



Court Blocks Healthcare Vaccine Mandate Across the Nation: A Game Plan for Healthcare Employers

Insights

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Not 24 hours after a Missouri federal court temporarily blocked the Centers for Medicaid and Medicare Services (CMS) from enforcing its COVID-19 vaccine mandate in 10 states, a Louisiana federal court took one giant step further and blocked the rule from taking effect in any healthcare facility across the country not covered by the Missouri decision. The judge's 34-page order issued late Tuesday contends that the federal government does not have the authority to implement the vaccine mandate, effectively putting the entire rule on ice for the time being. But with a January 4, 2022 deadline looming for covered workers to be vaccinated (and a December 6 deadline for accommodation requests and the first vaccine dose), as well as the ever-present threat that this court order could be overturned by an appeals court or the Supreme Court, what should healthcare employers do while waiting for a final decision?

What Happened?

Here's a quick timeline of critical events to catch you up to speed:

- CMS issued a rule on November 5 requiring various Medicare and Medicaid certified providers and suppliers to implement a workplace vaccine mandate if they want to remain in the Medicare/Medicaid programs. The mandate would require employees, volunteers, students, contractors, and other "staff" (broadly defined) who provide services within covered facilities be fully vaccinated against the COVID-19 virus by January 4, 2022. It also set a December 6 deadline for accommodation requests and the first vaccine dose. Importantly, the mandate did not include a testing option as does OSHA's nationwide ETS (also currently enjoined).
- 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 ago, that court granted the states' request to block the rule – but that order only applies to healthcare facilities in those 10 states.
- Separately, another 14 states filed a similar action in Louisiana: Arizona, Alabama, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Utah, and West Virginia. It's that lawsuit that led to yesterday's nationwide order blocking the CMS vaccine mandate for all healthcare employers across the country not already covered by the Missouri ruling.

What did the Louisiana Court Say?

Just as in the Missouri case, the Louisiana federal court entered a preliminary injunction against the CMS vaccine mandate, holding that the 14 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. It made five key findings to conclude that the states would likely prevail in any litigation attacking the mandate:

1. ***Federal Authorities Didn't Follow Standard Process***

It first faulted CMS for not following the standard notice-and-comment period that would have allowed interested parties to weigh in and provide their opinions on the rule. Although the federal agency claimed it had “good cause” to issue the rule without that typical process, the court disagreed. It cited to the fact that CMS took almost two months to prepare the interim final rule, which is longer than a normal notice-and-comment period.

2. ***CMS Doesn't Have Authority to Issue Mandate***

The court said that the separation of powers principle weighed in favor of striking down the rule because a “major question” such as a vaccine mandate impacting millions of workers should have been reserved for federal lawmakers and not federal bureaucrats in the executive branch. “There is no question that mandating a vaccine to 10.3 million healthcare workers is something that should be done by Congress, not a government agency,” said the court. “It is not clear that even an Act of Congress mandating a vaccine would be constitutional. Certainly, CMS does not have this authority by a general authorization statute.”

3. ***The Vaccine Mandate is Contrary to Law***

The judge cited to further provisions of law that were not followed in implementing the vaccine mandate, including one related to the typical administration of the Social Security Act (failing to advise state agencies before rolling out the rule, among other things). It also pointed out that CMS failed to conduct an initial regulatory analysis on the impact the mandate would have on small rural hospitals, positing that loss of workers not complying with the mandate and/or the loss of federal funds could be “significant.”

4. ***The Rule is “Arbitrary and Capricious”***

The court contended that CMS didn't follow reasoned decision making when it issued the rule, and for that reason was arbitrary and capricious. “The goal of the CMS Mandate is to increase individual vaccine rates,” the court noted, but according to the judge “will actually have the effect of harming patient well-being due to staff shortages of providers and suppliers. This is backed up by a number of declarations of various individuals that verify healthcare worker shortages, a significant number of healthcare workers that remain unvaccinated, and the harm that will be caused to these facilities in the event that even a few of the unvaccinated healthcare workers quit or are fired as a result of the CMS Mandate.” Additionally, the court chided CMS for failing to consider (or arbitrarily rejecting) “obvious” alternatives to the vaccine mandate, such as daily or weekly COVID-19 testing, wearing masks or shields, natural immunity, and social distancing.

5. ***The Mandate Violates Various Constitutional Principles***

Finally, the court cited various constitutional provisions such as the Spending Clause, the Tenth Amendment, and the Anti-Commandeering Doctrine for further justification as pressing pause on the vaccine mandate.

Scope of Decision

In addressing the geographic scope of the preliminary injunction, the judge noted a nationwide injunction was necessary due to the need for uniformity since the CMS mandate has a nationwide scope of the CMS Mandate. Therefore, the scope of this injunction is nationwide ***except*** for those employers in states covered by the Missouri ruling: Alaska, Arkansas, Iowa, Kansas, Missouri, New Hampshire, Nebraska, North Dakota, South Dakota, and Wyoming.

Where Does This Leave Healthcare Employers?

For all intents and purposes, healthcare employers covered by the CMS vaccine mandate in all locations across the country have been granted a temporary reprieve. The problem is that we do not know how “temporary” this reprieve will be, and how soon you may need to ramp up your compliance efforts if new life is breathed into the rule. Therefore, you may want to take a cautious approach and perform some behind-the-scenes actions to prepare for a possible resurrected vaccine mandate without unfurling major initiatives. Some steps to consider include:

- Establish a compliant written policy on vaccines and determine how you will enforce it should the CMS rule come back on line.
- Evaluate your company culture and how employees will react to a vaccine mandate. Do you know current site vaccination rates? Have you offered incentives and were they effective?
- Plan for how to handle temporary and long-term employee loss.
- Provide information to employees on vaccines and their safety and effectiveness.
- Determine “how” to explain the pending court litigation and pending appeal(s), because many employees may assume that the CMS rule is dead if they just glanced at headlines.
- Build a process (committee, outside providers, etc.) to evaluate requests for medical and religious accommodations.
- Recognize Collective Bargaining obligations if you are unionized.

Finally, it is critically important to keep an eye on state and local laws for two critical reasons.

- Some local laws may impact any self-imposed vaccine mandates you may have in place. Without the CMS rule in effect, any of your 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.

- At the same time, just because the federal healthcare mandate is on ice does not mean you can let your guard down. You may operate in a state or local jurisdiction that already has a vaccine mandate for healthcare workers in place – and those laws were not impacted by yesterday's decision.

What's Next?

The only practical distinction that may exist between employers operating in the Missouri decision's 10 states and the remainder of employers is if one of these two decisions is overturned while the other remains in place. In such a situation, it is possible that you may have different obligations to comply with a resurrected CMS vaccine mandate while other employers would be spared compliance obligations. And in such a situation, employers with multi-state operations may have a patchwork of rules to follow. You will thus need to monitor these separate pieces of litigation, and the best way to stay on top of these developments is to subscribe to Fisher Phillips' Insight system.

Where this litigation goes next is anyone's guess. As challenges against the CMS rule have also been filed in other states as well, we could see further court decisions further muddying the waters. And we could see a federal appeals court weigh in to overturn these preliminary injunctions at any moment. Given the varied rulings in play, we could see the Multidistrict Litigation Panel once again be called upon to break out its trusty raffle wheel and ping-pong balls to assign this controversy to one federal appeals court for an overall ruling as happened several weeks ago with OSHA's mandate-or-test ETS. And, of course, a trip to the Supreme Court for an ultimate decision is not out of the question.

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.

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