

President Biden's COVID-19 Vaccine Mandates Face Uncertain Future

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In early September, President Joe Biden announced sweeping vaccine mandates intended to get most working Americans vaccinated through a series of executive orders and rules published by federal agencies, including:

- Through the Occupational Safety and Health Agency (OSHA), all employees who work for employers having 100 or more employees
- Employees who work for health care providers regulated by the Centers for Medicare & Medicaid Services (CMS), such as hospitals, home health agencies, community mental health centers and federally qualified health clinics, and the volunteers, trainees and contractors who supply services to these entities where patients and their families may be present
- Workers employed by federal contractors
- Federal employees, including military
- Employees of Head Start and Early Head Start programs
- Employees who work on military bases and teach in schools for indigenous people

However, these mandates are being challenged and temporary stays/injunctions are being issued. First, the U.S. Court of Appeals for the Fifth Circuit issued a stay on Nov. 12 for OSHA's Emergency Temporary Standard (ETS), finding it had failed to demonstrate the necessity to protect employees from grave danger and citing the potential for economic upheaval.

The cases challenging OSHA's ETS have now been consolidated and assigned to the U.S. Court of Appeals for the Sixth Circuit. Keep in mind that states having their own safety and health agencies (like Michigan's MI-OSHA) will likely be issuing their own standards shortly (which will also likely face challenges).

Next, on Nov. 29, a federal judge in St. Louis blocked the CMS from enforcing its vaccine mandate for the health care workers in the 10 states that brought the case (Missouri, Nebraska, Arkansas, Kansas, Iowa, Wyoming, Alaska, South Dakota, North Dakota and New Hampshire). The court noted, among other things, that the mandate altered the balance of power between the federal and state governments and that the CMS could only issue this mandate with a clear authorization from Congress, given the potential vast economic and political significance of the mandate.

In a far broader order, a federal judge in Louisiana issued a temporary stay of the CMS mandate nationwide just yesterday. But, health care employers should also watch for potential mandates from their state's regulatory authorities.

Also yesterday, a federal judge in Kentucky granted a preliminary injunction that prevents the enforcement of the vaccine mandate applicable to federal contractors, finding it to be an overreach of the president's authority over federal procurement. The ruling temporarily affects enforcement only in the states that challenged the executive order: Kentucky, Ohio and Tennessee.

There will likely be further challenges to President Biden's mandates which are already under attack. The Biden administration is appealing all of the rulings, and these cases will likely all end up being heard by the U.S. Supreme Court, which now has a conservative majority.

Thus far, one mandate continues to withstand challenges: a private employer can lawfully mandate its employees to be vaccinated or face termination. Of course, employers must still consider whether to grant religious and medical exemptions requested by employees so these mandates are not absolute either.

So, how should employers react? First, for those mandates that are under challenge it is unlikely that the Jan. 4, 2022 deadline remains realistic because the legal process will take time. Some employers continue to require vaccinations given that the mandates still loom overhead, but other employers are taking the wait and see approach. However, as long as employees who have decided not to vaccinate have employment opportunities without mandates, those employers pressing forward will struggle with recruiting and retention.

The bottom line? More challenges are likely and additional rulings will follow. Employers need to stay current on the vaccine mandates affecting their business and with CDC guidance in order to remain compliant. Working closely with legal counsel during these rapidly changing and challenging times remains key.