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Red Light – Green Light: CMS Vaccination Mandate is On Again in 26 States?

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The CMS vaccine rule -- which applies to the staff of many Medicare- and Medicaid-certified providers such as hospitals, long-term care facilities, home-health agencies, and hospices (“covered entities”), and which has dominated news headlines in recent weeks (*see* our prior posts on it [here](#) and [here](#)) – is back in action, at least in some states.

After a federal court in Missouri halted the CMS Rule in 10 states (*see Missouri v. Biden*, — F. Supp. 3d —, 2021 WL 5564501 (E.D. Mo. Nov. 29, 2021)), a federal court in Louisiana issued a **nationwide** injunction purporting to enjoin the CMS Rule for the rest of the country, though only 14 states had brought the lawsuit in which the injunction was entered (*see Louisiana v. Becerra*, No. 3:21-CV-03970, 2021 WL 5609846 (W.D. La. Nov. 30, 2021)). The government sought review by the Federal Appeals Court to “stay” (or halt) the nationwide injunction.

Today, the Fifth Circuit Court of Appeals issued its opinion partially upholding and partially reversing the district court’s injunction. *See Louisiana v. Becerra*, No. 21-30734, 2021 WL 5913302 (5th Cir. Dec. 15, 2021). The Fifth Circuit noted that the government is likely to prevail on limiting the scope of the nationwide injunction, and as such, the appellate court “stayed” the injunction with respect to jurisdictions outside of the 14 states included in the lawsuit. In other words, although the CMS Rule is still halted in the 14 states that brought the lawsuit in Louisiana, and in the 10 states that are part of the Missouri lawsuit, for everywhere else, the injunction is lifted.

CMS Vaccination Mandate Still Enjoined	CMS Vaccination Mandate Back In Place
Alabama	California
Alaska	Colorado
Arizona	Connecticut
Arkansas	Delaware
Georgia	Florida
Idaho	Hawaii

Indiana	Illinois
Iowa	Maine
Kansas	Maryland
Kentucky	Massachusetts
Louisiana	Michigan
Mississippi	Minnesota
Missouri	Nevada
Montana	New Jersey
Nebraska	New Mexico
New Hampshire	New York
North Dakota	North Carolina
Ohio	Oregon
Oklahoma	Pennsylvania
South Carolina	Rhode Island
South Dakota	Tennessee
Utah	Texas
West Virginia	Vermont
Wyoming	Virginia
	Washington

Wisconsin

The major question on everyone’s mind is enforcement. On December 2, 2021, after the Missouri and Louisiana courts made their initial rulings, CMS released [guidance to state surveyors](#) instructing the surveyors that they must not survey providers for compliance with the CMS mandate requirements:

While CMS remains confident in its authority to protect the health and safety of patients in facilities certified by the Medicare and Medicaid programs, it has suspended activities related to the implementation and enforcement of this rule pending future developments in the litigation. Accordingly, while these preliminary injunctions are in effect, surveyors must not survey providers for compliance with the requirements of the Interim Final Rule.

Now that the vaccination mandate is back “on” in 26 states, we are all awaiting guidance from CMS on when enforcement in the non-enjoined states will start back up—if at all. This is of particular importance to covered entities, as the Phase 1 compliance deadline of December 6, 2021 has come and gone. Similarly, several covered entities have locations across state lines and may be forced to implement, and to comply with a hodgepodge of various federal, state, and local rules. Therefore, covered entities—in all states—should continue to be ready to put in place the policies and procedures necessary to comply with the CMS vaccination mandate. But, a reasonable interpretation of CMS’s December 2, 2021 instructions is that there should be no survey activity (even in states where the injunction is lifted) until after receipt of further guidance from CMS.

After today’s ruling, one thing remains clear, as noted by the Fifth Circuit: “This vaccine rule is an issue of great significance currently being litigated throughout the country.”

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