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Fifth Circuit Reversal of Nationwide Stay Leaves Enforcement Status of CMS Vaccine Mandate Uncertain

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After two federal courts issued preliminary injunctions preventing the Centers for Medicare and Medicaid Services (CMS) from enforcing its November 5, 2021 vaccine mandate nationwide, CMS issued a memorandum stating that it would not enforce the CMS Vaccine Mandate while these injunctions were in place. On December 15, 2021, a federal circuit court issued a ruling limiting the scope of one of the preliminary injunctions to only the plaintiff states involved in the two federal cases, leaving the CMS Vaccine Mandate enforceable in the remaining non-plaintiff states. This update discusses what this ruling means for providers.

Background

On November 29, 2021, the United States District Court for the Eastern District of Missouri issued a preliminary injunction in the first ten states to file a lawsuit challenging the CMS Vaccine Mandate (the Missouri Order). Those ten states are Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming.

Fourteen other plaintiff states filed challenges in Louisiana, including Alabama, Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Utah, and West Virginia. On November 30, 2021, the United States District Court for the Western District of Louisiana issued a similar preliminary injunction covering those 14 states, as well as the remainder of the country (the Louisiana Order). Together, the Missouri Order and the Louisiana Order created a nationwide stay of the CMS Vaccine Mandate. We previously issued updates about these two cases [here](#) and [here](#).

On December 2, 2021, in light of the Missouri and Louisiana Orders, CMS announced that it would not enforce the CMS Vaccine Mandate, "while there are court-ordered injunctions in place prohibiting enforcement of this provision."

On December 15, 2021, the United States Court of Appeals for the Fifth Circuit ruled that the Louisiana Order could not apply to states outside of the 14 plaintiff states in that case, leaving the injunction of the CMS Vaccine Mandate in place in only 24 states (Fifth Circuit Order).

The State of Texas brought its own challenge to the CMS rule, but after holding oral argument, the United States District Court for the Northern District of Texas stayed the lawsuit because the Louisiana Order already enjoined enforcement of the CMS Vaccine Mandate in Texas. Now that the Fifth Circuit Order limited the scope of the injunction, leaving Texas no longer covered by the Louisiana Order, the Texas district court reconsidered its earlier decision and stayed enforcement of the CMS mandate in Texas as of December 15, 2021 (Texas Order). The Texas Order now creates a divided nation with the CMS Mandate being enjoined from enforcement in the 25 above-mentioned states and enforceable in the remaining 25 states, District of Columbia, and U.S. territories.

What does the Fifth Circuit Order say?

The Fifth Circuit Order upheld the portions of the Louisiana Order implementing a stay of the CMS Vaccine Mandate. However, the ruling concluded there was insufficient justification for applying the injunction nationwide because the Louisiana Order did not specify how inconsistent rulings across the country would "undermine an injunction limited to certain jurisdictions." In other words, an injunction protecting unvaccinated workers in some jurisdictions will remain effective even if other jurisdictions do not have the same injunction.

Notably, the Fifth Circuit recently implemented a nationwide temporary stay of the Occupational Safety and Health Agency (OSHA) COVID-19 [Large Employer Vaccine Mandate](#), discussed [here](#). The Fifth Circuit Order acknowledged important distinctions between the CMS Vaccine Mandate and the Large Employer Vaccine Mandate, making clear that the statutory authority and applicability of the two laws differ.

What does this mean for the current enforceability of the CMS Vaccine Mandate in states not covered by the federal orders?

CMS's December 2, 2021 announcement states that it will not enforce the CMS Vaccine Mandate, "while there are court-ordered injunctions in place prohibiting enforcement of this provision." Although the Fifth Circuit Order limited the scope of the nationwide injunction, there are still court-ordered injunctions in place in the 25 states covered by the Missouri Order, the Louisiana Order, and the Texas Order. Thus, it is unclear whether CMS will resume plans to implement and enforce the CMS Vaccine Mandate in the other 25 non-plaintiff states, District of Columbia, and U.S. territories.

Providers in those states are left in a difficult position as they wait to hear what CMS intends to do. Providers are permitted to go forward with implementing compliance plans in the event CMS resumes enforcement, but they must consider whether their states have enacted laws prohibiting vaccine mandates that could create liability if the providers require vaccines.

For example, Tennessee enacted a law prohibiting employers from implementing vaccine mandates unless the employer is subject to a "valid and enforceable" federal vaccine requirement.

Health care systems with facilities in the 25 non-plaintiff states, District of Columbia, or U.S. territories that are not covered by the preliminary injunctions in the Missouri, Louisiana, or Texas Orders and have similar state law prohibitions on employer vaccine mandates must decide whether to delay implementation of the CMS Vaccine Mandate and possibly face exposure to federal penalties or comply and risk liability under their state's vaccine mandate prohibition laws. Additionally, these providers must weigh the impact that compliance with the CMS Vaccine Mandate could have on staffing availability.

Challenges on both sides of this issue continue to arise and have now reached our country's highest court. On December 16, 2021, the Biden administration filed requests for emergency stays of the Missouri and Louisiana Orders in the U.S. Supreme Court. Also, on December 16, 2021, Florida requested all of the judges on the U.S. Court of Appeals for the Eleventh Circuit to review a decision by a three-judge panel of that court that refused to issue an injunction against the CMS Vaccine Mandate pending appeal. We will continue to monitor these cases as they unfold and continue to provide you regular updates.

Given that the CMS Vaccine Mandate is legally valid and enforceable in the 25 non-plaintiff states, District of Columbia, and U.S. territories, providers in those states should have a plan in place to resume compliance in the event CMS declares it will resume enforcement. However, in the event compliance could create staffing issues or create liability under state law, providers may consider holding off on carrying out those compliance plans until CMS clarifies its intentions. Regardless, health care facilities should seek counsel on how to communicate to their staff by discussing your respective state's or states' legal and regulatory environment with a health care or labor and employment attorney.

If you have questions about the CMS Vaccine Mandate, compliance, or the legal challenges, please contact [Bahati Mutisya](#), [Matthew W. Wolfe](#), [Claire Cowart Haltom](#), [Jennifer Curry](#), [Martha L. Boyd](#), [Melissa Vest](#), or any member of Baker Donelson's [Health Law](#) and [Labor & Employment](#) teams.