

Healthcare Law Alert: Federal Vaccine Mandates: CMS to Issue Interim Final Regulations Expanding Federal Vaccine Mandate to Staff of Certain Medicare-Participating Providers and OSHA to Issue Emergency Rule for Employers with 100 or more Employees

On Thursday, September 9, 2021, the Biden Administration announced a COVID-19 Action Plan which sets forth a series of new COVID-19 vaccine mandates, including a proposal specific to the Healthcare industry, mandates that will apply to federal contractors, and mandates for large employers.

In conjunction with this announcement, the Centers for Medicare and Medicaid Services (CMS) posted a press release indicating that it will issue an Interim Final Rule expanding its previously-announced nursing home worker vaccine mandate to staff of other Medicare-participating providers, referencing hospitals, dialysis facilities, ambulatory surgical settings and home health agencies, “among others.” In addition, President Biden issued an Executive Order putting in place a mechanism whereby all federal contractors will be required to mandate that their workers be vaccinated against COVID-19. Finally, the President announced that the U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) will also issue an emergency regulation requiring companies with 100 or more employees to have workers fully vaccinated or tested on a weekly basis.

Mandates on Certain Medicare-Participating Providers

According to the CMS press release, Medicare-participating providers can expect to see CMS’s Interim Final Rule with a comment period in October. CMS had previously indicated that the Interim Final Rule detailing the directives for nursing homes would be published in September. There is no indication whether the nursing home Interim Final Rule will continue on the September timeline or be delayed, to be included in the October Interim Final Rule. Previously, the Biden Administration suggested that Medicare-participating providers risked losing federal funding if they did not comply with the vaccine mandate. CMS’ announcement that the mandate will take the form of a new Condition of Participation confirms that possibility. There is no indication yet about whether CMS will offer any alternatives or exceptions to the mandate.

Mandate for Federal Government Contractors.

With respect to federal contractors generally, the President’s Executive Order directs the Safer Federal Workforce Task Force to issue guidance defining the relevant terms in the Executive Order and explaining the protocols that contractors will be required to follow and any exceptions to the Task Force’s guidance. If the Director of the Office of Management and Budget determines that the Task Force’s guidance “will promote economy and efficiency in Federal contracting if adhered to by government contractors and subcontractors” and subsequently approves the Task Force’s guidance,

that guidance will be issued in the Federal Register and imposed on the covered federal government contractors. This Executive Order also does not mention alternatives or exceptions to the mandate.

Mandate for Large Employers.

Finally, the President's COVID-19 Action Plan directs OSHA to develop an emergency rule that will apply to companies with 100 or more employees. The Biden Administration's press release indicates that workers who remain unvaccinated will have to "produce a negative test result at least once a week", which raises questions such as who will pay for the testing, and should employees be paid for the time it takes to be tested and/or for the time it takes to travel to and from a testing site.

Hancock Estabrook will continue to monitor these initiatives and provide further guidance when the rules are published.