

Federal Efforts to Mandate COVID-19 Vaccinations, Testing and Masking: Overview and Status Update on Challenges in the Courts

by James A. Robertson and Jessica M. Carroll

In its ongoing efforts to address the COVID-19 pandemic, the federal government introduced numerous mandates requiring vaccination, testing, and masking of workers in a variety of settings. These mandates -- the Safer Federal Workforce Task Force COVID-19 Workplace Safety Guidance for Federal Contractors and Subcontractors, the OSHA Emergency Temporary Standard (ETS), and the CMS Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule for Medicaid and Medicare providers and suppliers -- have been challenged in the nation's courts by employers, individuals, states, religious organizations, and non-profit entities, among others. This article provides an overview of each mandate and its status as of this writing.

Safer Federal Workforce Task Force COVID-19 Workplace Safety Guidance for Federal Contractors and Subcontractors

On September 9, 2021, President Biden signed an Executive Order (EO 14042) directing federal agencies to contractually require certain federal contractors and subcontractors to implement COVID-19 workplace safety measures, including a vaccine mandate with a no "testing" option. Specifically, the Order directed the Federal Workforce Task Force to establish safeguards requiring all covered contractors to be fully vaccinated by January 18, 2022, unless the covered employees were legally entitled to an accommodation. The safeguards



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apply to all "newly awarded contracts" at any location where a covered employee works, to all full-time or part-time employee of a covered contractor working on or in connection with a federal contract, and to any individual working at a covered contractor workplace.

Eleven states challenged the federal contractor vaccine mandate. The federal district courts in Kentucky, Georgia, Louisiana, Missouri, and Florida issued preliminary injunctions barring enforcement of the mandate after concluding that the Executive Branch had not followed various required procedures for changes to federal contracting requirements and/or lacked the authority to impose the mandate. As a result of these decisions, enforcement of the mandate is currently enjoined nationwide.

Of particular note is the nationwide injunction issued by the U.S. District for the Southern District of Georgia enjoining the enforcement of the federal contractor vaccine mandate. There,

the Court determined that President Biden likely exceeded his authority under the Federal Property and Administrative Services Act by contractually requiring federal contractors and subcontractors to implement COVID-19 workplace safety measures, including vaccination requirements. The Court's

continued on page 20

continued from page 19

analysis focused on whether the President is authorized by law to issue the directives contained in EO 14042, or whether the EO instead signifies an enormous and transformative expansion in regulatory authority without clear congressional authorization.

The Court reasoned that if the law was construed to give the President the right to impose the vaccine mandate, the President could also impose “virtually any kind of requirement on businesses that wish to contract with the Government . . . so long as he determines it could lead to a healthier and thus more efficient workforce or it could reduce absenteeism.” Accordingly, the Court found that the plaintiff states were likely to succeed on the merits of their challenge.

The OSHA Emergency Temporary Standard (ETS)

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) released a set of emergency temporary standards (ETS) requiring employers with 100 or more employees to implement mandatory COVID-19 vaccination or weekly testing and masking requirements. Immediately thereafter, lawsuits were filed challenging OSHA’s authority to enforce the mandate and on November 6, 2021, the U.S. Court of Appeals for the Fifth Circuit issued an emergency stay of the ETS, pending briefing and expedited judicial review.

On November 12, 2021, the Fifth Circuit reaffirmed its stay in a 22-page opinion, determining that the petitioners, which included states, individuals, and religious organizations, had demonstrated the traditional elements required for a stay pending judicial review.

Focusing on whether OSHA has the constitutional and statutory authority to issue and enforce workplace rules that are as far-reaching and burdensome as the ETS, the Fifth Circuit held that the challenges to the ETS “show a great likelihood of success on the merits.” The Circuit Court held that the ETS “grossly exceeds OSHA’s statutory authority” under the OSHA Standards and Regulations (specifically, 29 U.S.C. § 655(c)(1)) which authorize OSHA to issue an ETS and bypass the period of public notice and comment only if the agency determines that employees are “exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards” and the ETS is “necessary to protect employees from such danger.” The Court Circuit concluded that OSHA did not demonstrate that the ETS met these requirements.

Further, the Circuit Court noted that the ETS “raises serious constitutional concerns” including that “it likely exceeds the federal government’s authority under the Commerce Clause” and implicates separation of powers principles because there is “no clear expression of congressional intent in §655(c) to convey OSHA such broad authority.” The Court also explained

that the ETS was both improperly over-inclusive (because it covers employees with little-to-no risk of exposure to COVID-19) and improperly under-inclusive (because it does not cover employees who work for companies with fewer than 100 employees).

The Circuit Court determined that denying a stay would cause irreparable harm to petitioners, noting that the ETS substantially burdens the liberty interests of covered employees who do not want to receive the COVID-19 vaccine, imposes non-recoverable compliance and other costs on covered employers, and infringes on the states’ police power over public health policy. Therefore, the Circuit Court held that granting a stay would not harm OSHA because “[a]ny interest OSHA may claim in enforcing an unlawful (and likely unconstitutional) ETS is illegitimate.” Lastly, the Circuit Court held that granting a stay is in the public interest, not only because the ETS causes “economic upheaval,” but also because the ETS raises constitutional questions and threatens individual liberty.

The federal government filed a motion asking the Sixth Circuit to dissolve the Fifth Circuit’s stay of the ETS. On December 17, a three-judge panel for the Sixth Circuit granted the government’s motion. Immediately thereafter, multiple petitioners filed emergency applications for an injunction to Justice Brett Kavanaugh of the United States Supreme Court, the Circuit Justice for the Sixth Circuit, asking for a stay of the ETS pending further judicial review. On December 22, 2021, the U.S. Supreme Court issued an order consolidating the emergency applications for an injunction and setting oral argument for Friday, January 7, 2022.

On January 13, 2022, the U.S. Supreme Court stayed implementation of OSHA’s ETS. In a 6-3 decision finding that the parties opposing the ETS “are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate,” the Court explained that although Congress has given OSHA the authority to regulate occupational dangers “it has not given that agency the power to regulate public health more broadly.” The stay of the ETS will remain in effect pending the Sixth Circuit’s review of the merits of the case.

CMS Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule

In November 2021, acting through the Centers for Medicare and Medicaid Services (CMS) to combat the spread of COVID-19 infections, the Secretary of Health and Human Services issued a mandate to protect the health and safety of Medicare and Medicaid patients being treated by healthcare providers in hospitals, nursing homes, ambulatory surgical centers, hospices, rehabilitation facilities and other facilities.

Shortly thereafter, 24 states challenged the mandate and on December 2, 2021, CMS suspended the COVID-19 vaccine mandate for that group of states pending resolution of the applications for injunctions prohibiting its enforcement.

On January 13, 2022, the U.S. Supreme Court upheld the CMS mandate for healthcare facilities participating in the Medicare and Medicaid programs, requiring all employees, volunteers, contractors, and other workers to receive a COVID-19 vaccine unless the employee is granted a medical or religious exemption. Non-compliance would result in fines and termination of Medicare and Medicaid provider agreements.

In a 5-4 decision, the U.S. Supreme Court found that pursuant to 42 U.S.C. §1302(a), Congress authorized the HHS Secretary to promulgate this type of requirement upon healthcare facilities participating in the Medicare and Medicaid programs in the interest of the health and safety of patients receiving care during a health emergency. Given the rampant spread of COVID-19, as a matter of public safety, the majority reasoned that unvaccinated staff pose a serious threat to the health and safety of patients -- particularly the elderly, disabled, or those in poor health -- as this could lead to patients forgoing medically necessary treatments, staffing shortages, or disruption to patient care.

In its decision, the majority focused predominantly on the well-being of the patient. While the dissent focused on the rights of healthcare facility staff members, the majority was not convinced that compelling staff members to choose between employment and involuntary vaccination prevented the implementation of a nationwide vaccine mandate on Medicare and Medicaid providers. In short, the majority agreed that the mandate was consistent with the fundamental principle of the medical profession: “first, do no harm.”

The Court was silent as to any dates or deadlines for compliance. As such, on January 14, 2022, CMS issued a memorandum to specifically address the new compliance deadlines for the 24 states that had filed for injunctions, and to reaffirm the previous deadlines for states that did not.

The new deadlines apply to the following states: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wyoming. The deadlines do not apply to Texas, as Texas sought an injunction separately from the other states and Texas’ application is still pending resolution.

Healthcare facilities in these 24 states must demonstrate the following by **February 13, 2022**:

- Implementation of policies and procedures for ensuring all facility staff are vaccinated or have received an exemption, **and**

- Verification that 100% of staff have received at least one dose of the COVID-19 vaccine, **or** have a pending request for, or have been granted, an exemption, **or** have been identified as needing a temporary delay before receiving the vaccine.

Additionally, these same 24 states must demonstrate the following by **March 15, 2022**:

- Implementation of policies and procedures for ensuring all facility staff are vaccinated or have received an exemption, **and**
- Verification that 100% of staff have received the necessary doses to complete the vaccine series (i.e., one dose of a single-dose vaccine or all doses of a multiple-dose vaccine series), **or** have a pending request for, or have been granted, an exemption, **or** have been identified as needing a temporary delay before receiving the vaccine.

Any state that fails to comply with the 100% standard by **April 14, 2022**, may be subject to enforcement action. Additional guidance is provided in the [January 14 CMS memorandum](#). Guidance specific to provider types and certified suppliers is provided [here](#).

For states that did not seek an injunction, the timeframes and parameters issued in the December 28, 2021 memorandum remain in effect. Those deadlines require implementation of policies and procedures for ensuring all facility staff are vaccinated, unless an exemption applies, along with:

- Verification that 100% of facility staff received at least one dose of the COVID-19 vaccine by **January 27, 2022**; and
- Verification that 100% of staff have received the necessary doses to complete the vaccine series (i.e., one dose of a single-dose vaccine or all doses of a multiple-dose vaccine series) by **February 28, 2022**.

In light of the U.S. Supreme Court’s holding and the CMS memorandum, healthcare facilities should comply with all relevant deadlines and requirements for the vaccine mandate as applied within their respective states. Failure to comply could result in becoming ineligible for Medicare and Medicaid funding.

In Conclusion

The federal landscape for mandates regulating the health and safety of employees during the COVID-19 pandemic is

continued on page 22

continued from page 21

rapidly evolving. The U.S. Supreme Court stayed the OSHA vaccine mandate but allowed the CMS vaccine mandate for certain healthcare workers, and the enforcement of the federal contractor's mandate is currently enjoined nationwide. Employers must understand their legal obligations to navigate the impact of these federal decisions and take steps to keep their employees safe in the workplace. In addition, employers must remain well informed and be prepared to tackle the complexities of local and state requirements related to these issues.

About the Authors:

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• Certification Corner •



HFMA certified members who are due to maintain their certification by May 31, 2022 recently received a reminder on certification maintenance. HFMA provided several resources that include maintenance information available to Certified Healthcare Financial Professionals (CHFP) and Fellows of the HFMA (FHFMA):

Where can I find maintenance information?

- Reminders - sent starting about 6 months in advance of the due date, and then monthly.
- The CHFP congratulatory letter - this is available to download in the eLearning dashboard upon passing Operational Excellence exam, module II of CHFP.
- In the email the member receives upon passing Operational Excellence, module II of CHFP.
- The maintenance instructions document includes general certification maintenance information, tips for using the maintenance reporting tool along with a list of eligible CHFP/FHFMA maintenance activities.
 - On the HFMA website: [Maintaining Your Certifications \(hfma.org\)](http://Maintaining Your Certifications (hfma.org))
 - In the FAQs linked here: [Maintenance FAQs \(hfma.org\)](http://Maintenance FAQs (hfma.org))

Some common FAQs:

- How can you earn credit hours? As an all-access member you have access to all HFMA online educational content. On-demand webinars are a popular resource to earn extra hours. Upon completion of an on-demand session you can submit the activity via the online reporting tool (HFMA login required) to ensure you receive credit. Note: on-demand sessions can be used for maintenance but do not qualify for official NASBA approved CPE credits. Only live events offer CPE.
- How can I verify that I have submitted the required number of activities (60 points) for my cycle? You may run a report of your current total points using the report at the top of the online reporting tool
- I have submitted my activities and renewed my membership due for my renewal in May. When will I receive confirmation I am in compliance? HFMA's system will auto update, and you will receive an email confirmation at renewal for the next cycle.

May 31, 2022 is approaching quickly, do not be late! Questions? Feel free to reach out to careerservices@hfma.org or arazanica@njha.com.