



UPDATE - Status of Implementation of the Federal COVID-19 Vaccine Workplace Rules

12.01.2021

Many employers are struggling with the seemingly ever-shifting rules and requirements relating to COVID-19 vaccines. Indeed, although the Biden Administration initiated three sweeping rules earlier this Fall ? one applicable to private employers with 100 or more employees, one applicable to federal contractors and subcontractors, and one applicable to certain health care facilities ? all have been subject to multiple judicial challenges across the country, and the implementation of some of these rules is now subject to temporary stays. Although we anticipate further legal developments and appeals, the current state of the law is as follows.

Private Employers Subject to the OSHA Rule

As we reported [here](#), on November 4, 2021, the Occupational Safety and Health Administration (OSHA) released its Emergency Temporary Standard (ETS) applicable to all private employers in the United States with 100 or more employees. The ETS mandated that all employees of a covered employer be ?fully vaccinated? (i.e. two weeks post final dose of the COVID-19 vaccine) or be subject to weekly COVID-19 tests. The ETS would have required employees to have the final dose of the vaccine or start weekly testing as of January 4, 2022, with employees having to be ?fully vaccinated? by January 18, 2022.

But then, almost immediately after it was issued, the U.S. Court of Appeals for the Fifth Circuit (sitting in Louisiana) issued a nationwide stay of implementation of the ETS ? effectively hitting a pause button on the requirement that employers implement the rule. In addition, in light of the multiple other challenges to the ETS in federal courts across the country, those other cases were consolidated into one case to be heard by the Sixth Circuit Court of Appeals (sitting in Ohio). That appeal is currently pending. In the meantime, however, OSHA has stated that it will not take any action to enforce the rule, pending further judicial action. We anticipate that this dispute will ultimately make its way to the U.S. Supreme Court. But, for now, the implementation and enforcement of the ETS applicable to private employers is on hold.

Government Contractors

As we reported **here** and **here**, back in September 2021, President Biden issued an Executive Order that tasked the Safer Federal Workforce Task Force to issue rules applicable to federal contractors and subcontractors that would mandate that all employees working on or in support of a covered federal contract be fully vaccinated. This rule did not have a testing option like the ETS rule. That guidance was issued in October and later amended such that all covered employees would have to receive their final dose of the vaccine by January 4, 2022, and be "fully vaccinated" by January 18, 2022. Just as with the other vaccine rules, this Task Force guidance has also been subject to legal challenges, though, so far, not as successfully as was applied to the OSHA and the Centers for Medicare & Medicaid Services (CMS) rule (discussed below).

Indeed, on November 30, 2021, in a ruling that the court limited to covered government contracts in the states of Kentucky, Ohio and Tennessee, the U.S. District Court for the Eastern District of Kentucky preliminarily enjoined the implementation of the vaccine mandate for federal contractors and subcontractors pending further proceedings. In its ruling, the court emphasized that it was deciding a very narrow issue: "Can the president use congressionally delegated authority to manage the federal procurement of goods and services to impose vaccines on the employees of federal contractors and subcontractors?" The court concluded that "in all likelihood, the answer to that question is 'no.'" The court emphasized: "This is not a case about whether vaccines are effective. They are. Nor is this a case about whether the government, at some level, and in some circumstances, can require citizens to obtain vaccines. It can." The court concluded that the matter will "continue with the benefit of full briefing and appellate review," so, until then, "enforcement of the contract provisions in this case must be paused." As such, in only the three states of Kentucky, Ohio and Tennessee, the federal contractor mandate is on temporary hold.

Separately, there are at least two other cases that challenge the contractor mandate. The State of Florida initiated an injunction action on October 28, 2021, in the U.S. District Court for the Middle District of Florida. On October 29, 2021, the states of Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota and Wyoming commenced a similar action in the U.S. District Court for the Eastern District of Missouri requesting preliminary and permanent injunctions of implementation of the mandate. Unless and until those courts issue an order enjoining the federal contractor vaccine rule, the rule remains in effect nationwide, except for contracts performed in Kentucky, Ohio and Tennessee.

CMS-Covered Health Care Facilities

As we reported previously **here** (FAQ 18, 19), the Centers for Medicare & Medicaid Services (CMS) COVID-19 vaccination rule required certain health care facilities to mandate that all employees, volunteers, and contractors have a first vaccine dose by December 6, 2021, their final dose of the vaccine by January 4, 2022, and be "fully vaccinated" by January 18, 2022. Providers that failed to comply with the CMS rule could lose access to Medicare and Medicaid funds.

On Monday, November 29, 2021, a federal court in Missouri blocked the federal government from enforcing the CMS vaccine mandate in 10 states: Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota and Wyoming. Then, on Tuesday, November 30, 2021, a

Louisiana federal court blocked enforcement of the CMS vaccine mandate for health care workers nationwide ? except for those 10 states to which the November 29 injunction order already applied.

The orders impose preliminary injunctions, and, if CMS appeals, which is anticipated, the appeals will go to the U.S. Courts of Appeals for the 8th Circuit and 5th Circuit, respectively. Two other challenges to the CMS vaccine mandate are pending in federal courts in Florida and Texas; however, the Florida court previously declined to issue a preliminary injunction against the enforcement of the CMS vaccine mandate. The landscape remains uncertain at this time, but unless or until the injunctions are lifted, the vaccine mandate is blocked from implementation nationwide.

Williams Mullen is continuing to monitor developments in these cases. In the meantime, employers should understand that, unless the implementation of these vaccination rules is permanently enjoined, likely following a ruling by the U.S. Supreme Court, they may still have to comply with these rules in the future.

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