

Limited Preliminary Injunction Issued for CMS Vaccine Mandate

November 29, 2021 – Dorsey Health Law
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On November 29, 2021, a federal court in Missouri enjoined the Centers for Medicare and Medicaid Services' (CMS) vaccine mandate in the following states: Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming. Those ten states filed a lawsuit on November 10, 2021, challenging the vaccine mandate and requesting a preliminary injunction. The new CMS vaccine mandate which we wrote about here requires covered staff to receive their first COVID-19 vaccine dose by December 5, 2021 and be fully vaccinated by January 4, 2022. In granting the preliminary injunction, the district court specifically ordered:

Defendants are preliminarily enjoined from the implementation and enforcement of 86 Fed. Reg. 61,555 (Nov. 5, 2021), the Interim Final Rule with Comment Period entitled "Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination," against any and all Medicare- and Medicaid-certified providers and suppliers within the States of Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming pending a trial on the merits of this action or until further order of this Court. Defendants shall immediately cease all implementation or enforcement of the Interim Final Rule with Comment Period as to any Medicare- and Medicaid certified providers and suppliers within the States of Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming.

What this means is that as of November 29, 2021, the December 5, 2021, and January 4, 2022 deadlines are on hold for employers covered by the CMS mandate in Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming. Any vaccine mandates enforced by covered employers in those states will be considered voluntary and subject to any state laws regarding vaccine mandates. Of the ten states, only Arkansas, Iowa, and Kansas have laws regulating COVID-19 vaccine mandates for private employers:

- Arkansas – On October 13, 2021, Arkansas' Governor allowed several vaccine-related bills to become law without his signature. The bills require employers to allow employees to obtain a waiver from a COVID-19 vaccine mandate if the employee produces a negative COVID-19 test once a week or provides proof of COVID-19 antibodies once every six months.
- Iowa – On October 29, 2021, Iowa's Governor signed a law requiring employers to grant exemptions from vaccine mandates beyond those required by federal law. Specifically, in addition to waivers for sincerely held religious beliefs, Iowa employers that voluntarily implement vaccine mandates must grant a waiver if an employee submits a statement that receiving the vaccine would be injurious to the health and well-being of the employee or an individual residing with the employee. In addition, Iowa employees discharged for not complying with an employer's vaccine mandate are eligible for unemployment benefits under the new law.
- Kansas – On November 22, 2021, the Governor of Kansas signed a law with medical



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waiver requirements similar to Iowa's law. On religious waivers, Kansas' law goes beyond what is required by federal law, mandating that employers grant requests for religious exemptions "without inquiring into the sincerity of the request." The law also outlines a complaint and investigation procedure for alleged violations and provides for monetary penalties that increase depending on the size of the employer. In addition, like the Iowa law, Kansas employees discharged for not complying with an employer's vaccine mandate are eligible for unemployment benefits.

The Biden Administration will almost certainly appeal the preliminary injunction. The Eighth Circuit Court of Appeals would consider the appeal and could overturn the injunction and reinstate the mandate. Given the timeline, we expect that new compliance deadlines would be established in the event the preliminary injunction is overturned.

What should employers do?

Covered employers in the ten states at issue who do not wish to proceed with a voluntary vaccine mandate may pause their current efforts to comply with the CMS vaccine mandate, but should at a minimum proceed with preparing a policy, religious and medical exemption forms, and an exemption review process so that employers are ready to proceed within any established deadlines if the preliminary injunction is lifted and the mandate is reinstated. This is the same recommendation we have given to large employers covered by the Occupational Safety and Health Administration's COVID-19 Vaccination and Testing Emergency Temporary Standard (OSHA ETS), which was stayed by the Fifth Circuit Court of Appeals on November 12, 2021.^[1]

Employers looking for consistency when it comes to COVID-19 vaccine mandates will not find it in today's ruling and healthcare employers can once again add themselves to the list of employers who operate in multiple states and must undertake the task of wading through the various federal mandates and their legal statuses. It is both possible and probable that multi-state healthcare employers will be required to comply with CMS's federal vaccine mandate in one state while operating in another state wherein, at least for now, CMS's federal vaccine mandate no longer exists.

Dorsey's employment and health care attorneys will continue to monitor the developments in this matter and will update our blog with changes.

^[1] On November 23, 2021, the Biden Administration asked the Sixth Circuit Court of Appeals to reinstate the OSHA ETS vaccine mandate, following a lottery that assigned to that Circuit multiple challenges to the vaccine mandate.