



Nursing Home Weekly: Recap of LeadingAge Updates

November 19, 2021

LeadingAge Coronavirus Update Call – only Monday next week. On Monday, November 22, at 3:30 PM ET we will welcome back Tina Sandri, CEO of Forest Hills in Washington, D.C. Tina will talk about how her organization has been working to quickly implement the new CMS visitation guidance while planning for the holidays. She will also talk about her organization's continuing efforts to educate on vaccination and success with boosters. **We will not be having our call on Wednesday, November 24** (the day before Thanksgiving) and will be back on Monday, November 29 to talk with Sue diRosario, director of support services for Methodist Conference Home in Rockland, ME, on her organization's success in hosting booster clinics in Maine. If you haven't registered for LeadingAge Update Calls, [you can do so here](#).

House Votes on Build Back Better. The House voted to pass the Build Back Better Act on Friday, November 19. The Senate is expected to take it up the week of December 6. In between Thanksgiving and December 6, the Senate must contend with other hot-button items like fiscal year 2022 appropriations, for which funding runs out on December 3, and scrub the House's Build Back Better bill for compliance with the arcane rules of the reconciliation process, and iron out some remaining substantive issues like paid family leave and state and local tax deductions. We expect Senate Majority Leader Chuck Schumer to bring a somewhat revised version of Build Back Better to the Senate floor the week of December 6. As the bill is still in flux, LeadingAge is asking stakeholders to continue to reach out, particularly to your Senators, to increase the bill's funding for HUD's Section 202 Housing for the Elderly program and protect the bill's other investments in workforce and Medicaid Home and Community Based Services. LeadingAge's alert is [here](#).

Latest on the Legal Challenges to CMS IFR and OSHA ETS.

- *CMS Interim Final Rule Challenges (CMS IFR remains in effect):* Florida has now filed a [lawsuit](#) challenging the CMS Interim Final Rule (IFR) mandating vaccinations for certain providers. There are now four lawsuits currently filed in federal courts, which are located in the Eastern District of Missouri, Western District of Louisiana, the Northern District of Texas, and Northern District of Florida, respectively. Unlike with the OSHA ETS, there are **no court orders** staying or providing relieve from the implementation and enforcement of the CMS IFR. The CMS IFR **remains in effect** unless and until we get a ruling from any of the courts hearing these challenges. The judge in the Louisiana case has ordered an expedited briefing schedule that requires the parties to file their briefs by December 1, 2021. We have not seen any of the other courts set a schedule to hear any motions yet, but that can change at any time. That is what we know at this point, but this will be a fluid situation for some time so stay tuned (and stay patient).
- *OSHA ETS Challenges (OSHA ETS stayed pending further decisions):* The 6th Circuit Court of Appeals is the venue for all the legal challenges to the OSHA Emergency Temporary Standard (ETS). Yesterday, one of the plaintiffs challenging the OSHA ETS filed a motion to have the case heard *en banc*, which means by all the judges of the 6th Circuit Court of

Appeals, rather than by a 3-judge panel that is usually randomly assigned to each case. The court ordered OSHA to respond to that petition by November 23rd. After that date, the court will decide whether to proceed with a full panel of judges or a 3-judge panel to hear the arguments on the merits of the challenges. Then, the court will set the timeline for the submission of briefs for each party and likely order an oral argument before issuing a decision. Given these developments, that likely puts any decision on the merits of the case at least two weeks out at the earliest. In the meantime, the 5th Circuit Court of Appeals order staying the implementation of the ETS remains in place. The stay **prohibits OSHA from implementing the ETS** until a further court decision. OSHA acknowledged such on their [website](#) this week and confirmed that they will not take any actions to implement or enforce the ETS until a further decision by the 6th Circuit Court of Appeals.

CMS & CDC Stakeholder Call on New Guidance. CMS and CDC will host a Nursing Home Stakeholder call on Tuesday, November 23 from 2:00 – 3:00 pm ET. The call will feature a discussion of recently released guidance (presumably visitation and survey memos) by subject matter experts (names not announced). Register [here](#) and you will be sent the information to join the call.

Distribution of Phase 4 and ARP Rural Provider Relief Fund Payments Delayed: HRSA updated its PRF website today noting that it will not begin distributing Phase 4 and American Rescue Plan (ARP) Rural payments until December 2021 and distributions will continue through January 2022. This reflects about a one-month delay from their original goal, which was to begin ARP Rural distributions in late November. In addition, a bipartisan bill was introduced called the, “Provider Relief Fund Improvement Act.” The [bill](#) seeks to extend the deadlines for providers to spend any received PRF dollars and would expand the uses of the dollars to include investments in workplace & safety measures. The bill does not appropriate additional PRF dollars. For more details, see this [article](#).

CMS on Standard Recertification and Complaint Survey Backlogs. On November 12, CMS issued [QSO-22-ALL](#) that directs State Survey Agencies (SAs) to address backlogs to standard recertification and complaint surveys. The MEMO also outlined the increased oversight CMS is focusing on for the health, safety and well-being of nursing home residents. This [article](#) reviews the MEMO and approaches the changes with operational tactics to help organizations.

“Wearing masks, regular vaccine boosters, and other precautions are likely to be our new normal.” So said Dr. David Fairchild, Chief Medical Officer for MinuteClinic and Senior Vice President and Associate Chief Medical Officer for CVS Health, on the LeadingAge Coronavirus Update Call today. See this [article](#) for the whole interview, in which Dr. Fairchild talked about vaccines, hesitancy, boosters, and the safety of COVID vaccines for children.

CDC Recommends Use of Johnson & Johnson’s Janssen COVID-19 Vaccine Resume: The CDC has [updated their information on use of the Johnson & Johnson’s Janssen COVID-19](#). The CDC has updated frequently asked questions on the use of Johnson & Johnson’s Janssen COVID-19.

HRSA Says Nursing Homes Can Wait to Report Infection Control Expenses until Second Reporting Period: On Monday’s LeadingAge Coronavirus Call, HRSA indicated that providers can wait to report certain expenses for future reporting periods because “all PRF payments have overlapping periods of availability.” This revelation may be of greatest interest to nursing home members who received Nursing Home Infection Control (NHIC) dollars including their incentive payments because these payments can only be used for infection control expenses and won’t be reported upon until the second and/or third

reporting periods. By waiting to report infection control expenses until the second and/or third reporting periods, a nursing home may be able to maximize use of their NHIC payments, while also using their General Distribution payments to cover lost revenues. For all providers, HRSA reinforced their PRF FAQ that indicates providers can choose during each reporting period whether to report expenses and lost revenues or enter “0” for expenses. Basically, HRSA said providers decide, how they apply their PRF funds received to their various coronavirus expenses and lost revenues.

HRSA also clarified that PRF general distribution funds can be used to cover **COVID-19 staff testing costs** that were not reimbursed or obligated to be reimbursed by another source. They did note that providers should document that the testing expenses were to prevent, prepare for and respond to coronavirus and that they weren’t reimbursed by other sources. This documentation just needs to be maintained by the provider not submitted as part of the reporting process.

In related news, some providers began receiving emails from HRSA today stating that they had not yet submitted their first PRF report. It sounds like this email went out pretty broadly and included providers who had actually submitted their reports already. Of note in the communication, HRSA indicates in the email, “Please be aware, if you are eligible for a Phase 4 General Distribution payment, HRSA will not release your Phase 4 payment until you have met your reporting requirements.” Providers who have already submitted their reports do not need to take any additional steps. However, this email should provide extra motivation for other providers to submit their First PRF report by the Nov. 30 deadline and sooner, if possible.

Article on Nursing Home Visitation: As we reported, CMS issued updated guidance on nursing home visitation. Read the LeadingAge article on these changes [here](#). Visitation returns to pre-pandemic in that visitation is permitted for all residents at all times in accordance with 42 CFR Section 483.10 Resident Rights. However, many COVID-era practices, including core principles of infection control, must continue to be observed.

Resource for COVID-19 Vaccine Policies Required by CMS Rule: As we noted during the November 11 Virtual Update, there are 10 processes that must be addressed in organization policies. We have developed this resource to help keep track of the processes that are required, with a few tips for developing, combining, and/or cross-referencing policies. Check out this resource [here](#).

EWA Asks Congressional Leadership to Keep Older Adults Workforce Priorities in Reconciliation Package. The Eldercare Workforce Alliance (EWA or Alliance), a coalition with whom LeadingAge works, sent a letter to the Congressional leadership to applaud them for the historic investments in the care of older adults and the eldercare workforce within the Build Back Better Act. EWA is a coalition of 35 national organizations representing the interdisciplinary care team – older adults, family caregivers, direct care workers, long-term services and supports (LTSS) providers, and health care professionals – joined together to address the immediate and future crisis in caring for an aging America.

The Alliance also asked the Congressional leadership for continued support for investments in initiatives that make historic investments in the elder care workforce recruitment and retention, which includes: Medicaid’s coverage of HCBS services, the Nursing Home Worker Training Grants, the Health Profession Opportunity Grants, and the Older Americans Act HCBS initiatives that allow the aging network to support this workforce.

EWA also requested that the Build Back Better Act include funding for The National Family Caregiving Support Program, and the caregiving tax credit be included in the final package. Additionally, to close the geographic and demographic gaps in geriatrics workforce training, EWA request an increase in the funding for the Geriatrics Workforce Enhancement Program (GWEP) and Geriatrics Academic Career Awards (GACA), administered by the Health Resources Administration. The GWEPs and GACAs are the only federal programs that train geriatric health care providers. You can access the letter [here](#).

HHS Monoclonal Antibody Distributions. [Here](#) is the notice of the allocation of monoclonal antibodies by state from the Federal COVID Response Team; the cycles (each weekly report) are usually for one week but this cycle (10) covers two weeks since Thanksgiving is next week.

Vaccine Mandates: New CMS and OSHA Rules: Virtual Update Recording Available. On November 11, LeadingAge policy experts held a 90-minute briefing explaining the Interim Final Rules by the Centers for Medicare and Medicaid Services (CMS) and the Occupational Safety and Health Administration (OSHA) mandating COVID-19 vaccinations for organizations with more than 100 staff and all staff in CMS-certified settings. Listen to the briefing and download the presentation materials here: [Vaccine Mandates: New CMS and OSHA Rules](#). Stay informed about vaccine mandate developments with the [latest information, tools, and resources](#).

Member Profile: “Students are the Future of Senior Living” Our workforce crisis isn’t only about retaining experienced frontline workers; it’s also about attracting the next generation of staff and demonstrating the great career options in long-term services and supports. [Here’s the story of one LeadingAge member](#) working with local high schools to give low-income students a promising start in our field, by offering CNA training, paid internships, mentoring, and meaningful jobs with a future.