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Status of CMS Vaccination Rules for Healthcare Providers

12.14.2021

Over the last few weeks we have issued client alerts on the status of the OSHA Interim Final Rule (IFR) regarding vaccines and testing requirements for all employers, as well as the CMS IFR directed at healthcare organizations, and the rules aimed at federal contractors.^{[1][2][3]} In recent days, including yesterday, December 13, 2021, there have been additional developments in court challenges regarding the CMS IFR that require the attention of healthcare providers.

Litigation on healthcare mandates: These legal developments include:

Nationwide Injunction: On November 30, a federal district court judge in Louisiana issued a national preliminary injunction forbidding the government from implementing the CMS IFR that would require non-exempted health care workers to become fully vaccinated by January 4. This injunction is on appeal to the Fifth Circuit Court of Appeals in New Orleans, and there is considerable legal debate about whether a nationwide injunction is permitted.

The 10-State Injunction: On November 29, a federal district court in Missouri issued against implementing the CMS IFR in 10 states (Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming). The Louisiana district court carved those 10 states out of its nationwide injunction. December 13, in an order with no explanation or opinion, a three-judge panel of the Eighth Circuit Court of Appeals denied the Government's emergency motion for a stay of the injunction while the appeal is heard, with one judge dissenting.

Denial of Florida Attorney General Motion for Injunction. Before the nationwide injunction, on November 24, a Florida district court denied the Florida Attorney General's "Time-Sensitive Motion for an Injunction." By a Sunday December 5 order, the

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Eleventh Circuit denied the injunction request.

The next day, December 6, in a 44-page opinion explaining its order, the Eleventh Circuit Court of Appeals majority (2 judges) explained that the nationwide injunction the CMS IFR -- which “*purported* to apply in Florida” -- was contrary to substantial precedent and did not preclude the Eleventh Circuit from ruling on Florida’s motion. The Eleventh Circuit denied the injunction as to Florida, because the Florida Attorney General failed to show 1) irreparable harm to the State of Florida from the CMS IFR or 2) a likelihood of success on the merits. In a 50-page opinion, the dissenting judge (who did not debate the nationwide injunction) disagreed would have enjoined the CMS IFR.

Other litigation. In federal lawsuits filed *before* the CMS IFR, vaccine hesitant staff sought to prevent hospitals from *voluntarily* compelling vaccinations, inquiring about vaccination status, or terminating employees. In those cases, involving hospitals as private parties (not governmental actors or compelled by a governmental actor), the courts declined to issue injunctions against the hospitals.

CMS status

After the injunctions issued by the Louisiana and Missouri district courts but before the Eleventh Circuit’s December 5 decision, CMS Directors notified their State Agency Directors by a December 2 Memo that CMS survey and enforcement of the CMS IFR would be suspended “while there are court-ordered injunctions in place prohibiting enforcement of this provision.” The Memo stated that “surveyors must not survey providers for compliance with the [IFR]” while preliminary injunctions were in effect.

Now what?

With the legal challenges pending, what should health care providers do? How can they be best prepared as the legal confusion clears?

First, consider that, if either preliminary injunction on appeal is dissolved, the Government will immediately begin to enforce the CMS IFR. Consider also that, the injunctions may remain in place until a review of the CMS IFR itself, quite possibly on an expedited basis. If the CMS IFR is ultimately upheld, the Government will again move very quickly to enforce its requirements. A transition period may be provided, but at this writing cannot be confidently predicted.

Nonetheless, health care providers and suppliers who have begun termination or disciplining of employees who refuse to get vaccinated or to provide proof of vaccination or whose exemption requests have been denied should place employment decisions on hold while preliminary injunctions affecting the providers and suppliers are in place. As noted above, CMS surveyors are not to find violations – and therefore presumably not to assess penalties or take other enforcement actions – in that period.

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The CMS IFR specifically emphasizes protections for “patients, residents, clients, PACE participants, and staff alike.” Mindful of that goal, healthcare providers and suppliers should review the CMS IFR provisions and put in place other mitigating measures, such as signage, screening, social distancing, and masking requirements. Those who have halted the exemption process should consider developing COVID-compliant policies and procedures (including exemption processes) to quickly roll out if and when compliance is required. Planning ahead, even if the procedures might not eventually be necessary, is preferable than just waiting to see what requirements might be.

Second, health care employers can still voluntarily implement their own vaccine mandate. As discussed above, however, we recommend stopping short of terminating employees and putting in place other mitigating measures for patient and staff safety.

Third, this Butzel Alert updates the status on the CMS IFR specific to healthcare providers, but remember there is also other litigation on the OSHA IFR applicable to employers and federal contractor requirements going on at the same time, so healthcare providers will have to keep track as all of these requirements are addressed in litigation and regulations.

More to come...

Note that the legal developments pertaining to the CMS IFR change almost daily. The accelerated nature of the cases and appeals means that healthcare providers should continue to monitor the situation closely.

Butzel will continue to track these cases, other litigation, and the CMS position. If you have any questions about the status of the CMS IFR, the requirements that the IFR was proposing, its impact on your health care facilities, and how to proceed in light of the injunctions and suspension of enforcement of the IFR, please contact the authors of this alert or any member of Butzel’s health law, labor and employment law, and federal contractor law practices.

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[1] [*resources-alerts-Federal-Judge-Blocks-Vaccine-Mandate-For-Federal-Contractors.html*](#); [2] [*resources-alerts-Part-I-Update-Where-Has-All-The-Litigation-Gone.html*](#); and [3] [*resources-alerts-Part-I-Compelling-Vaccination-in-Certain-Health-Care-Settings.html*](#).