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Federal Courts Pause Enforcement of CMS Vaccine Mandate Nationwide

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Earlier, we wrote about ten Plaintiff States that filed a lawsuit in a Missouri federal district court challenging the Centers for Medicare and Medicaid Services' (CMS) November 5, 2021 Interim Final Rule with Comment Period entitled "Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination" (CMS Vaccine Mandate). Since then, 12 more Plaintiff States have filed a separate but similar lawsuit in a federal district court in Louisiana.

These two federal district courts have now issued orders temporarily staying enforcement of the CMS Vaccine Mandate, and CMS has announced that it is suspending activities related to the implementation and enforcement of the CMS Vaccine Mandate pending future developments in the litigation. On November 29, 2021, the United States District Court for the Eastern District of Missouri issued a preliminary injunction preventing CMS from enforcing the CMS Vaccine Mandate in the first ten states to file suit (Missouri Order). The next day, the United States District Court for the Western District of Louisiana issued a similar preliminary injunction covering the remainder of the country (Louisiana Order). When read together, the Missouri and Louisiana Orders constitute a nationwide stay of the CMS Vaccine Mandate. On December 2, 2021, CMS announced that surveyors must not survey providers for compliance with the CMS Vaccine Mandate while the preliminary injunctions are in effect. Below, we discuss what these two orders mean for health care providers that were subject to the CMS Vaccine Mandate and what is likely to happen next.

What Do the Orders Say?

Both orders are preliminary injunctions that require CMS and the U.S. Department of Health and Human Services to immediately cease implementation and enforcement of the CMS Vaccine Mandate against all covered health care providers. Preliminary injunctions are not final orders, meaning the stay of the CMS Vaccine Mandate is intended to be temporary until there has been a full hearing on the merits. Thus, the orders prevent enforcement of the CMS Vaccine Mandate while the cases are pending.

To support these decisions, the orders relied on legal arguments that (i) CMS lacked authority to issue the CMS Vaccine Mandate, (ii) the CMS Vaccine Mandate improperly encroached on the plaintiff states' sovereign powers, and (iii) the CMS Vaccine Mandate would have a significant negative impact on the health care work force (particularly as it relates to likely staffing shortages), among other things.

The orders differ in their scope. The Missouri Order applies to "any and all Medicare- and Medicaid-certified providers and suppliers within the states of Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming" (the first ten Plaintiff States). The scope of the Louisiana Order "will be nationwide" except for the ten Plaintiff States that are already covered under the Missouri Order, and applies to "all healthcare providers, supplies, owners, employees, and all others covered by [the CMS Vaccine Mandate.]" Although the plaintiff states in the Louisiana suit consist only of Louisiana, Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Carolina, Utah, West Virginia, Kentucky, and Ohio, the Louisiana court made clear that its order applies "nationwide" to establish "uniformity" given the CMS Vaccine Mandate's nationwide scope.

The orders state that the Plaintiff States contesting the CMS Vaccine Mandate in each case are likely to succeed on their challenges, that the Plaintiff States will suffer irreparable harm if a preliminary injunction were not entered, that this potential harm outweighs any injury to the federal government resulting from the preliminary injunction, and that the public interest weighs in favor of granting the preliminary injunction. Both orders also heavily cited the November 12, 2021 Fifth Circuit Court decision implementing a temporary stay of the Occupational Safety and Health Agency (OSHA) COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS) covering private employers with 100 or more employees (often referred to as the Large Employer Vaccine Mandate).

What does the Order mean for providers covered under the CMS Vaccine Mandate?

Now that a nationwide stay is in effect, providers covered under the CMS Vaccine Mandate will have more time to ensure that all covered staff have been vaccinated or granted an exemption. Because these orders are not permanent injunctions of the CMS Vaccine Mandate, there is still a possibility that the courts will ultimately allow the CMS Vaccine Mandate to be implemented, at which point, a covered provider will need to be prepared to come into compliance. The length of the trials and when a final order ending the temporary stay will be issued in either case is uncertain. At the time of this writing, there are also appeals that the federal government has filed and emergency motions to lift the preliminary injunction.

In the meantime, providers should continue to work toward keeping their health care organizations as safe as possible. Given the uncertainty of the outcome of these cases and considering that other authorities at different government levels may issue similar vaccine mandates, it is recommended that providers continue working to implement a plan for compliance with the CMS Vaccine Mandate, should it be upheld. This includes a plan for ensuring all eligible employees are vaccinated, a plan for providing accommodations for those who are exempt, and a plan for tracking and documenting staff and vendor vaccinations. Providers should ensure that such plans are consistent with other federal and state laws.

If you have questions about the CMS Vaccine Mandate, compliance, or the legal challenges, please contact [Bahati Mutisya](#), [Matt Wolfe](#), [Claire Cowart Haltom](#), [Jennifer Curry](#) or any member of Baker Donelson's [Health Law](#) team.