



Lawsuits Likely If CMS Mandates Provider COVID-19 Vaccines

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Policy watchers acknowledge that potential CMS attempts to mandate health care staff get COVID-19 vaccinations would likely end up in court but are split on whether such mandates would prevail in the legal system, as CMS stays quiet on whether it would consider such a policy.

[Several health policy experts told *Inside Health Policy* Friday \(Aug. 6\) they believe CMS has the ability to require staff of Medicare and Medicaid providers get vaccinated against COVID-19.](#)

CMS did not comment on whether it has the authority to require health care staff receive COVID-19 vaccinations via conditions of participation, or whether it would consider levying such a requirement.

Experts say a provider vaccine mandate could be done by adding a requirement to the Conditions of Participation and Conditions for Coverage for Medicare and Medicaid, since the guidelines are meant to preserve health and safety of beneficiaries.

But CMS most likely would face legal challenges, said James Hodge, law professor and director of the Center for Public Health Law and Policy at Arizona State University.

Hodge worries that even if CMS were to issue a COVID-19 vaccine requirement for providers, it could be embroiled in controversy long enough that the requirement couldn't be quickly executed across the entire country.

However, Hodge thinks that as vaccine mandates become more common, people will increasingly realize these policies are needed to stop the COVID-19 pandemic. He believes judges would recognize the necessity.

"I think that's the consistent thing you'll hear from courts," he added.

Jill Rosenthal, director of public health policy at Center for American Progress who authored a recent memo on CMS' authority to mandate COVID-19 vaccines for providers, agreed CMS has strong authority to impose the mandate.

"You can sue over anything," she said. "But if you look at what the conditions of participation are designed to do, you know, they're designed to ensure safety ... I think there's every reason to indicate why it's appropriate."

One lobbyist, on the other hand, told *Inside Health Policy* he feels legal challenges over a mandate could end up at the Supreme Court, and he doesn't think the court would uphold a requirement. There's no solid precedent for a vaccine requirement like this, he believes.



Still, even if a CMS vaccine requirement were to be challenged and eventually overturned at the Supreme Court, the benefits of such a policy, even if temporary, could outweigh the consequences for CMS, Snell & Wilmer Partner Sunny Thompson said.

Thompson added that a CMS requirement now might face less legal backlash than it would've six months ago due to mounting support for vaccine mandates.

"I could see them saying, 'We're going to make a practical decision here even if it is to be overturned.'" she said. "At the end of the day, they're still acting under kind of an emergency situation given the pandemic ... I think that they do have enough political capital right now to probably implement something like that."

Experts are also divided over whether CMS could reasonably create a vaccine requirement for Medicare and Medicaid providers without undergoing the regular notice-and-comment period.

Wendy Epstein, a law professor and associate dean of research at DePaul University College of Law, said she believes CMS could argue there's reason to waive the typical notice-and-comment period for a new rule, given the COVID-19 public health emergency. The Center for American Progress echoed that sentiment in its recent memo.

But Rob Duston, a partner at law firm Saul Ewing Arnstein & Lehr, said he thinks the window of opportunity has passed for CMS to use the PHE as a reason to waive notice-and-comment on a vaccine mandate.

No COVID-19 vaccines have been granted full FDA approval yet -- Pfizer and BioNTech's vaccine is expected to receive approval next month -- but the shots have been available to health care workers since this past winter.

"Certainly they can raise it. But the fact that they waited now until this surge and this virus versus earlier in the pandemic to impose requirements is going to weaken that argument," Duston said.

Thompson also said CMS would likely have a stronger defense of a vaccine requirement for providers if it went through the regular notice-and-comment period or at least allowed providers a ramp-up time before instituting an emergency order.