

# U.S. Supreme Court Turns Centers for Medicare & Medicaid Services COVID-19 Vaccine Rules Back On

By Michael R. Bertoncini & Sarah R. Skubas

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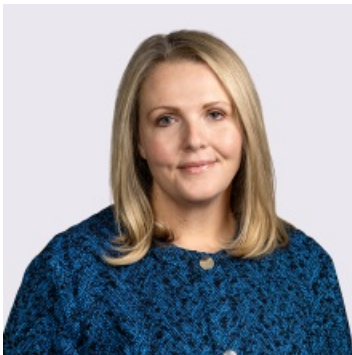


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## Related Services

COVID-19

Disability, Leave and Health Management

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In a 5-4 decision, the U.S. Supreme Court has ruled in favor of the government, allowing the Centers for Medicare and Medicaid Services (CMS) COVID-19 vaccine mandate to continue. *Biden, et al. v. Missouri, et al*, No. 21A240; and *Becerra, et al. v. Louisiana, et al.*, No. 21A240 (Jan. 13, 2022).

Accordingly, CMS can enforce in the 24 states that had been subject to the injunctions reviewed by the Court its [interim final rule](#) requiring many Medicare and Medicaid providers to ensure that their covered staff are vaccinated against COVID-19.

### Background

When Secretary of Health and Human Services Xavier Becerra, who administers the Medicare and Medicaid programs, originally announced the interim rule, two groups of states (one led by Louisiana and one by Missouri) filed separate actions challenging the interim rule. Each District Court hearing the dispute found the interim rule defective and entered preliminary injunctions against its enforcement.

In each case, the government asked the relevant Courts of Appeals to stay the injunction. The Fifth and Eighth Circuits [denied](#) the government's motions. The government then filed applications to the Supreme Court, requesting a stay of both District Courts' preliminary injunctions.

### Supreme Court Decision

In its decision, the Supreme Court agreed those injunctions should be stayed and the interim rule can take effect.

The Court majority concluded Secretary Becerra "did not exceed his statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule must ensure that their employees be vaccinated against COVID-19."

In addition, the majority stated the mandate "fits neatly" into the authorities given to the Department of Health and Human Services and these are "unprecedented circumstances" that "provide no grounds for limiting the exercise of authorities the agency has long been recognized to have."

### Implications for Covered Healthcare Employers

For most settings, the vaccination requirement applies to all staff, regardless of clinical responsibility or patient contact. All current and new staff who provide any care, treatment, or other services for the facility or its patients are covered. The interim rule also applies to nonemployees, such as students, trainees, volunteers, and individuals who provide care, treatment, or other services for the facility or its patients under

contract or other arrangement.

A limited exception to the vaccination requirement is available to staff who provide services completely remotely, such as fully remote telehealth or payroll services. However, vaccination is required for staff who primarily provide services through telework, but may sometimes encounter fellow staff who will enter a healthcare facility or site of care for their job responsibilities.

Important provisions of the CMS interim rule include:

- Covered providers and suppliers must implement mandatory vaccination policies that include a process by which staff may request an exemption from the vaccination requirement for medical or religious reasons in accordance with applicable federal law;
- There is no “test out” option;
- Only religious or medical exemptions are permitted;
- Covered providers and suppliers must track and securely document the vaccination status of each staff member, including those for whom there was a temporary delay in vaccination;
- Covered providers and suppliers must implement a process for ensuring additional precautions intended to prevent the transmission and spread of COVID-19 for all staff who are not fully vaccinated for COVID-19; and
- Facilities that do not comply with the rule risk loss of funding.

On December 28, 2021, [CMS published guidance](#) regarding compliance for the 25 states, the District of Columbia, and U.S. territories that were not covered by the appellate court stays of the interim rule that the Supreme Court has now lifted. In that guidance CMS established the following compliance deadlines:

- Phase 1 – January 27, 2022: All covered staff must receive their first dose of a multi-dose COVID-19 vaccine, unless they have pending requests for, or have been granted, medical or religious exemptions, or for whom COVID-19 vaccination must be temporarily delayed, as recommended by the Centers for Disease Control and Prevention, due to clinical precautions and considerations.
- Phase 2 – February 28, 2022: All covered staff must be fully vaccinated or have received an approved medical or religious exemption.

CMS is expected to provide additional guidance with regard to the implementation of the interim rule for the states that had been covered by the stays. Those are Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wyoming. As to Texas, the U.S. District Court for the Northern District of Texas previously issued a preliminary injunction prohibiting CMS from enforcing its interim rule in that state, which was not directly subject to the U.S. Supreme Court’s ruling. As of now, CMS did not identify Texas as a location it will enforce its rule in, but further rulings are expected from the court and CMS as clarification on this issue in light of the U.S. Supreme Court’s ruling.

All affected CMS-covered providers and suppliers should take care to meet applicable compliance deadlines and watch for additional guidance from CMS.

Jackson Lewis attorneys will continue to monitor how the Supreme Court's decision could affect staffing at facilities and the provision of critical healthcare services.

Please contact a Jackson Lewis attorney with questions.

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