

OSHA and CMS COVID-19 Vaccine Requirements

On September 9, 2021, President Biden announced the “Path out of the Pandemic” plan, “a six-pronged, comprehensive national strategy” in response to the recent COVID-19 surge.¹ The first prong, “Vaccinating the Unvaccinated” focuses on efforts to improve the COVID-19 vaccination rates amongst eligible individuals. This prong contains two initiatives that can potentially impact many assisted living providers. First, the “Department of Labor’s Occupational Safety and Health Administration (OSHA) is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work.” Second, the “Centers for Medicare & Medicaid Services (CMS) is taking action to require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement....” This memorandum will briefly outline each forthcoming requirement in turn, explain the process by which each requirement will be promulgated, and assess the potential impact on the assisted living community.

OSHA ETS

Summary. The OSHA Emergency Temporary Standard (ETS) will apply to all employers with 100 or more employees. According to the announcement, employers will be required to either 1) ensure all employees are vaccinated, or 2) require all unvaccinated employees undergo weekly COVID-19 testing. OSHA has indicated that the 100-employee threshold will apply at the company-wide level, and not per location. OSHA’s ETS will become effective immediately upon publication in the Federal Register. The ETS is expected to be published in the coming weeks.

Procedure. OSHA has the authority to issue an ETS when the agency determines that employees are exposed to “grave danger” from new hazards, and the ETS is necessary to protect employees from such danger.² Under the ETS authority, the Department of Labor (DOL) Secretary is exempted from the public notice and comment procedural requirements applicable to most agency regulations. As such, ETSs take effect immediately upon publication in the Federal Register. However, ETSs are, by design, temporary in nature. Once the ETS is issued and published in the Federal Register, it simultaneously becomes a “proposed permanent standard.” The statute outlines a comment process for proposed permanent standards. Interested parties can usually comment on any aspect of the ETS itself, and whether the ETS should become a permanent standard. OSHA must “finalize” the permanent standard within six months after the publication of the ETS.³

Impact. The OSHA ETS will impact many assisted living providers, especially those with multiple locations. We will learn more once the ETS is issued, but the agency’s clarification that the ETS employee threshold will be calculated on a company-wide basis has the potential to capture many Argentum members.

¹ <https://www.whitehouse.gov/covidplan/>

² 29 U.S.C. § 655(c)(1).

³ 29 U.S.C. 655(c)(3).

CMS IFR

Summary. President Biden also announced that CMS will issue an interim final rule (IFR) with comment period in early October requiring all healthcare facilities to implement mandatory vaccination programs for employees and potentially others as a condition of participation in the Medicare and Medicaid programs. The announcement comes just weeks after the Biden Administration previewed a mandatory vaccine policy that would apply only to nursing homes. The rule is now expected to apply to all certified Medicare and Medicaid facilities, including hospitals, long-term care facilities, dialysis facilities, ambulatory surgical settings, and home health agencies. At this time, it is unclear what exemptions may be available to unvaccinated workers, nor is it clear if there will be a testing alternative, although no such alternative was mentioned in the announcement.

Procedure. CMS is implementing the vaccine requirement for health care facilities via an IFR with comment period. Administrative agencies can issue IFRs, which can become effective immediately upon publication, without first publishing a proposed rule in the Federal Register and soliciting comments on the proposed rule. When issuing an IFR, an agency invokes “good cause,” issues a rule with a close-to-immediate (or even retroactive) effective date, and then holds a post-promulgation comment period. If the agency is persuaded by any of the comments and so chooses, the rule can be amended in light of those comments.

Because CMS is implementing the healthcare facility vaccine requirement via IFR, the requirement will likely become effective upon publication in the Federal Register (expected in early October), or shortly thereafter. Interested stakeholders will likely have the opportunity to comment.

Impact. It is likely the CMS IFR will impact assisted living facilities that participate in the Medicaid program (i.e., are Medicaid certified). The IFR announcement does not mention assisted living facilities by name, but the requirement will likely function as a condition of participation in the Medicare and Medicaid programs for all healthcare facilities. Depending on the IFR’s content, assisted living facilities that are Medicaid certified that wish to retain such certification will likely have to comply with the CMS IFR requirement. That said, Argentum will be conducting outreach to CMS in the coming weeks to confirm the IFR’s scope and potential applicability to the assisted living community.