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Courts Halt CMS Vaccine Rule, But 'It's a Very Fluid Situation'

By Nina Youngstrom

CMS's Nov. 5 vaccine mandate for Medicare and Medicaid facilities was body-slammed by federal courts the week after Thanksgiving, although its ultimate fate is still an open question.^[1] A federal judge in Louisiana on Nov. 30 blocked enforcement of the Omnibus COVID-19 Health Care Staff Vaccination regulation, saying CMS lacks the authority to mandate a vaccination and maybe Congress does as well.^[2] A day earlier, a federal judge in Missouri enjoined the vaccine mandate in 10 states^[3] and on Dec. 1 rejected CMS's request for a stay in that case.^[4]

With the fast-moving developments, it's too early to know how this will land. "It's a very fluid situation," said attorney Jackie Hoffman, with K&L Gates in Dallas, Texas. For the time being, hospitals and other facilities have been transported back to pre-mandate times, she said. They're free to require employees to get vaccinated under their own steam "unless there is something in their state or county that prohibits them from implementing a mandate," Hoffman said.

Meanwhile, it's unclear whether facilities covered by the vaccine mandate will set it far aside because the preliminary injunction will be challenged, said attorney Sandra DiVarco, with McDermott Will & Emery in Chicago. "This is all a bit bonkers," she noted.

CMS's vaccine mandate has two phases: By Dec. 6, providers regulated by the Medicare conditions of participation (CoPs) are required to have a plan for vaccinating staff, providing medical or religious exemptions and accommodations, and tracking and documenting staff vaccinations. Employees and other people (e.g., licensed practitioners, students, trainees, contracted staff and others "who provide care, treatment or other services at the facility") must have the one-dose vaccine or the first shot of the two-dose vaccine by that date or have requested an exemption. Everyone must be fully vaccinated by Jan. 4 unless an exemption has been granted.

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