



Policy Brief

November 12, 2021

The next issue of AHPA's Policy Brief will run on December 3rd.
AHPA wishes you and your family a wonderful Thanksgiving holiday.



Biden Administration Mandates COVID-19 Vaccination

Last week, the Centers for Medicare and Medicaid Services (CMS) [released](#) a new rule mandating COVID-19 vaccinations for health care workers. This mandate will apply to all Medicare and Medicaid providers and suppliers regulated by CMS. Employees that do not have any direct contact with patients, such as those who work completely remotely, will also be exempt. An accompanying rule was [released](#) on the same day by OSHA to apply a vaccine mandate to companies with more than 100 employees, but it currently faces [mounting](#) lawsuits.

What is in the CMS Rule?

The vaccine mandate requires that all health care providers vaccinate all their hired or contracted personnel against COVID-19. By December 6, 2021, all non-exempt staff must have had their first vaccination; by January 4, 2022, all must be fully vaccinated. Providers must create a process for implementing and documenting vaccinations, as well as developing

contingency plans for staff who are not fully vaccinated, as in the case of an exemption. There are still many questions surrounding the rule, such as how to enforce a religious exemption, as well as who it will impact if the lawsuits are successful.

What questions still remain?

While CMS released an [FAQ](#) alongside this new rule, it still leaves many implementation questions unanswered. For example, although CMS refers to Title VII of the Civil Rights Act to [define](#) a religious exemption, CMS does not include an example of what a religious exemption for a vaccine could look like. This leaves it up to providers to draft their own exemption framework that both avoids penalties from CMS and lawsuits from employees. CMS noted that they will release guidelines for enforcement of these policies in the near future.

Will this be implemented?

Lawsuits against the OSHA vaccine mandate for organizations with more than 100 employees were filed soon after its release. Almost 27 states have [joined](#) the lawsuits, including Texas and Florida, meaning implementation will likely face an uphill battle. Earlier this week, several states have also opened [lawsuits](#) against the CMS vaccine mandate. These cases are expected to be expedited through the courts; we may get an answer soon on whether these rules will be upheld. It is also unclear if the outcome will only apply to the jurisdiction of states filing lawsuits or nationwide.



CMS Releases Payment Rules for Outpatient Care and Physician Offices

CMS has released their CY 2022 Outpatient Prospective Payment System (OPPS) and Physician Fee Schedule (PFS) final rules. The rules solidify payment rates and coverage changes for Medicare services delivered in hospital outpatient departments, ambulatory surgical centers (ASCs) and physician offices. Notably, CMS has decided to pause the elimination of the Inpatient Only (IPO) List and add back many of the procedures removed from the list earlier this year. AHPA is developing detailed summaries of both rules for our members; click [here](#) for the official OPPS fact sheet and [here](#) for one on PFS.

Overall Highlights from the OPPS Final Rule:

Overall, CMS has increased payment rates under OPPS by 2%; hospitals and ASCs that fail to meet quality reporting requirements will be subject to a 2% reduction. CMS has decided to:

- Halt the elimination of the IPO list, adding back the vast majority of the 298 procedures removed this year.
 - CMS also finalized its policy to exempt procedures removed from the IPO list from two-midnight medical review.
- Increase the size of civil monetary penalties associated with price transparency noncompliance, depending on the hospital's size.
 - Hospitals with more than 30 beds could incur a daily penalty of \$10/bed.
- Launch the Radiation Oncology alternative payment model, effective January 1, 2022.
- Continue paying clinic visits at off-campus provider-based departments at 40% the OPPS rate.
- Maintain payment for 340B drugs at average sales price minus 22.5%.

Quality Reporting Program Highlights

CMS finalized several changes to the Hospital Outpatient Quality Reporting Program (OQR).

The Agency will:

- Remove two chart-abstracted measures beginning with the CY 2023 reporting period:
 - *Fibrinolytic Therapy Received Within 30 Minutes of ED Arrival (OP-2)*
 - *Median Time to Transfer to Another Facility for Acute Coronary Intervention (OP-3)*
- Add five measures to the program, two with modifications:
 - *COVID-19 Vaccination Coverage Among Health Care Personnel*
 - *Breast Cancer Screening Recall Rates*
 - *STEMI eCQM*
 - *Modified: OAS-CAHPS Survey-based Measures (OP-37-a-e)*
 - *Modified: Cataracts – Improvement in Patient's Visual Function within 90 Days*

Overall Highlights from the PFS Final Rule:

The PFS [final rule](#) includes a decrease in the conversion factor of -3.7%, [raising concerns](#) from the AMA. The rule will also:

- Eliminate geographic barriers to using telehealth for behavioral health care, allowing the patient's home as a permissible originating site.
- Allow for audio-only telehealth services for mental health visits.
- Extend the telehealth "category 3" flexibilities through CY 2023.
- Reimburse directly for professional services provided by physician assistants.
- Increase the reimbursement rate for select vaccines.
- Delay the implementation of the Acceptable Use Criteria program's penalty phase until January 1, 2023.



Build Back Better Bill Spells Trouble for Hospitals:

Potential Reduction in DSH Payments

Last week, the U.S. Senate [released](#) the text for the Build Back Better (BBB) bill. Previously, there has been some ambiguity over the bill's contents as the potential size and spending has fluctuated, with Democratic leaders making changes that will garnish enough votes. One of the biggest surprises in the text was the inclusion of a provision that would reduce the pools for the Medicaid Disproportionate Share Hospital (DSH) program and uncompensated care. These reductions would drastically hamper access and quality of care for the most vulnerable. Keep reading to learn more about the problematic provision of this bill and the response from industry leaders.

DSH Cuts

DSH [payments](#) are allocated to safety-net facilities that treat a large portion of uninsured or Medicaid patients. The [proposed](#) reduction to the DSH program would impact states that have not expanded their Medicaid programs. Under the proposal, organizations in these states stand to lose as much as \$7.8 billion over 10 years. Additionally, if other states choose to terminate their Medicaid expansion, they will also be subjected to reductions in their DSH allotment. The whole situation is shaping up to be a political power struggle between federal and state governments over Medicaid expansion, with hospitals caught in the middle.

Industry Response

The DSH payment reduction provision has ruffled feathers within the health care industry, with many prominent organizations [calling](#) for its [removal](#) from the bill. The goal of increasing coverage for residents in non-expansion states is shared among industry leaders. However, those in opposition to the provision are stressing that expansion efforts should not come at the expense of vital funding to facilities. Should the provision be retained in the final version of the bill, it will make it difficult for hospitals in non-expanded states to continue to serve their patients and communities. U.S. Senators have taken note; Senator Rick Scott (R-FL) recently circulated a [“Dear Colleagues”](#) letter highlighting the dangerous consequences of DSH cuts.

OSHA Vaccine Mandate

In conjunction with the CMS COVID-19 vaccine mandate, which covered health care workers at facilities participating in Medicare and Medicaid; OSHA released an additional COVID-19 mandate for all other places of work. The mandate applies to businesses with 100 or more employees, including both full-time and part-time workers, which covers more than 84 million workers and two-thirds of the nation's private-sector workforce. Workers will have until January 4th to receive the final dose of the vaccine. Those who remain unvaccinated after January 4th will have to provide a negative COVID test to their employer weekly to continue in-person work. However, the future of the mandate remains in question as the Fifth Circuit Court of Appeals issued a [temporary stay](#) one day after the mandate went into effect. Additionally, 27 states have filed lawsuits calling into question the legality of the mandate.

An Eye on SCOTUS: What's on the Docket

The Supreme Court has a busy fall session, including hearing several health care-related cases. Here are some of the key cases we are keeping an eye on:

- **Whole Women's Health v. Jackson (11/1)** - [examines](#) the Texas law that allows private citizens to file civil lawsuits against abortion providers.
- **Becerra v. Empire Health Foundation (11/29)** - [decides](#) whether CMS can legally factor in Medicare and commercial insurance payments in determining the DSH payment cap.
- **American Hospital Association v. Becerra (11/30)** - [settles](#) a longstanding dispute around CMS' authority to make cuts to reimbursement rates for 340B drugs.
- **Dobbs v. Jackson Women's Health Org. (12/1)** - [examines](#) the constitutionality of pre-visibility abortion prohibitions, which could be the most substantive case on the issue since Roe v. Wade.
- **CVS Pharmacy v. Doe (12/7)** - [considers](#) whether certain disability discrimination claims can arise from protections under the Rehabilitation Act or Section 1557 of the Affordable Care Act.

Life is a Highway: Infrastructure Package Passed

The infrastructure bill passed last Friday in a late-night vote. The vote received some [bipartisan](#) support, with 13 moderate Republicans voting in favor; internal conflicts within the Democratic party continued as six progressives voted against the infrastructure package. The infrastructure bill will, [among many things](#), provide funding to upgrade American roads and bridges and resources for mass transit and rail projects. Additionally, the \$65 billion allocated towards broadband capabilities provides a win for the health care industry. This investment will increase broadband infrastructure and improve internet access, affordability and accessibility across the

U.S. As telehealth becomes more prominent within the industry, the boost in broadband will help create a more equitable outcome for millions of Americans.

Additional Updates to COVID-19 Regulations

AHPA continues to follow new COVID-19 regulations, guidance and other government actions. The updates below are the latest guidance and other developments since November 1st to help mitigate the impacts of COVID-19.

Pfizer Gets the Green Light for COVID-19 Vaccinations for Kids Ages 5-11

The FDA has [granted](#) authorization for the Pfizer COVID-19 vaccine for children ages 5 to 11. Children will receive a low dose that is one-third of the dosage given to adults.

Nebraska Becomes First State to Challenge CMS Vaccine Mandate

The Nebraska Department of Justice filed a [lawsuit](#), in a 10-state coalition, seeking to stop the CMS vaccine mandate for health care workers. The lawsuit argues that CMS has violated both the U.S. Constitution and other federal laws.

5th Circuit Court Places a Stay on OSHA Vaccine Mandate

The 5th Circuit Court of Appeals has placed a [temporary stay](#) on the OSHA vaccine mandate. Arguments for throwing out the OSHA mandate range from an over-step of authority by OSHA to the regulation being in violation of the U.S. constitution



AHPA Resources

Missed an AHPA webinar lately? No problem!

Visit AHPA's [YouTube channel](#), where members can stream webinars on demand at their convenience.

Below is a list of the recent regulatory work that AHPA has conducted.

- OSHA ETS [AHPA Comment](#)
- Surprise Billing; P1 [Regulatory Summary](#) | [AHPA Comment](#) | [Comment Summaries](#)
- Surprise Billing; P2 [Regulatory Summary](#)

- IPPS [Regulatory Summary](#) | [AHPA Comment](#) | [Comment Summaries](#)
- PFS [Regulatory Summary](#) | [AHPA Comment](#) | [Comment Summaries](#)
- OPFS [Regulatory Summary](#) | [AHPA Comment](#) | [Comment Summaries](#)
- Behavioral Health RFI [AHPA Comment](#)
- SDOH RFI [AHPA Comment](#)
- CMS Vaccine Mandate [Regulatory Summary](#)

WHAT WE'RE READING...

[“Don't Wait”: WHO Urges U.S. to Pay Attention as COVID-19 Surges in Europe](#) – CBS News

[America's Prices are Surging More than They Have in 30 Years](#) – CNN Business

[COP26 Climate Summit: Goals Explained in Maps and Charts](#) - Aljazeera