

## UPDATE ON CMS AND OSHA COVID-19 VACCINE MANDATES

December 21, 2021

As [previously discussed](#), on November 5, 2021, the Centers for Medicare and Medicaid Services (“CMS”) issued an emergency regulation that required many healthcare providers who participate in Medicare and Medicaid to ensure that their staff be fully vaccinated (as defined in the regulation) against COVID-19 by January 4, 2022. Simultaneously, the Department of Occupational Safety and Health (“OSHA”) released an emergency temporary standard (“ETS”) that mandated large employers require workers be vaccinated against COVID-19 or undergo testing at least once a week. The requirement that employers be fully vaccinated or tested regularly was set to go into effect on January 4, 2022. Since then, both CMS’s and OSHA’s vaccine mandates have faced multiple legal challenges leaving employers uncertain whether and when these requirements may be enforced.

### CMS VACCINE MANDATE

On November 29, 2021, a U.S. district judge in the [Eastern District of Missouri](#) temporarily halted CMS’s vaccine mandate in the ten states that had originally sued to block enforcement of the regulation: Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming. The next day, a [Louisiana district judge](#) issued a preliminary injunction barring enforcement in the remaining states throughout the country. On December 13, 2021, the [Eighth Circuit](#) refused to dissolve the Missouri district court’s stay. However, on December 15, 2021, the [Fifth Circuit Court of Appeals](#) lifted the injunction as to any state that was not a party to the lawsuit or already covered by the Missouri district court’s injunction while it also declined to lift the Louisiana’s district court’s injunction with respect to the fourteen states that had challenged the vaccine mandate in Louisiana district court – Alabama, Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Utah, and West Virginia. Additionally, on December 15, 2021, a district judge in [Texas](#) granted an injunction that applies only in this state blocking enforcement of the CMS vaccine mandate. In sum, there is now an injunction against the CMS vaccine mandate in 25 states. CMS may enforce the vaccine mandate in the other 25 states. Covered healthcare providers in these states are awaiting [guidance](#) from the agency, as to the deadlines for COVID-19 vaccination that will apply.

### OSHA VACCINE MANDATE

On November 12, 2021, the [Fifth Circuit Court of Appeals](#) blocked OSHA from implementing and enforcing its vaccine mandate. As legal challenges were filed in various appeals courts, these challenges were consolidated and assigned at

random to the Sixth Circuit Court of Appeals. On December 17, 2021, a three-judge panel of the [Sixth Circuit](#) reversed the decision of the Fifth Circuit, lifted the stay and ruled that OSHA may enforce its vaccine mandate. The case has been appealed to the Supreme Court. OSHA has [announced](#) that due to the uncertainty created by the stay it will adjust the compliance dates for the ETS. “OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard’s testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.”

## CONCLUSION

In sum, CMS has not yet announced any time for pursuing its mandate in the 25 states where an injunction is not in place – California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington, and Wisconsin – and enforcement of the COVID-19 vaccination requirements is permissible. However, employers in those states should prepare to comply with the CMS vaccine mandate in the event CMS proceeds with revised deadlines for vaccination. Employers subject to the OSHA mandate should also plan to comply with OSHA’s testing mandate by February 10, 2022, while awaiting a decision from the Supreme Court.

If you have questions or need assistance regarding compliance with these vaccine requirements and other employment laws, please contact a member of Hancock Daniel’s [Labor & Employment](#) team. For any other concerns arising from the pandemic, please contact a member of our [COVID-19 Task Force](#).

*The information contained in this advisory is for general educational purposes only. It is presented with the understanding that neither the author nor Hancock, Daniel & Johnson, P.C., is offering any legal or other professional services. Since the law in many areas is complex and can change rapidly, this information may not apply to a given factual situation and can become outdated. Individuals desiring legal advice should consult legal counsel for up-to-date and fact-specific advice. Under no circumstances will the author or Hancock, Daniel & Johnson, P.C. be liable for any direct, indirect, or consequential damages resulting from the use of this material.*