

**Alert | Health Emergency Preparedness Task Force:
Business Continuity Amid COVID-19**



November 2021

Court Blocks Implementation of CMS Vaccine Mandate in 10 States

On Nov. 29, 2021, the United States District Court for the Eastern District of Missouri **enjoined** implementation of the Centers for Medicare & Medicaid Services (CMS) COVID-19 vaccine mandate in the states of Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming, directing that CMS immediately cease all implementation or enforcement of the CMS Nov. 5, 2021 vaccine mandate as to any Medicare- and Medicaid-certified providers and suppliers within those states. *See Missouri, et al. v. Biden, et al.*, 2021 U.S. Dist LEXIS 227410 (E.D. Mo., Docket No. 4:21-cv-01329-MTS, Nov. 29, 2021).

This GT Alert Covers the following:

- Missouri federal district court has enjoined enforcement of CMS COVID-19 vaccine mandate in 10 states.
- Ruling puts on hold requirement that all health care workers obtain vaccination before Dec. 6, 2021.
- Decision affects 10 states that were parties to the lawsuit; however, other suits are pending in other states.

Specifically, the CMS Interim Final Rule with Comment Period, 86 Fed. Reg. 61,555 (Nov. 5, 2021) (Mandate), added a requirement for multiple provider categories¹ to require vaccination by Dec. 5 as a condition to participation in the Medicare and Medicaid programs. The Mandate applies to all persons working at the facilities, including employees, trainees, students, volunteers, and contractors, who provide any care, treatment, or other services for the facility.

In response to a lawsuit brought by the 10 states, the court, per the Honorable Matthew T. Schelp, ruled that the Mandate was invalid and enjoined its application in those states that were parties to the lawsuit. First, the court ruled that CMS did not have authority to issue the mandate because Congress did not grant CMS such authority as it would preempt state and local laws regarding vaccination. Accordingly, the court held that the mandate would require some direct indication from Congress. Judge Schelp rejected the argument that CMS had the authority to determine the conditions of participation in the Medicare and Medicaid programs. He wrote that the Mandate would require clear direction from Congress, as it would alter the balance between federal and state power.

Second, the court found that the Mandate violated the Administrative Procedure Act and the Social Security Act, as it bypassed the typical notice and comment period. Here, Judge Schelp rejected CMS's claim of good cause in light of the COVID-19 pandemic, citing CMS's delay in issuing the Mandate and given that the Mandate's application was delayed until Dec. 5, 2021 He opined that CMS's evidence did not show that COVID-19 is as dire an emergency as it was in the past and considered CMS's evidence speculative.

Third, the court found that the Mandate was arbitrary and capricious because there was insufficient evidence showing that vaccines have an impact on preventing the spread of COVID-19 in the health care facilities subject to the Mandate. CMS cited data from LTC facilities, but the court rejected this argument. Further, the court held that CMS rejected alternatives to the Mandate such as weekly testing and natural immunity. Acknowledging that the court should not substitute its judgment for that of CMS, it nevertheless concluded that there was no rational basis to support the Mandate.

Finally, the court held that the Plaintiffs were likely to suffer irreparable harm, specifically to the states' sovereign interests in enforcing their own COVID-19 laws and found that the Mandate would create staffing shortages because individuals would refuse the vaccine and quit their positions, especially in rural areas. The court did not seem to consider whether the Mandate also would result in fewer absences of staff due to the effectiveness of the vaccine. Holding that the public interest would be served by granting the injunction, the court went on to speculate that due to more therapeutics and treatments, "[t]he status quo today, without the CMS mandate, is still far better than the public faced even just a few months ago."

The decision may be taken up by the Eighth Circuit Court of Appeals. CMS will likely argue that the court substituted its opinions and beliefs for those of the agency. The decision only affects the 10 states that were parties to the lawsuit. The Missouri lawsuit is one of a number of such suits brought by state attorneys general to prevent implementation of the CMS vaccine mandate.

¹ The Mandate applies to Ambulatory Surgical Centers (ASCs); Hospices; Psychiatric residential treatment facilities (PRTFs); Programs of All-Inclusive Care for the Elderly (PACE); Hospitals; Long Term Care (LTC) Facilities; Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs-IID); Home Health Agencies (HHAs); Comprehensive Outpatient Rehabilitation Facilities (CORFs); Critical Access Hospitals (CAHs); Clinics, rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services; Community Mental Health Centers (CMHCs); Home Infusion Therapy (HIT) suppliers; Rural Health Clinics (RHCs)/Federally Qualified Health Centers (FQHCs); and End-Stage Renal Disease (ESRD) Facilities. 86 Fed. Reg. at 61,569–70.

For more information and updates on the developing situation, visit [GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#) and [Business Continuity Amid COVID-19](#) page.

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