

Employers: Hang on for Another Spin Around the Vaccine Mandate Carousel

December 17, 2021

The latest update to the ongoing saga of President Joe Biden's vaccine mandates and the revolving door treatment of them in the federal district and appellate courts just took another spin, at least with respect to the CMS mandate for health care workers.

A quick history to date of the vaccine mandate path to taking effect:

- September - President Biden announced sweeping vaccine mandates to get most working Americans vaccinated through executive orders and rules published by federal agencies including:
 - Through the Occupational Safety and Health Administration (OSHA) for all employees who work for employers with 100 or more employees
 - Through the Centers for Medicare & Medicaid Services (CMS), such as hospitals, home health agencies, community mental health centers and federally qualified health clinics, as well as the volunteers, trainees and contractors who supply services to these entities where patients and their families may be present
- The U.S. Court of Appeals for the Fifth Circuit issued a stay on Nov. 12 for the OSHA Emergency Temporary Standard (ETS), and the cases challenging this rule have been consolidated in the U.S. Court of Appeals for the Sixth Circuit, with the stay remaining in place for the time being
- The CMS rule was challenged in St. Louis, Missouri and on Nov. 29, a federal district court judge blocked CMS from enforcing the vaccine mandate against the 10 states that brought the case (which did not include Michigan, Ohio, Indiana or Illinois)
- The following day, Nov. 30, a second case challenging the CMS rule was successful in getting a federal judge in Louisiana to enter a stay of the CMS mandate for the entire country

Yesterday, the Fifth Circuit issued a ruling in the appeal of the sweeping CMS stay out of Louisiana, upholding the stay for the 14 states (including Indiana and Ohio) that brought that case, and overturning the stay for all but the 24 states covered as noted herein.

A Texas district court judge immediately entered a preliminary injunction against the CMS mandate in Texas, so 25 states have a pause on the CMS mandate as of today.

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Michigan and Illinois are not plaintiffs in either of the cases and, therefore, the CMS rule may now be enforced in those states. CMS issued a statement on Dec. 3 advising that it wouldn't enforce the COVID-19 vaccine mandate while the preliminary injunctions are in effect. Notably, CMS did not say what it would do if the preliminary injunctions are stayed, as happened yesterday.

In addition, the Sixth Circuit yesterday, voted 8 to 8 declining to hear the OSHA ETS challenges "en banc," meaning it will go to a three-judge panel rather than the entire bench, at least initially.

This is an evolving situation, and it is very likely the federal government will appeal the injunctions to the U.S. Supreme Court soon. In the meantime, employers subject to the CMS vaccine mandate should put policies in place in anticipation that enforcement could begin shortly.

Employers need to stay current on the vaccine mandates that affect their business and the CDC guidance as well. It is important to work closely with your legal counsel to stay up to date on the quickly changing rules and requirements.