Nursing Homes, Devastated by COVID, Now Struggle to Survive an Employee Vaccine Mandate

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According to the federal Centers for Medicare & Medicaid Services (CMS), the devastating impact of COVID-19 on nursing homes and their residents was not due merely to the medical fragility of the nursing home population. CMS has concluded that the nursing home setting itself facilitated the early spread of COVID-19 in the United States.

Now, however, data collected by the Centers for Disease Control and Prevention (CDC) (https://bit.ly/3AdoZEY) show the Delta variant is having less of an impact in the nursing home setting than many other places in the U.S. where vaccination rates are far lower. Nevertheless, the Biden administration's recent push to boost vaccination rates via employee mandates initially targeted nursing homes. The administration likely singled out nursing homes because CMS identified them as a hotbed of early COVID activity.

After analyzing data collected about COVID cases among Medicare recipients ("beneficiaries") between March 1 and Dec. 31, 2020, CMS concluded beneficiaries were at much greater risk of contracting and becoming seriously ill with COVID if they lived in a nursing home. CMS reviewed the COVID cases reported in connection with services rendered to Medicare Part A beneficiaries. CMS placed beneficiaries into two categories: beneficiaries who resided in nursing homes within 30 days before their first COVID diagnosis or hospitalization were designated as "nursing home" beneficiaries; all others were designated as "community" beneficiaries.

CMS used several other measures to analyze the incidence of COVID among beneficiaries: age, sex, ethnicity, underlying chronic condition, type of Medicare coverage, and the reason the individual was eligible for Medicare (age, disability or end-stage renal disease). However, the most statistically significant factor was

whether an individual was a "nursing home" beneficiary or a "community" beneficiary.

"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 concluded, "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' conclusion, President Joe Biden announced that he was directing the Department of Health and Human Services (HHS) to issue regulations requiring all nursing home staff to be fully vaccinated. CMS (part of HHS) stated it would work with the CDC to develop the regulations for release 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. This means any nursing home refusing to comply with the new regulations will be ineligible for funding from CMS.

Few, if any, of the 15,000 nursing homes impacted by the regulations can afford to lose their Medicare and Medicaid funding. Medicare and Medicaid funding accounts for more than 80% of the revenue at many nursing homes. That said, government payments to nursing homes are typically far below what nursing homes can receive from private-pay residents and often fail to cover a nursing home's expenses.

Over the last couple of years, the reluctance of Medicare beneficiaries to move into nursing homes due to the fear of contracting COVID has exacerbated nursing homes' pre-existing funding challenges. Although the risk of contracting COVID is now greater in many other settings where mask usage and vaccination rates remain low, nursing homes continue to experience historically low occupancy rates.

Achieving an Industry-Wide Mandate

The pandemic significantly worsened two chronic problems facing nursing homes: a funding shortfall and staffing shortfall. While

nursing home owners and operators will have little choice but to implement a vaccine mandate tied to their Medicare and Medicaid funding, many fear a catastrophic effect on their staffing levels. For that reason, the nursing home industry responded vocally to the Biden administration's issuance of a vaccine mandate for nursing homes only.

Some industry representatives stated that singling out nursing homes was a "punitive" measure and would further erode public trust in an industry already suffering disproportionately from the pandemic. The nation's largest association of senior living providers, the American Health Care Association/National Centers for Assisted Living (AHCA/NCAL), mobilized its members to submit comments on the proposed vaccine mandate to CMS. Together, the nursing home industry called on the federal government to expand its employee vaccine mandate to all health care providers. That call has been answered.

On Sept. 9, 2021, the Biden administration announced (https://go.cms.gov/2YgAjmE) the expansion of the employee vaccine mandate to all facilities receiving Medicare and Medicaid funding. According to HHS Secretary Xavier Becerra, expanding 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 suggests the Biden administration and HHS were themselves concerned a vaccine mandate limited to nursing home staff might prompt such staff to flee to positions elsewhere in the health care industry.

The current expectation in this fast-moving scenario is that, sometime in October, CMS will issue regulations for an employee vaccine mandate to be implemented uniformly in all federally funded health facilities. A vaccine mandate applied consistently across the health care industry would help deter nursing home staff from leaving their current jobs in the hopes of finding an employer with more lax standards. In fact, preventing an exodus of workers from the entire health care industry may have been one of the reasons President Biden announced, on the same day as the mandate for health facilities, an employee vaccine mandate for all companies with at least 100 employees.

What Next?

Providers will need to review and comply with the vaccine mandate regulations once released. But there are many unknowns. What will be the compliance deadline? How will the deadline account for the fact that the Johnson & Johnson vaccine requires a single dose while the others require two doses? If the regulations provide for medical and religious exemptions, will employers receive guidance on who qualifies for an exemption and what type of accommodation is "reasonable"?

If the regulations lack specificity, nursing homes may face employee losses despite the industry-wide vaccine mandate. For example, suppose the regulations provide for a religious exemption but do not specify how that exemption should be applied. In that case, one facility might vigorously review exemption applications to confirm they document a sincerely held religious belief while another facility accepts all exemption applications at face value. Vaccine-hesitant employees could leave the first facility for employment at the second. For this reason, facilities should urge the government to issue well-delineated regulations, which will allow them to tell staff, "We are just complying with the government's rules."

In general, flexibility in health care legislation is commendable — a recognition that medical professionals are often better suited than politicians to decide how a health care goal can be achieved in practice. In the case of an employee vaccine mandate, however, specific and comprehensive regulations can help create a level playing field for health care providers. A vaccine mandate applied uniformly across the health care industry will minimize the risk of nursing home staff suing — or leaving — their current employers because they think other health care employers are offering more "favorable" treatment.

For more information, reach out to one of the authors of this article. You can also visit our Health Law Matters blog for more insight into legal issues impacting the health care industry.

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