



## ALERTS

### New Ruling Throws Healthcare Facility Vaccine Mandates Into State Vs. State

December 16, 2021

#### Highlights

Vaccine mandates are back for healthcare facilities in 26 states

There is no guidance yet from Centers for Medicare and Medicaid Services on its enforcement stance

This appellate court ruling casts doubt on the legality of CMS vaccine mandates

In the wake of a Dec. 15, 2021 [ruling out of the U.S. Court of Appeals for the Fifth Circuit Court](#), healthcare facilities in just over half the states in the country are once again under a federal mandate to vaccinate workers and ensure others who appear routinely on their premises are vaccinated.

The ruling partially revives the Centers for Medicare and Medicaid Services' (CMS) vaccine mandate requiring healthcare facilities' staff and others to get vaccinated against COVID-19 or lose funding from CMS. It essentially limits a lower court's nationwide injunction to just the 14 states that sued to block the mandate. The mandate remains blocked in an additional 10 states subject to an earlier injunction in a different federal court.

The 14 states that sued in federal court in Louisiana – Alabama, Arizona,

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### J. Michael Grubbs

Partner  
Indianapolis

P 317-231-7224  
F 317-231-7433  
[michael.grubbs@btlaw.com](mailto:michael.grubbs@btlaw.com)



### Mark E. Rust

Of Counsel (Retired)

P 312-214-8309  
[mrust@btlaw.com](mailto:mrust@btlaw.com)



### Laura D. Seng

Partner  
South Bend

P 574-237-1129  
F 574-237-1125  
[laura.seng@btlaw.com](mailto:laura.seng@btlaw.com)

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Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Utah, and West Virginia – now join the additional 10 states subject to a Missouri federal court injunction. Those states are Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming.

While the mandates may be tested in other courts, facilities would be well-advised to continue their preparations for vaccine mandates in the event of a further reversal of these injunctions. And in states that are subject to the mandates once again, facilities should consider weighing the threat of enforcement against other practical issues in implementing the rules – while the industry awaits further CMS guidance.

The appellate court, while casting doubt on the ultimate legality of the CMS mandate, found that the preliminary injunction should only apply in the 14 states party to the lawsuit, not nationwide, because “[t]his vaccine rule is an issue of great significance currently being litigated throughout the country. Its ultimate resolution will benefit from the ‘airing of competing views’ in our sister circuits.”

In upholding the injunction for the states that sued, the court said it appears likely that the vaccine mandate will not prevail as it moves through other courts. That said, the court noted that there are significant differences between the healthcare worker vaccine mandate and another vaccine mandate applying to businesses employing more than 100 people – as that mandate has also been enjoined. The court stated that the key difference between the two types of mandates was that the healthcare worker vaccine mandate was targeted at healthcare facilities, “especially nursing homes ... where COVID-19 has posed the greatest risk.”

CMS did not immediately comment on its intent to enforce the vaccine mandate in the 26 states not presently affected by the injunction. Previously, CMS said it would not enforce the vaccine rule while preliminary injunctions are in place, but it is not yet clear how aggressive CMS will be in enforcing the mandate in only half the states given this ruling, and given that initial deadlines it set have already passed.

To obtain more information regarding this alert, contact the Barnes & Thornburg attorney with whom you work or Michael Grubbs or 317-231-7224 or [michael.grubbs@btlaw.com](mailto:michael.grubbs@btlaw.com), Mark Rust, Chair of Healthcare Industry Practice, at 312-214-8309 or [mark.rust@btlaw.com](mailto:mark.rust@btlaw.com), Laura Seng, Director of Health Law Resources and Risk Management, at 574-237-1129 or [laura.seng@btlaw.com](mailto:laura.seng@btlaw.com).

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