



## ALERTS

### CMS Vaccine Mandate Allowed By U.S. Supreme Court

January 14, 2022

#### Highlights

U.S. Supreme Court rules that the COVID-19 vaccine mandate can proceed for healthcare providers and suppliers

Additionally, the court let injunctions stand, preventing the Biden administration from enforcing employer vaccine mandates in non-healthcare settings

The ruling does not change the compliance timelines for the 25 states where the mandate was not enjoined

**Update: CMS has provided clarification that the first dose of a two-dose vaccine must be completed by Feb. 14 and the second dose by March 15.**

The U.S. Supreme Court ruled on Jan. 13, 2022, that the vaccination mandate **for employees, contractors and volunteers at certain federally certified healthcare providers and suppliers** can proceed. Although the **5-4 “per curiam” decision** is not technically a ruling on the merits, it does lift the injunction affecting half the country that delayed enforcement of the mandate under Medicare and Medicaid.

Some Medicare and Medicaid providers and suppliers with high

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vaccination rates may welcome the ruling as an incentive for the remaining staff to become vaccinated. However, entities with low vaccination rates are likely worried that the mandate will cause holdouts to resign – leaving insufficient numbers of staff to continue normal operations.

In its opinion, the majority rejected the ruling by two federal appellate courts that the Secretary of Health and Human Services (HHS) exceeded his authority when requiring vaccine mandates. It emphasized that Congress granted authority to the HHS Secretary to protect patient “health and safety,” and not just to address accounting and routine administrative matters as the petitioning states argued.

The court observed that the HHS Secretary has historically controlled and prevented infectious diseases through the Centers for Medicare and Medicaid (CMS) Conditions of Participation and, as a result, concluded vaccination requirements are “a common feature of the provision of healthcare in America,” citing other existing regulations that require healthcare workers to be vaccinated against conditions such as hepatitis B, influenza, measles, mumps and rubella. It went on to say those requirements for healthcare providers and suppliers reflect a “straightforward and predictable example” of the health and safety authority granted to the Secretary by Congress.

Through two dissenting opinions, four justices argued that the vaccine mandate is arbitrary or capricious since it failed to go through normal rule-making protocol, and that it exceeded the authority granted by Congress.

Note that a per curiam opinion of the court is an unsigned explanation of the majority which, in this case, lifted two injunctions based on the conclusion that they would not withstand judgment on the merits. If the states challenging the mandate go in front of the court for further argument, it is still possible the court could rehear the case next term, long after implementation is enforced.

## Enforcement of Vaccine Mandates

In a separate ruling on the same day, the [Supreme Court also let stand injunctions](#) preventing the Biden administration from enforcing employer vaccine mandates in the non-healthcare setting under the Occupational Health and Safety Act (OSHA) because Congress never intended to grant such broad authority under OSHA.

In a press release issued after the Supreme Court ruling, CMS Administrator Chiquita Brooks-LaSure stated the ruling did not change the compliance timelines for the 25 states where the mandate was not enjoined.

CMS had announced in a Dec. 28 memo that [full compliance with the mandate](#) in the 25 states where the mandate was not enjoined requires 100 percent of staff without approved religious or medical exemptions to have the first dose by Jan. 27 and the second dose of a two-dose vaccine by Feb. 28. The memo also detailed that providers and suppliers with 80 percent of staff vaccinated by Jan. 27 and 90 percent by Feb. 28, with a plan to reach 100 percent within 30 days, will not be subject to an enforcement remedy.

It appears CMS may allow 30 days from Jan. 13, the date of the Supreme

Court decision, for the other 25 states to achieve the first 80 percent threshold.

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