



Nursing Home Weekly: Recap of LeadingAge Updates

December 17, 2021

LeadingAge Coronavirus Update Calls. All Update Calls are at 3:30 PM ET. Workforce issues around the country are still headline news and many LeadingAge members are still wondering “where did the workers all go?” On our Monday, December 20th call we will welcome back Mark McInernay, Director of the Center for Workforce Research and Information for the state of Maine. He will talk about the latest trends in the workforce and what we have learned about how workers are coming back into the workforce and some possible recruitment ideas for LeadingAge Members. LeadingAge members are also working hard to stay informed about the omicron variant and how we can control transmission. On our Wednesday, December 22nd call, we will be joined by Ronald Nahass, a leading infectious disease doctor who will take about the latest trends with COVID-19 and provide ideas and strategies for our members to control transmission and protect staff and residents. If you haven’t registered for LeadingAge Update Calls, [you can do so here](#).

Update on Legal Challenges to CMS Interim Final Rule. We have two updates today after the Eighth Circuit and Fifth Circuit Courts of Appeals decisions earlier this week. The updates involve the separate cases filed individually by the states of Texas and Florida, respectively.

- **Texas**— After the Fifth Circuit eliminated the injunction on the CMS vaccine mandate for 26 states that were not part of the Louisiana litigation, the federal district court in Texas revisited Texas’s challenge to the CMS vaccine mandate. The Texas court entered a preliminary injunction enjoining the CMS mandate for communities in Texas.

We have a tie --- the Texas injunction means that the CMS vaccine mandate is paused in 25 states and in effect in another 25 states. Injunctions are now in place in the following states: Texas, Louisiana, Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Carolina, Utah, West Virginia, Kentucky, Ohio, Missouri, Nebraska, Arkansas, Kansas, Iowa, Wyoming, Alaska, South Dakota, North Dakota, and New Hampshire.

- **Florida**— Florida has petitioned for a “rehearing en banc” of the Eleventh Circuit Court of Appeals decision refusing to enjoin the CMS vaccine mandate pending appeal. The motion asks for the full court to overrule the three-judge panel’s order denying Florida an injunction pending appeal. The Eleventh Circuit as a whole is more conservative than the three-judge panel that denied Florida’s request for an injunction pending appeal. Florida’s motion for rehearing en banc will delay it seeking relief from the U.S. Supreme Court, likely putting it after applications from the federal government seeking to fully stay the Missouri and Louisiana district court’s preliminary injunctions.

Barring any changes from CMS, the CMS Memo QSO 22-04, issued on December 2nd, is still in place, which states that they will not enforce the interim final rule while there are court-ordered

injunctions in place prohibiting enforcement of the provisions: <https://www.cms.gov/files/document/qso-22-04-all.pdf>. LeadingAge reached out to CMS for clarity. They report they are “reviewing the court decisions and evaluating next steps.” We will keep you updated if/when we hear any additional response from CMS or any updates on the legal challenges.

Action on Build Back Better Unlikely Before January. The second top Democrat in the Senate, Democratic Whip Senator Durbin, signaled today that they plan to revisit Build Back Better in January. He deferred to Senator Schumer to make official announcements but confirmed what many observers feared to be the case. This means LeadingAge members still have time to reach out to their Senators and let them know about the importance of passing the bill, with its HCBS expansion, housing, and

LeadingAge article explaining Phase 4 Provider Relief Payments: This [article](#) explains the methodology HRSA used in calculating the payments and what providers can expect as an average payment. In response to some of your inquiries, HRSA has not published a list of providers who will receive Phase 4 payments starting tomorrow.

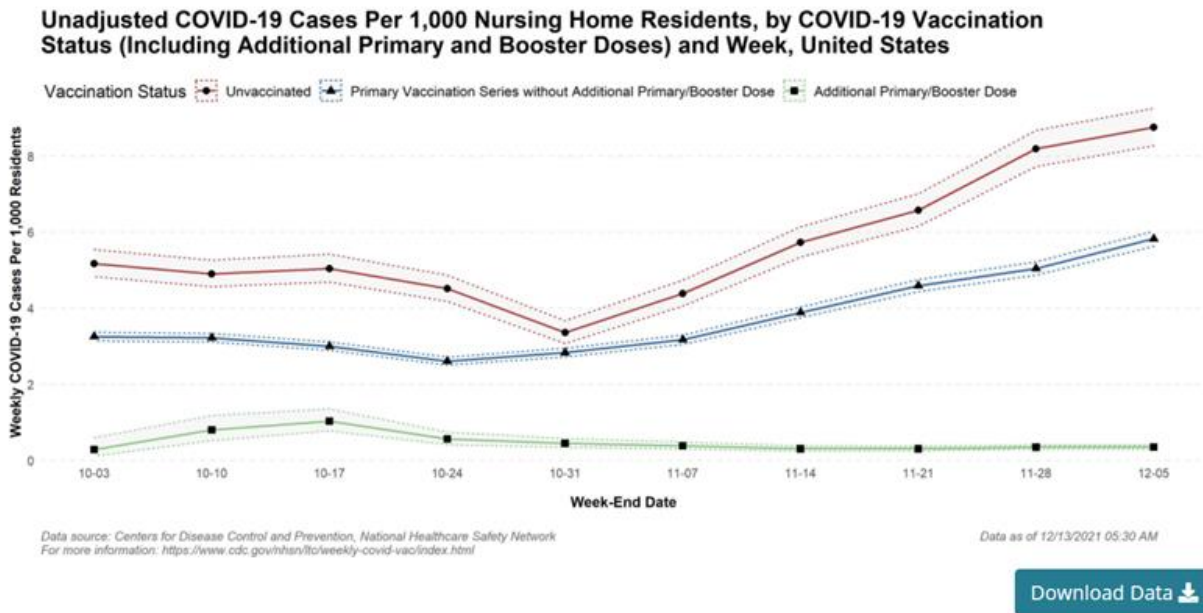
Updated EEOC Guidance on Whether COVID-19 Qualifies as a Disability. The Equal Employment Opportunity Commission (EEOC) updated its [guidance](#), saying that a person diagnosed with COVID-19 may be considered to have a disability under the Americans with Disabilities Act (ADA) under certain circumstances. A person diagnosed with COVID-19 who has mild symptoms that resolve in a few weeks without issue will not be considered to have a disability under the ADA. A person *maybe* considered to have a disability when their COVID-19 symptoms cause mental or physical impairment that “substantially limits one or more major life activities.” The ADA requires employers to offer reasonable accommodations that allow workers with disabilities to do their jobs and protects workers from discrimination based on their disabilities

Conversation with a Nursing Home Provider on their Pandemic Experience and Leaders of Color Network: On Monday, Deke Cateau, CEO of [AG Rhodes](#) (LeadingAge Member) in Atlanta, Georgia joined us on the LeadingAge Coronavirus Update Call. Deke Cateau shared his new book “[Brush Fire: COVID-19 and Our Nursing Homes](#)” that documents his pandemic experience and the LeadingAge’s Leaders of Color Network. The interview is summarized [here](#)

Resources for Hiring Afghan Refugees. Here is [an article](#) on our interview today with Krish O’Mara Vignarajah of Lutheran Immigration and Refugee Service. She provided resources and information for LeadingAge members interested in hiring Afghan refugees. She also directed interested employers to the TENT.org [U.S. Employers’ Guide to Hiring Afghan Refugees](#).

Number of childless older adults is increasing. Declines in marriage and fertility are starting to be reflected in the lives of aging adults, according to a [press release](#) today from the US Census Bureau. Approximately 16.5% of Americans over age 55 have no children, according to a report released by the Census Bureau at the end of the summer, [Childless Older Americans: 2018](#). Childless older adults have higher levels of personal net worth and educational attainment and are less likely to have a disability. Aging services providers should keep an eye on this increasing trend; fewer sons and daughters means there will be fewer informal caregivers available to help childless older adults in the coming years.

Chart from the CDC website.



FROM HHS:

Friday, CDC released an *MMWR* on [booster and additional primary dose COVID-19 vaccinations among adults aged ≥65 Years](#) in the United States between August 13, 2021 – November 19, 2021. Although COVID-19 vaccines are highly effective, vaccine effectiveness wanes over time, and adults aged ≥65 years are at increased risk for severe COVID-19–associated illness. Booster and additional primary vaccine doses increase protection. During August 13–November 19, 2021, 18.7 million persons aged ≥65 years received a booster or additional primary dose of COVID-19 vaccine, constituting 44.1% of eligible persons aged ≥65 years. Coverage differed by primary series vaccine product and race/ethnicity. Strategic efforts are needed to encourage eligible persons aged ≥18 years, especially those aged ≥65 years and those who are immunocompromised, to receive a booster and/or additional primary dose to ensure maximal protection against COVID-19.

Senate Finance Committee releases Build Back Better Title. Last weekend the Senate Finance Committee released its 1180-page [draft provisions](#) for Build Back Better, covering Medicare, Medicaid, tax and other provisions in its jurisdiction. Here is a quick topline list of provisions affecting nursing homes and other post-acute providers. High points in the Senate Finance draft for LeadingAge members:

- There is a big good change in the bill – the requirement that CMS implement minimum staffing ratios has been eliminated, while the study to determine if there should be minimums has been retained and CMS is now directed to report to Congress on its conclusions, starting in 2025 and every 5 years thereafter.

- However, the requirement that beginning in 2024 both SNFs and NFs must have an RN on duty 24/7 has been retained. While we did not succeed on our arguments that this requirement should be subject to a real study and that it is not feasible in parts of the country, there is a provision that could help fund new staff. “Grants to Improve Staffing and Infection Control” provides \$800M beginning in 2024 to states to provide wage or benefit enhancements or improve and develop training and career development opportunities and/or expand staffing for nursing staff that care for Medicaid recipients.
- The second grant that members need to be aware of is the Nursing Home Worker Training Grant provision, approximately \$1.7B – directed at non-RN workforce (direct care workers, HH, hospice, LPNs). Again, opportunity to work with states.
- The special focus facility program is expanded with funding to CMS to increase total SNFs in the program to 3.5% (recall that hearing several years ago revealed that CMS kept the program at a very low number because it had not been funded, with big waiting list), and creates a mandatory on-site consultation program (but no new penalties), which was included in a bill LeadingAge supports, the Nursing Home Reform and Modernization Act of 2021, and is the first time Congress has recognized the importance of not focusing on punishment as the first response to poor performance.
- The bill also includes funds to CMS to improve the survey system, including training, tools, tech assistance and funding to state agencies to improve surveys – a little disappointing as no focus on consistency or alternative ways of looking at ensuring compliance, like the consultation program for SFFs..
- There are 2 additional reporting requirements – resident assessment data and direct care staffing data – that will be subject to 2% penalty for inaccurate reporting from FY 2026-2031 (the reporting requirements aren’t new, the implications for inaccurate reporting are).
- Another positive: the bill retains the HCBS expansion we support -- this is another critical opportunity for state partners to ensure that their state applies for an HCBS Improvement Grant – extensive work will be needed to identify current and future needs, especially around workforce and expanding opportunities for Medicaid recipients – the benefit is a 6% FMAP increase, with additional 2% for states that support self-directed care and the self-directed workforce. Really critical source of funds to enhance direct care workforce
- Other provisions – Money Follows the Person demonstration program is permanently extended, as are protections against spousal impoverishment for Medicaid home-based recipients; and the Independence at Home demonstration program is also made permanent.

Senate HELP Committee BBB Title too. The Senate HELP Committee also released its [draft bill](#), preserving many of the workforce provisions LeadingAge supports. Highlights are:

- **Direct Care Workforce Grants.** \$1 billion in FY 2022 – 2031; 3-year renewable competitive grant funds specifically for the recruitment, training and retaining direct care workers. Eligible entities include a nonprofit organization with experience in aging, disability, supporting the rights and interests of direct support workers, or training or educating direct support workers. Each eligible entity receiving a grant under subsection shall use the grant funds to provide competitive wages, benefits, and other supportive services, including transportation, child care, dependent care, workplace accommodations, and workplace

health and safety protections, to the direct support workers served by the grant that are necessary to enable such workers to participate in the activities supported by the grant.

- **Technical Assistance Center for Supporting Direct Care and Caregiving.** The Administration for Community Living, for FY 2022, is appropriated, \$20 million to remain available until September 30, 2031, for necessary expenses to establish, directly or through grants, contracts, or cooperative agreements, a national technical assistance center to provide technical assistance for supporting direct care workforce recruitment, education and training, retention, and career advancement, and for supporting family caregivers and caregiving activities.
- **Registered Apprenticeships Program.** The National Registered Apprenticeships Program is allocated \$500 million to support programs described in such paragraph that serve a high or high percentage of individuals with barriers to employment, including individuals with disabilities, or nontraditional apprenticeship populations.
- **Funding for the Aging Network and Infrastructure.** Under the Administration for Community Living most of the additional \$1.2 billion for OAA authorized programs has been retained. This includes \$655 million for necessary expenses to carry out part B of HCBS supportive services for FY 2021. The allocation should be used to invest in the aging services network workforce and physical “infrastructure” investments.
- **Palliative Care and Hospice Education and Training Funding,** were retained, and it includes the following:
 - \$20 Million for Palliative Care and Hospice Academic Career Awards;
 - \$25 Million for Training Health Professionals in palliative and hospice care;
 - \$30 Million for Palliative Care and Hospice Education and Training; and
 - \$20 Million for Hospice and Palliative Nursing, to establish a program to award grants and contracts to 22 accredited schools of nursing, health care facilities and programs leading to certification as a Certified Nursing Assistant.

Article on MedPAC recommendation to cut SNF rates. Here is an [article](#) containing more details on the MedPAC analysis of how SNFs have fared during 2020 and the pandemic. MedPAC has made this and similar recommendations in the past but CMS typically has not acted on it. In order to effectuate the recommendation, both Congress and CMS would have to take action.