

CMS Vaccine Mandate Temporarily Halted for Covered Health Care Employers Nationwide

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On Tuesday, November 30, 2021, the United States District Court for the Western District of Louisiana issued a preliminary injunction, enjoining the CMS vaccination mandate effective November 5, 2021.^[1] This order marks the second preliminary injunction issued against the health care mandate, coming only one day after a Missouri District Court issued its injunction for ten mid-western states.^[2] The expansive Louisiana ruling and its accompanying order enjoins the vaccine mandate for all states with the exception of those already covered by the Missouri order.^[3] The below summary discusses key takeaways from the Louisiana District Court ruling and explains what this decision now means for covered health care employers.

Q: Why is the Mandate Enjoined?

A: The preliminary injunction comes as a result of complex legal arguments attacking CMS's constitutional authority to impose a vaccine mandate for health care employers who receive Medicare or Medicaid. On November 15, twelve states including Montana, Alabama, Arizona, Georgia, Idaho, Indiana, Louisiana, Mississippi, Oklahoma, South Carolina, Utah, and West Virginia, filed a complaint and motion against the mandate arguing, among other things, that the mandate exceeds federal statutory authority. (See Louisiana Complaint, pp 26-46).^[4] In its 34-page ruling, the Louisiana District Court Judge assessed all arguments set forth by the plaintiff-states and ultimately ruled in their favor, finding that the motion sufficiently pled all elements necessary for the issuance of a preliminary injunction. (See Memorandum Ruling, p. 33).

Q: Do the States Have Legal Standing to Sue?

A: Yes. In its ruling, the Court first addressed the threshold issue of standing and whether the plaintiff-states articulated a palpable injury which could be effectively redressed by the issuance of an injunction. (See *id.*, p. 7). In assessing whether the states met the standing requirement, the Court explained, "The Plaintiff States also have standing and injury, based upon

the alleged loss of jobs, loss of businesses, loss of tax revenue, and other damages allegedly resulting from employees being fired for refusing the vaccine and/or providers being terminated by CMS from the Medicare/Medicaid provider agreement.” (See *id.*, p. 10). Ultimately, the Court found and held that the states demonstrated a “substantial likelihood” that a preliminary injunction would remedy the injuries suffered as a result of the mandate. (See *id.*, p. 11).

Q: Why Did the Court Find the States Established a “Substantial Likelihood of Success” for a Preliminary Injunction?

A: To prevail on a preliminary injunction motion, the plaintiff-states were required to show, among other things, that there is a substantial likelihood of success on the merits. (See *id.*) The states argued: (1) the Government issued the mandate without following the statutorily required process; (2) the CMS mandate is beyond the authority of the Government; (3) the mandate is contrary to law; (4) the CMS mandate is arbitrary and capricious; and (5) the CMS mandate violates the Spending Clause, Tenth Amendment, and Anti-Commandeering Doctrine. (See *id.*, p. 12). In determining whether the states demonstrated a likelihood of success, the Court analogized this case to the *BST Holdings v. OSHA* case, which also recently resulted in a preliminary injunction against OSHA and its vaccination mandate affecting large private employers. (See *id.*, pp. 12-32). In sum, the Court assessed each argument presented by the plaintiff-states and ultimately concluded that, like the plaintiffs in the *BST Holding* case, the states here demonstrated that constitutional authority was exceeded, thus warranting a preliminary injunction. (See *id.*, pp. 33-34).

Q: What Does This Injunction Mean for Healthcare Employers?

A: In short, the preliminary injunction temporarily restrains the Department of Health and Human Services and the Centers for Medicare and Medicaid Services from implementing the vaccine mandate requirements for health care employers receiving Medicare and Medicaid. Therefore, covered employers and staff members, are not, as of November 30, 2021, required to adhere to the CMS vaccine mandate *at this time*.

Q: Is this Injunction Permanent?

A: No. A preliminary injunction is a temporary injunction which only preserves the status of a case prior to final judgment. It is immediately appealable in this case. Thus, the federal government is expected to quickly appeal to the U.S. Court of Appeals for the Fifth Circuit and seek a stay of the injunction pending appeal. From there, the ruling could, upon review, be affirmed, or it could be stayed and/or overturned, the latter of which alternatives would require healthcare employers to enforce the vaccine requirements as originally discussed in our [prior article](#).

Q: To Whom Does the Injunction Apply?

A: The injunction against the CMS vaccine mandate applies to *all states*, with the exception of Alaska, Arkansas, Iowa, Kansas, Missouri, New Hampshire, Nebraska, Wyoming, North Dakota, and South Dakota. The named states are excluded from the Louisiana ruling because of the Missouri injunction which enjoins the CMS vaccine requirements for those states. (See Missouri Complaint).^[5] According to the Louisiana District Court ruling, the scope of the preliminary injunction applies nationwide “due to the need for uniformity.” (See Memorandum Ruling, p. 33). The Court further explained that the expansive geographic scope of the injunction is to protect the many unvaccinated health care workers in states across the nation. (See *id.* at 33-34). Thus, all health care employers originally affected by the CMS vaccine mandate are now covered by this ruling.

Q: What Are Employer's Options Going Forward?

A: The practical upshot is that, as it stands, CMS cannot enforce the vaccine mandate against covered health care entities at this time. Therefore, covered employers around the country can decide whether to continue their efforts in requiring staff to be fully vaccinated, or cease all efforts until the legal system renders a final ruling on the constitutionality of the mandate. Although the decision to move forward with mandatory vaccinations now rests in the hands of employers for the time being, employers must remember that an appellate court could rule in favor of CMS and the Department of Health and Human Services and could also stay the temporary injunction pending appeal. Thus, employers should carefully consider the practicality of ceasing vaccination efforts and the effect it may have on its staff, should the legal system find the mandate constitutionally enforceable.

Nexsen Pruet is prepared to assist employers with navigating the legal implications of this ruling and other compliance needs related to the COVID-19 virus. Please let us know if there is anything we can do to help.

[1] <https://www.scag.gov/media/pkwfhnum/28-memorandum-ruling-granting-nationwide-preliminary-injunction.pdf>

[2] [cms-injunction.pdf](#) (mo.gov)

[3] <https://www.scag.gov/media/pzjknt0q/29-order-granting-nationwide-preliminary-injunction.pdf>

[4] [CMS-Mandate-Complaint-final.pdf](#) (dojmt.gov)

[5] [doc-1---complaint-cms.pdf](#) (mo.gov)