LEGAL UPDATES

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# U.S. District Courts in Missouri and Louisiana Enjoin CMS from Implementing COVID-19 Vaccine Mandate in 50 States

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On November 29, 2021, the U.S. District Court for the Eastern District of Missouri (Missouri court) issued a preliminary injunction enjoining the Centers for Medicare and Medicaid Services (CMS) from implementing and enforcing the CMS Interim Final Rule ("CMS Rule" or "CMS Vaccine Mandate") to require healthcare workers at facilities participating in Medicare and Medicaid to be fully vaccinated against COVID-19. The injunction affects covered Medicare- and Medicaid-certified healthcare providers in 10 states: Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming. On November 30, 2021, the U.S. District Court for the Western District of Louisiana issued a preliminary injunction enjoining CMS from implementing and enforcing the CMS Rule in the remaining 50 states not covered by the Missouri court's preliminary injunction. While these decisions place employers in unique circumstances that will require employer-specific compliance strategies, including consideration of each employer's goals and tolerance for risk, a few best practices are recommended below.

### The role of state law restrictions on vaccine mandates

The legal landscape faced by employers seeking to comply with federal and state laws relating to COVID-19 vaccines and mitigation measures is complex. Covered healthcare employers in all 50 states (who are not subject to the federal contractor COVID-19 vaccine mandate under Executive Order 14042, as briefly discussed below) should look to state law to determine if the states in which they operate have recently passed any laws banning or limiting their ability to mandate vaccination for their workforces. For example, as discussed

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below briefly, the Missouri and Louisiana court decisions are in direct conflict with a Florida decision in a substantially similar lawsuit requesting injunctive relief. However, while the Florida court declined to enjoin the CMS Rule, the Florida legislature recently passed a law limiting an employer's ability to mandate vaccination. Numerous states, including Arkansas, Kansas, Iowa, Tennessee, Texas, Alabama, Utah, and Montana have either passed or are considering passing laws that limit an employer's ability to mandate vaccination. While many of these state laws do not prohibit vaccine mandates, they may require an employer to grant exemptions beyond what is required under federal law. Additionally, while federal law preempts conflicting state law, the nationwide preliminary injunction of the CMS Rule likely means that employers in those states face risk in failing to comply with state law.

**Missouri and Louisiana decisions to temporarily block the CMS vaccine mandate**

The Missouri court found that plaintiffs satisfied each of the four elements for imposing injunctive relief: 1) a likelihood of success on the merits of their claim to injunctive relief; 2) the threat of irreparable harm absent imposition of an injunction; 3) the balance of equities and hardship to the plaintiffs outweighs the competing claims of injury by the defendant; and 4) injunctive relief is in the public's interest.

The Missouri court determined that plaintiffs were likely to succeed on the merits because CMS lacked the statutory authority to enact a federal vaccine mandate. While the court cited the unprecedented economic and political impact of the CMS Vaccine Mandate and the adverse impact of the Rule on a state's authority to legislate health laws, the Court did not address CMS' competing authority to dictate the terms of participation in federally administered programs. The Missouri court also concluded that the CMS Rule was unlawful because CMS violated the Administrative Procedure Act (APA) by bypassing the notice-and-comment procedures and invoking the good-cause exception, despite the agency's own delay in promulgating the rule.

According to the Missouri court, the standard for establishing a claim of irreparable injury requires demonstrating that irreparable injury "is likely" in the absence of an injunction and is not just a mere "possibility." The Missouri court found that plaintiffs would be irreparably harmed by an inability to enact state laws regarding vaccine mandates; by experiencing staff reductions due to the implementation of the CMS Vaccine Mandate; by experiencing negative economic effects due to the CMS Vaccine Mandate in "Plaintiff states, especially rural areas;" and by experiencing business and financial losses associated with compliance with the CMS Vaccine Mandate. Notably, the court did not discuss the impact of the exemption process permitted under the CMS Rule. Defendants immediately filed a notice of appeal from the Missouri court's decision.

The Louisiana lawsuit was initiated by 12 states: Louisiana, Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Carolina, Utah, West Virginia, Kentucky and Ohio. Yet,

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the Louisiana court chose to extend the geographic scope of its ruling to impose the preliminary injunction on a nationwide basis. In imposing a nationwide injunction, the Louisiana court excluded only those states already subject to the preliminary injunction issued by the Missouri court while not excluding Florida.

Regarding the substance of the Louisiana decision, it addressed primarily the same substantive issues as the Missouri court and borrowed significant portions of the rationale used by the Fifth Circuit in its decision to impose a preliminary injunction on the implementation and enforcement of the Occupational Safety and Health Administration's Emergency Temporary Standard in the case, *BST Holdings, LLC v. Occupational Safety and Health Administration*. In short, like the Missouri court's decision, the Louisiana court enjoined CMS' vaccine mandate upon deciding that the Plaintiff states were likely to prevail on the merits of their claims, would suffer irreparable injury in the absence of a preliminary injunction to preserve the status quo, and the balance of equities and public interest was served by the issuance of the injunction.

**Comparing the Florida District Court decision reaching the opposite conclusion**

In a nearly identical suit filed in the U.S. District Court for the Northern District of Florida (Florida court), the Florida court summarily denied the plaintiffs' motion for a temporary restraining order or permanent injunction. In contrast to the Missouri decision, the Florida court determined that a preliminary injunction is "an extraordinary and drastic remedy" that is granted only when all elements of the remedy of injunctive relief are satisfied.

Focusing on the irreparable injury requirement of the claim for injunctive relief, the Florida court described the requirement as indispensable and the plaintiffs' claim of irreparable injury due to estimated mass resignations as speculative and conclusory. The Florida court declined to find the existence of irreparable injury based on economic losses that could be suffered as a result of federal funding cuts for two primary reasons: 1) any violations of the APA could be remedied by compensatory or corrective relief; and 2) the lack of evidence to suggest that the anticipated loss of federal funding from the State agencies' non-compliance would occur immediately on December 6. Further, the Florida court noted that plaintiffs failed to consider the availability of the CMS Rule's exemption process on estimates of staff losses and that any potential termination of federal/CMS funding would not occur until after December 6. Accordingly, the Florida court denied injunctive relief because plaintiffs failed to show that irreparable injury would result in the absence of injunctive relief.

While the Florida decision affects only employers in the state of Florida, the opposing decision on substantially similar issues demonstrates the level of legal uncertainty facing healthcare employers implementing COVID-19 safety and compliance measures during this public health emergency.

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**Best practices for healthcare employers impacted by the preliminary injunction**

The Missouri and Louisiana court decisions prohibit only CMS from imposing and enforcing vaccine mandates. Notably, the preliminary injunctions do not prohibit private employers, including covered healthcare facilities, from implementing mandatory vaccine policies, although those employers should still be wary of state law and include appropriate exemptions required under federal and state law. While the CMS Vaccine Mandate is enjoined, impacted employers should consider the following courses of action to comply with the remaining laws regarding vaccine mandates, to prepare for potential outcomes regarding federal mandates currently enjoined, and to implement employer-specific measures appropriate for the workplace to mitigate the transmission of COVID-19:

1. Covered healthcare employers that are also subject to the federal contractor COVID-19 vaccine mandate under Executive Order 14042 should comply with the federal contractor COVID-19 vaccine mandate, unless it has been enjoined in states in which the employer operates (Ohio, Tennessee and Kentucky, as of this writing) and the employer has made the decision not to mandate vaccines.

2. Covered healthcare employers that are not subject to the federal contractor COVID-19 vaccine mandate but are subject to state laws that restrict vaccine mandates should comply with state law. To the extent allowed under state law, employers should continue to collect data regarding employee vaccination status required under the CMS Rule and be prepared to comply with the CMS Rule in the event the injunction is lifted.

3. Healthcare employers covered by the OSHA ETS that was published on June 21, 2021, must continue to comply with the June 21 OSHA ETS. The June 21 OSHA ETS does not impose a vaccine mandate but does require employers to implement mitigation measures including monitoring points of entry, providing personal protective equipment at no cost to the employee, and if the employer requires testing of employees to screen for COVID-19, to pay for the cost of the testing and the time associated with waiting for test results. If employees choose to receive a COVID-19 vaccine, the employer must provide reasonable time and paid leave to employees for vaccination and recovery from any side effects resulting from the vaccination. Additional requirements of the June 21 OSHA ETS can be found on OSHA's website. The June 21 OSHA ETS is a temporary standard that will likely expire on December 21, 2021 if not replaced with a permanent standard.

4. The November 6, 2021 OSHA ETS applicable to employers with 100 or more employees remains stayed, and OSHA has suspended implementation and enforcement of the ETS at this time. Any subsequent decision by the Sixth Circuit affecting the stay will not occur until after December 6, the initial compliance deadline of the November OSHA ETS.

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5. The injunctions imposed by the Missouri and Louisiana courts apply only against CMS; they do not apply directly to employers. Consequently, employers that do not fall under either paragraph 1 or 2 above have the flexibility to adopt and implement their own policy regarding COVID-19 vaccinations and should consider that the multiple court actions and injunctions/stay subsequently could be lifted and the vaccine mandate requirement reinstated. A strategy for such employers includes:

   a. Continue to collect data in compliance with the CMS Rule and if applicable, the November OSHA ETS; *and*

   b. Consider whether to impose a "soft mandate" that provides employees with the option of getting vaccinated or, alternatively, submitting to routine testing and masking; *or*

   c. Depending on recruitment and retention-of-personnel concerns, consider rolling out a previously planned "hard mandate" but refrain from or delay aggressive enforcement actions related to noncompliance with the hard vaccine mandate based on goals and risk tolerance; *or*

   d. As a minimum compliance measure, continue to implement measures required under the June OSHA ETS.

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**Contact us**

To be sure, these changing legal requirements pose unique challenges for employers that already face a challenging situation. Husch Blackwell's Labor and Employment team can help formulate policies and implement procedures that are uniquely suited for your workplace. Contact Julianne Story, Barbara Grandjean, Tom O'Day, Brian Hendrix, Jenna Brofsky, Jessica Brown or your Husch Blackwell attorney.

**Your comprehensive COVID-19 legal resource**

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.

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