evaluate their current compliance with the CMS vaccination requirement in light of the updated QSO memo and consider updating existing policies and procedures to reflect this change in approach and interpretation.

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