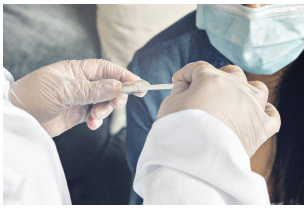

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Nursing Homes: Spread of COVID and Vaccine Mandates

News coverage of COVID-19 outbreaks at nursing homes in the United States helped create an assumption that nursing homes played a central role in the spread of the pandemic in this country. Data collected and analyzed by the federal Centers for Medicare & Medicaid Services (CMS) now substantiate this assumption. CMS's data indicates that the disproportionately high rate of COVID infections, hospitalizations, and deaths among nursing home residents is not attributable solely to that population's higher-than-average vulnerability to illness. The nursing home setting itself appears to have placed Medicare recipients ("beneficiaries") at greater risk of contracting and becoming seriously ill with COVID-19. CMS's findings were likely an influential factor in the Biden administration's decision to require nursing homes to vaccinate all staff or lose their Medicare and Medicaid funding. Nursing home owners and operators, already grappling with severe staffing shortages, feared a vaccine mandate focused on nursing homes would cause an exodus of staff to other sectors of the health care industry. They sought, and achieved, an expansion of the employee vaccine mandate to the health care industry at large.

"COVID-19 and the Workplace: Legal Requirements Employers Should Know."

This article is part three of our four-part series.

Part 1: Thinking About Implementing a Mandatory COVID 19 Vaccine Policy? Here Is What to Consider
Part 2: Maintaining Employee Medical Information and COVID-19
Part 3: Nursing Homes: Spread of COVID and Vaccine Mandates
Part 4: Coming Soon

CMS's conclusion about Medicare beneficiaries being at greater risk from COVID if they lived in a nursing home is based on the COVID-19 diagnoses from all services provided to Medicare Part A beneficiaries between March 1 and December 31, 2020. These COVID diagnoses were recorded on a claim or patient encounter

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record submitted to Medicare by any type of provider, whether a physician's office, hospital, laboratory, or other healthcare settings. Using submissions it received for all Medicare Part A beneficiaries (both those receiving Original Medicare and those enrolled in Medicare Advantage plans), CMS placed beneficiaries into two categories. If a beneficiary had resided in a nursing home within the 30 days before the beneficiary's first COVID-19 diagnosis or hospitalization, CMS placed the beneficiary in the "nursing home" category. All others were designated as "community" beneficiaries. CMS used several other categories to analyze the incidence of COVID among Medicare beneficiaries: age, sex, ethnicity, underlying chronic condition (e.g., asthma, diabetes), type of Medicare coverage, and the reason the individual was eligible for Medicare (age, disability or end-stage renal disease). The most statistically significant factor, however, was whether the individual receiving Medicare was in the "nursing home" category or the "community" category. "Nursing home" beneficiaries accounted for just 2% (1.4 million) of the Medicare beneficiaries (62 million), but about 22% of all COVID-19 cases in the U.S.

CMS's report offers the following comparisons of "nursing home" and "community" beneficiaries:

- Nursing home residents were 14 times more likely to be diagnosed with COVID-19.
- Nursing home residents were 12 times more likely to be hospitalized with COVID-19.
- Nursing home residents were about twice as likely to die within 30 days of admission to a hospital for COVID-19.

Based on comparisons like these, CMS concluded that "the location where beneficiaries reside (e.g. nursing homes) have significantly impacted COVID-19 related diagnoses, hospitalizations, and 30-day mortality."

Presumably prompted by CMS' data, President Joe Biden announced on August 18, 2021, that he was directing the Department of Health and Human Services ("HHS") to implement regulations requiring nursing homes to vaccinate their staff. CMS, which is part of HHS, issued a press release the same day stating it

would collaborate with the Centers for Disease Control and Prevention to develop these regulations, with the intention of releasing them in September. The Biden administration made it clear compliance with the regulations would become one of the "conditions of participation" in the federal Medicare and Medicaid programs. In other words, nursing homes across the country currently receiving any federal funds that flow through CMS will become ineligible for funds if they fail to impose a COVID-19 vaccine mandate on their staff in accordance with the new regulations. According to the White House, those regulations will "apply to nearly 15,000 nursing home facilities, which employ approximately 1.6 million workers and serve approximately 1.3 million nursing home residents."

Few, if any, of those 15,000 nursing homes can afford to jeopardize their Medicare and Medicaid funding. While Medicare generally does not cover the "room and board" portion of a long-term stay in a nursing home, it covers many of the medical costs incurred by residents of a nursing home. It is estimated Medicare and Medicaid funding accounts for more than 80% of the revenue at many nursing homes. While nursing homes owners and operators have little choice but to implement the employee vaccine mandate, many expressed concern that doing so will aggravate an existing staffing crisis. Some argued that singling out nursing homes was a "punitive" measure and would further erode public trust in an industry already suffering disproportionately from the pandemic. Industry representatives called on the federal government to expand the employee vaccine mandate to all health care providers. That call has been answered.

On September 9, 2021, the Biden administration announced the expansion of the employee vaccination mandate to all facilities receiving Medicare and Medicaid funding as a condition of continued funding. According to HHS Secretary Xavier Becerra, the expansion of the mandate was necessary because "[e]nsuring safety and access to all patients, regardless of their entry point into the health care system, is essential." This statement hints at the fact that the Biden administration and HHS took the concern that a vaccine mandate limited to nursing home staff might prompt such staff to leave their jobs for other positions in the health care

industry seriously. And, perhaps, in a preemptive move to deter health care workers from leaving the industry entirely upon learning of an industry-wide mandate, the Biden administration announced on September 9 that all employers with 100 or more employees must ensure their workforce is fully vaccinated or undergoes weekly COVID testing. Government-mandated COVID vaccines for employees are thus spreading from nursing homes to the U.S. population at large, imitating the pattern the COVID-19 virus itself followed.

For more information, please contact Rhonda Schechter or any attorney with Frost Brown Todd's Health Care Innovation industry team.

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