

CMS Vaccine Mandate Enjoined Nationwide

Amundsen Davis Health Care Alert and COVID-19 Alert

December 1, 2021

On Tuesday, November 30, Louisiana federal district Judge Doughty issued a nationwide injunction against implementation of Centers for Medicare & Medicaid Services' (CMS) vaccine mandate for health care workers. Judge Doughty's decision was issued just a day after Missouri federal district Judge Schelp issued a preliminary injunction against the mandate in 10 states. Unlike the Missouri decision, the Louisiana court issued a nationwide injunction due to that court's conclusion that there was a need for uniformity and protection of unvaccinated health care workers. In reaching its decision, the court relied heavily on the Fifth Circuit's injunction against the OSHA vaccine or test mandate, which we discussed in an earlier blog.

First, the court agreed that plaintiffs were likely to prevail on all of their arguments against the vaccine mandate. The court concluded that CMS issued the vaccine mandate without following statutorily required processes for notice and comment and rejected CMS' argument that it met the good cause exception that would exempt it from those requirements. Next, the court found that the mandate was beyond the authority of CMS, concluding that such a sweeping requirement should have at least been issued by Congress, not a federal agency, and questioned whether even Congress would have authority to issue the mandate.

The court also concluded that the CMS mandate is likely contrary to law because the federal government did not consult with appropriate state agencies regarding the mandate, improperly dictated hiring and firing policies with respect to unvaccinated employees, and did not conduct a regulatory impact analysis for rural hospitals given the mandate's likely significant impact on rural hospitals.

In addition, the court agreed that the CMS mandate was likely arbitrary and capricious because it ignores patient well-being and instead focuses on the health of health care providers. Plaintiffs maintained that increasing individual vaccine rates would harm patient well-being by causing staff shortages and the federal government failed to consider or arbitrarily rejected alternatives to the mandate, such as daily or weekly COVID testing, wearing masks, natural immunity and/or social distancing. The court found that CMS had not provided any evidence of why it rejected these alternatives or why it departed from its earlier position of not requiring vaccines. Finally, the court found that the mandate likely violates the states' police powers and improperly delegates

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authority to CMS.

The court next concluded that the states had shown irreparable injury by not being able to enforce their laws that were preempted by the mandate, incurring costs associated with the mandate, by having their police power encroached, and by having substantial burdens placed on the liberty interests of their citizens. Granting the injunction was in the public interest because it would maintain the liberty of individuals who do not want to take the COVID-19 vaccine.

We will keep you updated regarding the status of this issue. In the interim, health care entities who were subject to the CMS rule should be prepared to comply with the rule if the injunction is lifted.

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