

Judge Blocks Portions of Centers for Medicare and Medicaid Services (CMS) Vaccine Mandate (US)

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On November 5, 2021, the federal Centers for Medicare and Medicare Services (CMS) issued an emergency regulation requiring that many types of health care facilities and providers that receive Medicare or Medicaid funds ensure that their staff, contractors, and volunteers receive at least their first COVID-19 vaccine dose by December 6, 2021 and be fully vaccinated by January 4, 2022. The vaccination requirements apply to 15 categories of Medicare and Medicaid-certified provider and supplier types that are regulated under the Medicare/Medicaid health and safety standards known as Conditions of Participation (CoPs), Conditions for Coverage (CoCs), or Requirements, including hospitals, ambulatory surgery centers, community mental health centers, end-stage renal disease facilities, home health agencies, hospices, and rehabilitation agencies, among others. The Rule does not provide an alternative for periodic testing in lieu of vaccination, but does still require reasonable accommodation for religious, medical, and disability reasons.

The Attorneys General of ten (10) U.S. states brought suit in Missouri on November 10, 2021 to block the implementation of the CMS vaccine mandate, arguing that the rule would lead to widespread staffing shortages in hospitals and health care facilities, particularly vexing rural healthcare providers. The petitioners also argued that the interim final rule, which went into immediate effect but is still subject to public comment, violated the Administrative Procedure Act's requirement of notice-and-comment rulemaking, and is unconstitutional.

On November 29, 2021, Judge Matthew Schelp of the Eastern District of Missouri issued an [order](#) blocking the implementation of the CMS vaccine mandate in Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming. The 32-page order explains the Judge's finding that CMS likely lacked authority to implement the requirement on an emergency basis, and that the Biden administration likely violated administrative law in issuing it without prior public comment. Judge Schelp agreed with the petitioners that health care facilities in their states were reasonably likely to suffer major staffing shortages if the mandate was not blocked. Because staffing shortages resulting from "vaccine hesitancy" exacerbated by governmental mandates could result in health care facilities adopting crisis standards of care or closing to new patients or the most severely ill patients, Judge Schelp found sufficient evidence of irreparable harm to the citizens of those states. In reaching this conclusion, he attempted to balance the likelihood of irreparable harm from "crippling" facility closures and staffing shortages against what he found to be uncertainty in the effectiveness of "controversial" COVID-19 vaccines in

preventing disease transmission by the unvaccinated, writing ([in contravention of public health agencies](#)) that “CMS lacks evidence showing that vaccination status has a direct impact on spreading COVID in the mandate’s covered healthcare facilities.”

The latest decision creates a split among district courts, as earlier this month, a Florida federal court rejected attempts to block implementation of the CMS rule. Despite that decision, the petitioners in the instant action forged on, with Missouri Attorney General Eric Schmitt promising after announcement of the decision to continue to “push back” against purported government overreach, including, he described, business lockdowns, mask mandates, and vaccine requirements.

The Biden administration is likely to pursue an appeal to the Supreme Court. While that process is underway, facilities subject to the Regulations are urged to confirm with counsel the status of the interim final rule in their jurisdiction(s) and plan accordingly for the rapidly approaching first vaccination deadline.

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