

## Insights

### 'Tis the Season: Court Issues Nationwide Temporary Stay of CMS Mandatory Vaccination Rule

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The Biden Administration's push for mandatory vaccinations in the workplace has been dealt another blow, this time to the **Interim Final Rule** (the "CMS Rule") issued on November 5, 2021 by the U.S. Centers for Medicare and Medicaid Services ("CMS") and scheduled to go into effect on December 6, 2021.

As we discussed in our prior **client alert**, **webinar**, and **podcast**, the CMS Rule applies to health care facilities which are subject to CMS conditions of participation, including ambulatory surgical services, hospice care, programs of all-inclusive care for the elderly, hospitals, long term care facilities, home health services, comprehensive rehabilitation programs, infection prevention and control and antibiotic stewardship programs, end-stage renal disease facilities, community mental health centers, psychiatric residential treatment facilities, and federally qualified health centers. It requires such facilities to adopt mandatory vaccination policies for its employees and other covered staff members unless such individuals work 100% remotely, are granted a medical or religious exemption, or whose vaccinations are temporarily delayed due to medical contraindications.

On Tuesday, November 30, 2021 a U.S. District Court in Louisiana issued an **order** (the "CMS Nationwide Injunction") which temporarily stays implementation of the CMS Rule nationwide, including in Indiana, except for 10 states which are already subject to a prior **stay** issued on November 29, 2021 by a U.S. District Court in Missouri. The CMS Nationwide Injunction will remain in place until conclusion of the case, upon further order of the issuing court, or upon the order of a higher court reviewing the order on appeal.

For health care facilities subject to the CMS Rule, there are a few key takeaways:

- The stay temporarily halts implementation of the CMS Rule, which was scheduled to begin with Phase 1 on December 6, 2021.
- The stay does not prohibit covered facilities from voluntarily implementing or continuing mandatory vaccination programs, subject to applicable law.
- Covered facilities should carefully monitor the situation and remain prepared to comply, as compliance obligations may happen rather quickly if the stay is lifted. For example, preparatory activities such as ascertaining current vaccination status of covered staff or processing medical and religious exemption requests may be already be in process.
- Covered facilities should determine their anticipated course of action and communicate the action plan with covered staff. Individuals may still have many questions and concerns regarding the CMS Rule or other COVID-19 related safety measures.

The CMS Nationwide Injunction joins a series of other legal developments with respect to the federal mandatory COVID-19 vaccination provisions announced as part of President Biden's Path out of the Pandemic, including with respect to both the U.S. Occupational Safety and Health Administration's ("OSHA") Interim Final Rule applying an Emergency Temporary Standard ("OSHA ETS") and the federal contractor mandate.

The OSHA ETS, which requires most employers with 100 or more employees to mandate COVID-19 vaccination or require weekly COVID-19 testing, suffered its first blow on November 6, 2021, when the Fifth Circuit Court of



Appeals temporarily stayed the mandate and then on November 12, 2021 issued a preliminary injunction reaffirming its initial stay. On November 16, 2021, that case was reassigned to the Sixth Circuit Court of Appeals, which will handle the ongoing challenge to the OSHA ETS. In response to the Fifth Circuit's issuance of the preliminary injunction, OSHA announced that it has suspended its activities relating to implementing and enforcing the OSHA ETS.

The federal contractor mandate, which requires covered contractors to implement mandatory COVID-19 vaccination without a testing option, but which does allow for religious and medical exemptions, is also being challenged in various cases around the country. Some of these challenges include a lawsuit filed in a U.S. District Court in Florida as well as a lawsuit filed in a U.S. District Court in Missouri on behalf of ten states, all seeking an injunction of the federal contractor COVID-19 vaccination mandate. Further, on November 30, 2021, a U.S. District Court in Kentucky issued a preliminary injunction temporarily blocking enforcement of the federal contractor mandate in Kentucky, Ohio, and Tennessee. In addition to other state challenges, a federal prison employees union has filed a lawsuit seeking to stop the federal contractor mandate. Despite these challenges, as of the writing of this article, the federal contractor COVID-19 vaccination mandate remains in effect in all states except Kentucky, Ohio, and Tennessee.

Our attorneys will continue to monitor the status of the federal mandates and associated legal challenges. We are available to help clients navigate these challenging compliance scenarios. For more information on the CMS Nationwide Injunction, mandatory vaccination programs, or other COVID-19 related compliance questions, please contact any member of Krieg DeVault LLP's **Labor and Employment** practice.

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