

FEDERAL JUDGE BLOCKS COVID-19 VACCINE MANDATE FOR HEALTHCARE PROVIDERS IN 10 STATES: WHAT SHOULD HEALTHCARE EMPLOYERS DO?

Insights
Nov 30, 2021

A federal judge in Missouri just temporarily blocked the Centers for Medicaid and Medicare Services (CMS) from enforcing its COVID-19 mandate in 10 states: Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming. The Court's 32-page opinion issued yesterday questions the anticipated breadth and the scope of [the mandate issued by the agency in early November](#), as compared to the data and rationale that CMS cites in support of the rule. While this Order is a significant victory for some covered healthcare providers that do not want to require employees to be vaccinated, its limited geographic scope creates further questions and uncertainty – especially for national healthcare employers with employees that fall both inside and outside the reach of the court's order. Regardless of your location, this decision is worthy of your attention because it could influence other courts to issue similar rulings in the near future. What should covered healthcare employers know about this November 29 decision?

What Happened?

As a refresher, [CMS issued an Interim Final Rule \(referred to as an IFC\) on November 5](#), effectively revising the conditions of participation that various Medicare and Medicaid certified providers and suppliers must satisfy to remain in the CMS Medicare/Medicaid programs. Among other things, the rule mandates that most employees, volunteers, students, contractors, and other "staff" (broadly defined) who provide services within covered facilities be fully vaccinated against

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the COVID-19 virus by January 4, 2022. It also sets an earlier deadline for accommodation requests and the first vaccine dose: December 6, 2021.

On November 11, a collection of 10 states (Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming) filed a complaint in a Missouri federal court challenging the enforceability of the CMS mandate. Two days later, the states filed a Motion requesting that the court enter a preliminary injunction to prevent the administration and CMS from enforcing the mandate. Other states have filed similar lawsuits in other jurisdictions, such as Florida, Louisiana, and Texas. On November 20, the Northern District of Florida denied a request to block the CMS rule.

What did the Missouri Court Say?

Most critically, the Court entered a preliminary injunction against the CMS vaccine mandate, holding that the states demonstrated a likelihood of success on the merits and established that they would suffer immediate and irreparable harm in the absence of an injunction. The Court also found that the balance of equities weighed in favor of the states and that a preliminary injunction is in the public's interest.

Judge Rules that Agency Didn't Have Power to Issue Rule

The Court agreed with the states that CMS likely did not have the authority to enact the IFC. How so? The Court explained that Congress did not specifically authorize the agency to issue a rule with such vast political and economic significance and which so markedly alters the balance of power between state and federal governments. The Court also noted that CMS may have improperly bypassed its usual notice-and-comment process. CMS can only bypass the notice-and-comment requirements if "good cause" establishes that those procedures "are impracticable, unnecessary, or contrary to the public interest" under the circumstances. The Court said that this exception should be read narrowly and only used in "rare" circumstances. The Court reasoned that CMS could not rely on its own delay in drafting the rule to demonstrate the good cause required to skip the notice-and-comment period.

Court: Mandate Not Justified

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Perhaps most importantly, the Court agreed with the states that the IFC is “arbitrary and capricious” – part of the standard by which courts assess the validity of actions by federal agencies. Specifically, the court found no rational connection between the facts and the ultimate choice by CMS to mandate vaccination. The Court also found that CMS lacks evidence that vaccination status has a direct impact on the spread of COVID-19 within the covered healthcare facilities. The Court questioned the agency’s reliance on data from long-term care facilities, which are disproportionately impacted by COVID-19 compared to the other 14 types of covered facilities, and failure to exclude facilities serving patients in age ranges that are not at as high of risk, thus finding that the IFC is overbroad. The Court also expressed concern about CMS’s admission that the continued efficacy of the vaccine on transmission of COVID-19 is uncertain. The Court further held that CMS failed to consider (or simply rejected) obvious alternatives to a mandate, such as daily or weekly testing ([which is provided in the currently enjoined OSHA ETS](#)) or natural immunity due to prior infection.

The court was also concerned that CMS did not explain its departure from a history of encouraging but not mandating other vaccinations. The court commented that many entities, workers, and patients may have relied on CMS’s history of not mandating other vaccinations, in arriving at their own opposition to vaccine mandates. Then they did not have the opportunity to present their viewpoints to CMS for consideration.

Court Defers to States’ Rights

Additionally, the Court found that the states had easily demonstrated the IFC would result in immediate and irreparable harm not only by restricting the states’ sovereign interests in enforcing state laws but, perhaps more importantly, by negatively impacting the health and well-being of the states’ citizens. Recognizing that the almost certain exodus of healthcare employees who do not want to be vaccinated will further exacerbate critical staffing shortages plaguing the healthcare industry throughout the pandemic, the Court noted that the IFC would likely result in a decrease of quality care which would, in turn, compromise patient safety. With this backdrop, the Court concluded that the IFC would effectively impede access to necessary care for the elderly and for individuals who cannot afford

healthcare, in direct contravention of Medicare and Medicaid's core objectives.

Finally, the Court reasoned that the balance of equities tipped in favor of the states and that a preliminary injunction would further public interest. In so holding, the Court first noted that there would be very little public impact in maintaining the status quo. It pointed to, among other things, the continuing rise in vaccination rates across the country, the development and availability of treatments to combat COVID-19, and the unknown effectiveness of the vaccine in preventing transmission of the disease.

Where Does This Leave Healthcare Employers?

It must be emphasized that the underlying Order enjoining CMS from enforcing the IFC is expressly limited in scope to covered providers and suppliers in the 10 states at issue: Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming. Thus, there is no room to interpret the order as having broader application. Unless and until further decisions are issued by the courts or CMS, covered healthcare providers and suppliers outside these states must continue to prepare for compliance with the CMS rule and its deadlines of December 6 and January 4.

For employers in one of the 10 covered states, it is critically important to keep an eye on state and local laws that may impact any self-imposed vaccine mandates employers have in place. Some such laws require additional exemptions beyond disabilities or sincerely held religious beliefs. Further, we recommend that you watch for the potential appeal of this Order to the Eighth Circuit Court of Appeals, which could flip this decision at any moment and reinstate the CMS mandate in the 10 states. (The best way to stay on top of these developments is to subscribe to [Fisher Phillips' Insight system](#).)

Without the CMS rule, or other federal requirement for vaccination, employers with mandatory vaccine policies likely must comply with state laws that otherwise would have been preempted by the CMS rule. For example, Kansas and North Dakota recently passed laws that impact vaccine mandates and what exemptions must be considered, and the Arkansas legislature recently passed a bill that is expected to become law in the coming months.

Conclusion

As always, we will continue to monitor the situation regarding healthcare employers' vaccine mandates and provide updates as warranted. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our [FP Vaccine Subcommittee](#) or [Healthcare Industry Team](#).