

DEPARTMENT OF HEALTH & HUMAN SERVICES  
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**DATE:** March 18, 2022

**TO:** Kate Davis  
Director of Regulatory Affairs  
Kansas Governor Laura Kelly

**FROM:** Jonathan Blum  
Principal Deputy Administrator and Chief Operating Officer  
Centers for Medicare & Medicaid Services

**SUBJECT: Updated FY2022 Kansas Medicare Allocation for Survey and Certification**

The Centers for Medicare & Medicaid Services' (CMS) is required by statute to protect the health and safety of individuals receiving care and services at Medicare- and Medicaid-certified providers and suppliers. CMS recently issued new rules to require most health care facilities that participate in the Medicare and Medicaid programs to ensure COVID-19 vaccination of eligible staff.<sup>1</sup> This requirement protects patients. CMS' rules also provide for exemptions based on recognized medical conditions or religious beliefs, observances, or practices.

Kansas has entered into an agreement with the Department of Health and Human Services under Section 1864 of the Social Security Act (Act) for its state survey agency to survey health care providers to determine whether they meet the statutory and regulatory requirements for participation in Medicare (Agreement). Article II of the Agreement stipulates the functions to be performed by the State, which include certifying whether providers and suppliers within Kansas comply with all applicable statutory definitions and requirements in the Act and in implementing regulations. Article II.A.1; 42 C.F.R. § 488.11. Specifically, the State is responsible for "surveying for the purpose of certifying to the Secretary the compliance or non-compliance of providers and suppliers of services and resurveying such entities, at such times and manner as the Secretary may direct." Article II.A.1(c). Under section 1864(b) of the Act, CMS allocates funding to states to pay the reasonable costs of performing the functions specified in the Agreement and for Medicare's fair share of costs related to Medicare facilities. CMS's process for making these awards is also set forth within the Agreement, Chapter 4 of the CMS State Operations Manual and the FY2022 Mission and Priority Document (Admin Info 22-03).

On February 24, 2022 Kate Davis, Director of Regulatory Affairs for Kansas Governor Laura Kelly, notified CMS that Kansas would not evaluate a provider's or supplier's compliance with

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<sup>1</sup> Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination (86 FR 61555).

the federal vaccination requirements implemented in CMS's interim final rule with comment period (IFC) entitled "Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination," (86 FR 61555) (CMS vaccine rule). We believe Kansas has anticipatorily repudiated performance of its requirements under the Act, regulations, CMS instructions and the 1864 Agreement.

In light of the State's stated refusal to survey these new rules, CMS will take the following actions to ensure the health and safety of patients receiving care in facilities that are required to comply with these and all applicable federal rules.

- CMS will communicate directly with applicable providers and suppliers in Kansas that they are responsible for maintaining compliance with the federal requirements for all Conditions of Participation, Conditions for Coverage, and Requirements for Participation, despite the State's announcement. CMS will further communicate that it will directly administer supplemental oversight processes and investigations needed to ensure they meet the requirements of the CMS vaccine rule.
- CMS will remind providers that Accrediting Organizations with CMS-approved accreditation programs will survey for compliance with all Medicare and Medicaid regulations, including the COVID-19 vaccine requirements.
- CMS will also communicate to providers that demonstration of compliance with the requirements of the CMS vaccine rule will be necessary.
- CMS will inform the public to directly communicate any complaints regarding CMS' COVID-19 vaccine rule to the CMS Location and request the State do the same to ensure that the federal Medicare/Medicaid requirements are met during this time period.

Finally, if Kansas continues to not fulfill its responsibility to survey and certify the compliance of Medicare- and Medicaid-certified providers and suppliers within its state for compliance with the CMS vaccine rule, CMS cannot pay its full Survey and Certification budgetary allocation for FY2022. Specifically, ***CMS will reduce Kansas' survey and certification funding allocation in upcoming funding distributions by \$348,723 for FY2022 to implement supplemental federal processes to ensure provider compliance with the COVID-19 vaccine rules. CMS reserves the right to adjust this amount in future years based on changes to the state's determination on this matter.*** CMS will incur additional costs to confirm certified provider and supplier compliance with this rule in Kansas and will adjust for that cost by

reducing the budget allocation from the state. In FY2021, Kansas had approximately 1,120 providers subject to the vaccine mandate. The reduction is based on the estimated costs of providing federal oversight for the vaccination requirement at \$348,723 (federal surveyor wage multiplied by 8 hours for the onsite survey, pre- and post-survey review, and accompanying activities multiplied by 1,120 providers). This ensures that there are resources to enforce all Medicare/Medicaid requirements, while maintaining other state survey and certification operations. We are not waiving any terms and continue to expect full performance of Kansas' obligations under the law and pursuant to the Agreement.

While we are disappointed in Kansas' approach to meeting its survey and certification requirements, please be assured that CMS will continue to take every step possible to ensure the safety of patients and that federal funds are efficiently administered.