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Does the Recent Supreme Court Decision On Mandatory Vaccines Apply to All Healthcare Providers?

On January 13, the U.S. Supreme Court issued a decision staying preliminary injunctions of the Centers for Medicare & Medicaid Services' (CMS) interim final rule (CMS rule) that required *certain* healthcare facilities to ensure all of their staff are vaccinated against COVID-19, **but the mandate does not apply in all healthcare settings, nor does it apply to all healthcare professionals**. *(i) Background* On November 5, 2021, the Secretary of Health and Human Services (the Secretary) issued the CMS rule that amended the existing conditions for participation in Medicare and Medicaid. In particular, the Secretary added a new requirement that covered facilities ensure that their staff are vaccinated against COVID-19. A facility's failure to comply with the CMS rule would lead to certain monetary penalties, denial of payment for new admissions, and ultimately termination of participation in the Medicare and Medicaid programs. Shortly after the CMS rule's announcement, two groups of states—one led by Louisiana and one by Missouri—filed separate actions challenging the CMS rule, and the district courts entered preliminary injunctions against its enforcement. *Louisiana v. Becerra*, 2021 WL 5609846 (Nov. 30, 2021); *Missouri v. Biden*, 2021 WL 5564501 (Nov. 29, 2021). The Biden administration appealed those decisions to the Eighth and Fifth Circuit Courts of Appeals, respectively, and both appellate courts denied the applications for stays of the preliminary injunctions. As a result, the Biden administration sought stays of the injunctions from the Supreme Court, arguing that the CMS rule was lawful. *(ii) Supreme Court Decision*

In reviewing the applications, the Court held, in a per curiam opinion, that the CMS rule fell "within the authorities that Congress has conferred upon" the Secretary. The Court explained that "Congress has authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that 'the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.'" The Secretary "determined that a COVID-19 vaccine mandate will substantially reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients." Thus, the Secretary "accordingly concluded that a vaccine mandate is 'necessary to promote and protect patient health and safety' in the face of the ongoing pandemic." The Court further noted that "the Secretary routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers themselves." Therefore, "the Secretary did not exceed his statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the [CMS] rule must ensure that their employees be vaccinated against COVID-19." The Court stayed the orders of the District Court for the Eastern District of Missouri and the District Court for the Western District of Louisiana granting preliminary injunctions pending disposition of the government's appeals in the Fifth and Eighth Circuits.

Justice Thomas authored a dissent, joined by Justices Alito, Gorsuch and Barrett, which argued that "the Government [had] not made a strong showing that it ha[d] statutory authority to issue the rule." *(iii) To Whom Does the Rule Apply?* Not all healthcare facilities and providers are covered by the CMS rule. The CMS rule covers the following Medicare- and Medicaid-certified provider and supplier types:

- Ambulatory Surgery Centers
- Community Mental Health Centers
- Comprehensive Outpatient Rehabilitation Facilities
- Critical Access Hospitals
- End-Stage Renal Disease Facilities

- Home Health Agencies
- Home Infusion Therapy Suppliers
- Hospices
- Hospitals
- Intermediate Care Facilities for Individuals with Intellectual Disabilities
- Licensed Clinics and Rehabilitation Agencies
- Public Health Agencies as Providers of Outpatient Physical Therapy and Speech-Language Pathology Services
- Psychiatric Residential Treatment Facilities (PRTFs)
- Programs for All-Inclusive Care for the Elderly Organizations (PACE)
- Rural Health Clinics/Medicare Federally Qualified Health Centers
- Long-Term Care Facilities

Significantly, the CMS rule *does not* generally extend to additional facilities such as pharmacies or physician offices, nor does it apply to individual physicians or clinicians unless they work in the listed facilities. Certain physicians, clinicians, students and staff, however, may be covered by the rule in certain scenarios even if their primary place of work is a medical office or another facility not covered by the CMS rule. For example, if a physician has admitting and/or treating privileges within a facility subject to the CMS rule, such as an ambulatory surgery center or a hospital, the facility will mandate that the physician be vaccinated. Facilities must first determine whether they are covered by the CMS rule. Covered facilities must then take steps to ensure their staff are vaccinated by the applicable deadlines. All staff who interact with other staff, patients, residents, clients or PACE program participants in any location beyond the formal clinical setting must be vaccinated by the applicable deadlines with limited exceptions for certain telework staff. Notably, the CMS rule does not provide for testing alternatives for unvaccinated staff. Regulated facilities covered by the CMS rule should have a process or plan in place for documenting and tracking staff vaccinations as well as a process for evaluating accommodation requests for those with a disability or sincerely held religious belief. Moreover, covered facilities should also consider applicable state laws for any potential conflicts to ensure that their current vaccination and/or testing policies comply with state and federal law. Day Pitney's Employment and Healthcare attorneys are available to answer questions in this continuously evolving area.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center. COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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