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CMS Vaccine Mandate Stayed in Ten States

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On November 29, 2021, a federal district court in Missouri entered a preliminary injunction prohibiting CMS from enforcing its COVID-19 vaccine mandate in Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming, pending a trial on the merits. *State of Missouri et al. v. Biden*, No. 4:21-cv-01329-MTS (E.D. Mo. 2021).

1. The Order. Judge Matthew Schelp concluded that a preliminary injunction was appropriate because (1) the plaintiff states were likely to establish that (a) CMS exceeded the scope of its authority in promulgating the vaccine mandate, (b) CMS failed to provide adequate notice and comment before issuing the regulations, and/or (c) the mandate is arguably arbitrary and capricious; (2) the plaintiff states were likely to establish irreparable injury if the injunction were not granted; and (3) the balance of equities appear to weigh in favor of the injunction given that the public would likely suffer little harm by maintaining the status quo. Consequently, Judge Schelp ordered CMS to cease all implementation or enforcement of the vaccine mandate until after a trial on the merits.

2. Effect of the Order. Although this was an important battle, it must be kept in perspective. First, the district court's injunction was preliminary, not permanent: the final outcome will depend on the trial if the case makes it that far. Second, CMS will almost certainly seek an immediate appeal to the federal Eighth Circuit Court of Appeals. The outcome at the appellate level is by no means certain. Third, by its express terms, the district court order only applies in the ten states that sued (Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming); it does not extend to other states. Courts from other states may reach a different conclusion, thereby potentially setting up a final showdown at the Supreme Court unless CMS backs down. And fourth, the decision only addresses the CMS vaccine mandate; it does not address vaccine mandates imposed by states or individual facilities independent of the CMS rule. So far, state and individual facility mandates have been upheld by courts around the country.

3. Effect in Other States. On November 15, 2021, 12 other states (Alabama, Arizona, Georgia, Idaho, Indiana, Louisiana, Mississippi, Montana, Oklahoma, South Carolina, Utah, and West Virginia) filed a similar lawsuit in a federal district court in Louisiana. Since then, Kentucky and Ohio have joined the Louisiana suit. Florida filed a separate suit on November 18, 2021, in the federal district court of Florida. In the Florida case, the court denied Florida's request for preliminary injunctive relief. As in the other cases, the plaintiffs in the Louisiana case have asked for a

preliminary injunction. It is not clear if or when the Louisiana court will rule on that issue, although one might expect a decision to issue promptly given the rapidly approaching December 6 deadline.

Conclusion. So what should facilities do now?

1. If you are a facility in Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, or Wyoming, you may suspend efforts to implement or enforce the CMS mandate until a court rules otherwise. You may want to notify employees but ensure they understand that the decision is preliminary and that you will continue to monitor the situation and respond appropriately. Of course, the Missouri decision does not affect facilities that have imposed or wish to impose their own vaccine mandate independent of the CMS rules.

2. If you are a facility in Alabama, Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Utah, or West Virginia, and perhaps other states who are not parties to the Louisiana case, stay tuned. The outcome of the Louisiana case is uncertain; after all, Florida and Missouri district courts reached different conclusions. In the meantime, the CMS rule and its December 6 deadline are rapidly approaching. CMS is undoubtedly regrouping after the Missouri decision but, as of this morning, there is no indication that it intends to postpone the deadline in other states. Accordingly, the safest thing to do is to press forward cautiously to comply with the mandate until you hear otherwise from the courts or CMS.

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