

Courts Halt Federal Vaccination Mandates Amid Legal Challenges

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The Biden Administration's various vaccine and/or testing mandates for employers with over 100 employees, certain healthcare providers, and federal contractors, continue to face significant legal challenges. Following is an update on the status of those legal challenges.

OSHA ETS

As [previously reported](#), the federal Sixth Circuit Court of Appeals based in Cincinnati has been chosen to preside over litigation concerning OSHA's Emergency Temporary Standard (ETS) requiring companies with at least 100 employees to mandate COVID-19 vaccinations or submit to weekly testing and mask requirements. The ETS imposed two compliance deadlines: proof of vaccination and mask-wearing for unvaccinated employees beginning December 6, and the additional requirement of weekly testing for unvaccinated employees beginning January 4. Prior to the case being transferred to the Sixth Circuit, the Fifth Circuit Court of Appeals issued a nationwide stay of the ETS, which currently remains in effect.

OSHA has requested the Sixth Circuit to dissolve or modify the stay. The Sixth Circuit has released a timeline for parties to file briefs, responses and replies with a final filing date of December 10. This means that the Sixth Circuit is unlikely to take further action until approximately mid-December. In the meantime, OSHA has made clear that it will stand down on its efforts to implement the ETS pending further litigation.

The Sixth Circuit's decision may not be an "all or nothing" outcome. In its Emergency Motion to dissolve the stay, OSHA requested that the Sixth Circuit modify the stay to allow certain components of the ETS to go into effect if the stay is not lifted in its entirety. Specifically, OSHA requested that the masking-and-testing requirement remain in effect pending the litigation of the stay and that the stay be limited to allow employers the option to adopt COVID-19 policies, notwithstanding any state or

local laws that may restrict such policies.

For now, employers who would otherwise be covered by the ETS should still remain prepared to comply in the event the stay is lifted. However, the ETS is currently stayed until at least December 10 and, unless the stay is lifted, either as a result of OSHA's request to dissolve or a later decision of the Court, the ETS will not take effect. Employers should also continue to monitor state and local laws, which could impose additional requirements.

Healthcare Employers: CMS Interim Final Rule

On Tuesday, November 30, a federal judge in Louisiana issued a preliminary injunction to block the start of the CMS Interim Final Rule (the "CMS Rule"). The injunction applies nationwide except for ten states that are already under a preliminary injunction order issued on November 29 in Missouri.^[1]

The CMS Rule was released on November 5, and established conditions of participation on various Medicare and Medicaid certified providers and suppliers. Generally, the rule mandated that covered staff must be fully vaccinated by January 4. The CMS Rule also set a deadline for accommodation requests and receipt of the first vaccine dose by December 6. As of now, these conditions are halted nationwide.

What does this mean for healthcare employers? Healthcare employers should continue to monitor state and local laws that will impact existing employer vaccine mandates. In the meantime, covered employers who do not wish to proceed with a vaccine mandate may pause their efforts to comply with the CMS Rule. However, these preliminary injunctions are likely to be appealed, and thus healthcare employers should be ready to proceed with the requirements of the rule should the controlling injunction be reversed.

Federal Contractors and Subcontractors Vaccine Mandate

Separately, on Tuesday, November 30, a federal judge in Kentucky issued a preliminary injunction blocking the implementation of the vaccine mandate for federal government contractors and subcontractors. The ruling is limited to the three states, Kentucky, Ohio, and Tennessee that challenged the Federal Contractor and Subcontractor mandate. It is the first ruling against the contractor mandate but may be an indicator of additional challenges in light of the success of this first challenge.

The original deadline for covered employees to be fully vaccinated was January 4, 2022, but it had already been extended to January 18. At the moment, employers covered by the federal contractor mandate in Kentucky, Ohio, and Tennessee can halt their efforts to comply with the rule. However, like employers covered by the CMS rule, these employers should be ready to proceed with the requirements of the rule should the injunction be reversed. Federal contractors and subcontractors in other states, including Michigan, should continue to monitor for any additional court rulings, but should otherwise be ready to comply with the January 18 deadline and the other provisions of this mandate, barring any additional legal developments.

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