



February 1, 2022

Memorandum: On February 1, 2022, the Kentucky Board of Emergency Medical Services met and approved the attached memorandum drafted by KBEMS attorneys in reference to COVID-19 vaccine mandates.

The KBEMS Board of Directors voted to approve the contents of the memorandum for distribution and made a recommendation that all EMS professionals in Kentucky seek COVID-19 vaccination.

This memorandum is for reference only and does not constitute legal advice.



Kentucky Board of Emergency Medical Services

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MEMORANDUM

Re: CMS Vaccine Mandate
By: John K. Wood
Client: KBEMS
Matter #: 1587-070
Date: 1/17/21

ISSUE: Are EMS personnel required to be vaccinated against COVID-19 under the Centers for Medicare & Medicaid Services' (CMS) November 5, 2021, Interim Final Rule (the Rule), 86 Fed. Reg. 61561, 61616-61627?

Yes, many EMS personnel are likely indirectly subject to the Rule. If an EMS agency provides services to a Medicare or Medicaid-certified facility under contract or other arrangement, those employees who provide care, treatment, or other services for the facility or its patients likely must be vaccinated against COVID-19.

BACKGROUND

On November 5, 2021, the Centers for Medicare & Medicaid Services (CMS) issued an Interim Final Rule that requires covered entities to develop and implement policies and procedures to ensure that all covered staff are fully vaccinated against COVID-19. 86 Fed. Reg. 61561, 61616-61627. Two federal district courts issued preliminary injunctions blocking the Rule from taking effect. The United States moved for a stay of the injunctions in the Fifth and Eighth Circuit Courts of Appeals, which both Courts denied. On January 13, 2022, the United States Supreme Court granted the stay, allowing the Rule to take effect.

CMS VACCINE MANDATE

In the past, the Secretary of CMS has relied on a long list of detailed conditions with which facilities must comply to be eligible to receive Medicare and Medicaid funds. Such conditions have long included a requirement that certain providers maintain and enforce an “infection prevention and control program designed . . . to help prevent the development and transmission of communicable diseases and infections.” 42 CFR § 483.80.

Pursuant to this authority, the Secretary issued the Rule on November 5, 2021, which requires covered facilities to ensure that their staff are fully vaccinated against COVID-19. The Rule requires providers to offer medical and religious exemptions, and does not cover staff who telework full-time. A facility’s failure to comply may lead to monetary penalties, denial of payment for new admissions, and ultimately, termination of participation in the programs. 86 Fed. Reg. 61561, at 61574. The Secretary issued the Rule after finding that vaccination of healthcare workers against COVID-19 was “necessary for the health and safety of individuals to whom care and services are furnished.” *Id.* at 61561.

The Rule applies to 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
- Clinics
- Rehabilitation Agencies
- Public Health Agencies as Providers of Outpatient Physical Therapy and Speech-Language Pathology Services
- Psychiatric Residential Treatment Facilities (PRFTs) Programs for All-Inclusive Care for the Elderly Organizations (PACE)
- Rural Health Clinics/Medicare Federally Qualified Health Centers
- Long-Term Care Facilities

External FAQ, CMS Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule, CENTERS FOR MEDICARE & MEDICAID SERVICES (Dec. 28, 2021)
www.cms.gov/files/document/cms-omnibus-covid-19-health-care-staff-vaccination-requirements-2021.pdf.

The Rule applies to eligible staff working at almost all CMS-certified facilities that participated in the Medicare and Medicaid programs, regardless of clinical responsibility or patient contact. All current staff, as well as any new staff, who provide any care, treatment, or other services for the facility and/or its patients must be vaccinated pursuant to the Rule. This includes facility employees, licensed practitioners, students, trainees, and volunteers. Additionally, this also includes individuals who provide care, treatment, or other services for the facility and/or its patients under contract or other arrangements. *Id.*

EMS PROVIDERS

In regard to EMS providers, the CMS FAQ guidance referenced above explains:

EMS providers are not regulated by CMS health and safety standards; therefore, they are not directly subject to these requirements. Some EMS providers may be subject to the vaccination requirements by virtue of their professional relationship with a health care entity that is regulated by CMS. For example, a hospital may contract with EMS providers and therefore these staff would be included in the requirement. Additionally, an EMS provider may also provide non-emergency transportation for Long Term Care facility residents under contract. In that case, EMS staff would be subject to COVID-19 vaccination requirements in the [Interim Final Rule] as applied to Long Term Care facility staff.

Id.

As discussed above, the Rule applies to all staff of Medicare or Medicaid-certified facilities, including hospitals, clinics, and long-term care facilities. The term “staff” includes anyone who provides any care, treatment, or other services for the facility and/or its patients/residents, “[r]egardless of clinical responsibility or patient contact.” For example, hospital “staff” include:

- (1) Hospital employees;
- (2) Licensed practitioners;
- (3) Students, trainees, and volunteers; and
- (4) ***Individuals who provide care, treatment, or other services for the hospital and/or its patients, under contract or by other arrangement.***

42 CFR 482.42(g)(1) (emphasis added); *see also e.g.* §483.80(i)(1) (long-term care facilities); §484.70(d)(1) (home health services). Accordingly, any EMS providers that provide services to a covered facility or its patients, residents, or clients under contract or by other arrangement are likely subject to the vaccine mandate. However, staff who provide support services that are performed exclusively outside of the facility, and who do not have any direct contact with patients or other staff, are not subject to the mandate. *See e.g.*, 42 CFR 482.42(g)(2)(ii) (hospitals).

EMS personnel who do not qualify for a medical or religious exemption and who provide care, treatment, or other services to a covered facility or its patients under contract or other arrangement likely must receive their first dose of a COVID-19 vaccine by February 14, 2022, and must be fully vaccinated (*i.e.*, one dose of a single-dose vaccine or all doses of a multiple-dose vaccine series) by March 15, 2022. *See Guidance for the Interim Final Rule – Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, QSO-22-09-ALL, CENTERS FOR MEDICARE & MEDICAID SERVICES (Jan. 14, 2022), www.cms.gov/files/document/qso-22-09-all-injunction-lifted.pdf.