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Fifth Circuit Lifts Nationwide Ban on CMS Vaccine Mandate, Limiting Ban to Litigant States

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On December 15, 2021, in*State of Louisiana et al. v. Xavier Becerra, et al.*, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) effectively revived the Centers for Medicare and Medicaid Services Interim Final Rule regarding COVID-19 Health Care Staff Vaccination (CMS rule) for roughly half the country by partially staying the November 30, 2021 Order issued by the U.S. District Court for the Western District of Louisiana.

The lower court's order had imposed a *nationwide* preliminary injunction of the federal government's implementation and enforcement of the CMS rule. The Fifth Circuit stayed application of the preliminary injunction to all states that are not parties to that lawsuit. Under the Fifth Circuit's order, the preliminary injunction remains in effect for the following 14 states: Arizona, Alabama, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Utah, and West Virginia. Additionally, because yesterday's decision was issued by the Fifth Circuit, the preliminary injunction from the U.S. District Court for the Eastern District of Missouri (in the Eighth Circuit) remains in place for the following 10 states: Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming.

Further, in response to the Fifth Circuit's decision to lift the nationwide stay, the U.S. District Court for the Northern District of Texas issued a preliminary injunction enjoining CMS from implementing and enforcing the CMS rule in the state of Texas. The Texas court previously had placed the lawsuit filed by the state of Texas challenging federal enforcement of the CMS rule on hold pending the outcome of the Louisiana District Court decision. In issuing the preliminary injunction on December 15, 2021, the Texas court concluded the

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state of Texas was likely to succeed on the merits of its claims against CMS because CMS had exceeded its statutory authority to regulate health and safety by requiring vaccine compliance as a condition of employment. The court also determined that CMS' failure to sufficiently analyze the exacerbating effect of the CMS rule on existing healthcare staff and resource shortages was arbitrary and capricious.

Consequently, CMS is expected to resume enforcement of the CMS rule in all states that were not parties to any of the lawsuits referenced above.

Fifth Circuit decision

In granting a partial stay, the Fifth Circuit recognized that the principles of judicial restraint compel limiting the preliminary injunction to those states that are parties to the lawsuit. In reaching this conclusion, the Court quoted Supreme Court Justice Gorsuch's concurrence in *Department of Homeland Security v. New York*. Justice Gorsuch's concurrence criticized the frequent imposition of nationwide injunctions as jeopardizing a judicial system that benefits from issuing interlocutory orders limited to the litigants to better facilitate the careful deliberation of competing views.

The Fifth Circuit denied the federal government's request for a stay of the preliminary injunction as to all states. The Fifth Circuit concluded that the government had not made a strong showing of likely success on the merits as to its authority to issue the CMS rule.

The status of the CMS rule in each state

CMS is enjoined from implementing and enforcing the CMS rule in those states subject to the preliminary injunction imposed by the U.S. District Court in Louisiana, as modified by the Fifth Circuit, the U.S. District Court for the Eastern District of Missouri, and the U.S. District Court for the Northern District of Texas. The chart below identifies the states in which CMS can enforce its rule. At the same time, numerous states have passed or are considering laws that limit an employer's ability to mandate COVID-19 vaccinations. Some of these laws require employers, including CMS-regulated facilities, that mandate COVID-19 vaccination for their workforce to provide exemptions broader than what is required under federal law. While federal law preempts conflicting state law, some employers may remain caught between federal and state law, and risk penalties for non-compliance with either law.

Status of CMS Rule by State

States	CMS Rule Effective	CMS Rule Enjoined
Alabama		X

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States	CMS Rule Effective	CMS Rule Enjoined
Alaska		X
Arizona		X
Arkansas		X
California	X	
Colorado	X	
Connecticut	X	
Delaware	X	
Florida*	X	
Georgia		X
Hawaii	X	
Idaho		X
Illinois	X	
Indiana		X
Iowa		X
Kansas		X
Kentucky		X
Louisiana		X
Maine	X	
Maryland	X	
Massachusetts	X	
Michigan	X	

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States	CMS Rule Effective	CMS Rule Enjoined
Minnesota	X	
Mississippi		X
Missouri		X
Montana		X
Nebraska		X
Nevada	X	
New Hampshire		X
New Jersey	X	
New Mexico	X	
New York	X	
North Carolina	X	
North Dakota		X
Ohio		X
Oklahoma		X
Oregon	X	
Pennsylvania	X	
Rhode Island	X	
South Carolina		X
South Dakota		X
Tennessee	X	
Texas		X

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States	CMS Rule Effective	CMS Rule Enjoined
Utah		X
Vermont	X	
Virginia	X	
Washington	X	
West Virginia		X
Wisconsin	X	
Wyoming		X

*The state of Florida filed a lawsuit challenging the CMS rule. The U.S. District Court for the Northern District of Florida denied Florida's motion for a preliminary injunction enjoining the CMS rule and subsequently reaffirmed the denial. The Eleventh Circuit denied Florida's motion for an injunction pending an appeal of the Florida District Court decision.

What this means for you

Until CMS provides further guidance, CMS-covered healthcare facilities located in states that are not parties to any lawsuit in which a court has enjoined CMS from enforcing the CMS rule should rely on CMS' December 2, 2021 communication advising state surveyors that CMS is suspending implementation and enforcement of the CMS rule. However, such covered healthcare employers also should prepare for future implementation and enforcement of the CMS rule. At a minimum, such employers may take steps to determine the vaccination status of their workforce.

In states where the preliminary injunction remains in place, employers are reminded that the 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.

This post will be updated with any additional announcements released by CMS regarding enforcement of the CMS rule as a result of the Fifth Circuit's decision.

We will continue to monitor court decisions, as well as any announcement by CMS related to the CMS rule. For compliance issues related to the CMS rule and other federal vaccine mandates, or issues involving conflicting state mandate laws and orders, contact Barbara Grandjean, Kevin Koronka, Tom O'Day, Jenna Brofsky and Jessica Brown or your Husch Blackwell attorney.

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