

Ruling Puts Vaccination Mandate for Nursing Homes on Hold

Article

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The federal requirement that nursing homes vaccinate staff against COVID-19 is on hold temporarily after a judge's ruling this week in Louisiana. The ruling, coming amid concerns over the omicron variant of the coronavirus, could ease pressure on nursing homes facing staffing shortages but for now leaves vaccination rules in an uncertain status.

In November, the Centers for Medicare & Medicaid Services (CMS) issued an emergency regulation requiring that nursing homes participating in Medicare and Medicaid have all non-exempt staff get their first vaccination by December 6 and their final dose by January 4. But that mandate was set aside, temporarily, by Tuesday's ruling by Judge Terry A. Doughty of the U.S. District Court for the Western District of Louisiana.

The Louisiana district court's ruling applies nationwide, except for 10 states already covered by a separate preliminary injunction issued by a federal court in Missouri. Wisconsin was not among those 10 states.

The Louisiana court granted a preliminary injunction barring implementation of the vaccine mandate until the court resolves the case before it or until the U.S. Court of Appeals for the Fifth Circuit or the U.S. Supreme Court issues an order on the subject. The injunction was requested by Louisiana and 13 other states, from Georgia to Utah. The federal government appealed the injunction Wednesday.

In the wake of the nationwide preliminary injunction, nursing homes – for now – do not face a federal requirement to vaccinate non-exempt staff. However, operators should watch for further court action that might reinstate the mandate, and should prepare to comply with the vaccine requirements if needed.

Judge Doughty found that CMS did not have authority to impose the vaccine mandate. He reasoned that the mandate did not go through the public notice and comment procedure, should be imposed (if at all) by Congress rather than a government agency, violated the Social Security Act, and would harm patients by the loss of staff and funding. Moreover, the judge wrote, CMS and the Department of Health and Human Services did not consider "obvious

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alternatives” such as daily or weekly testing, masks, social distancing or natural immunity. “The rejection of natural immunity as an alternative is puzzling,” Judge Doughty wrote. He noted that fully vaccinated people can still become infected, and he questioned the benefit of the vaccines and the need for mandating them when the Centers for Disease Control is recommending booster shots after full vaccination.

The court found that the 14 states requesting the injunction would suffer irreparable injury by encroachment on their state powers and by costs of enforcing the mandate, that their citizens’ liberty would be harmed by having to choose between losing their jobs or taking the vaccine, and that their facilities would face higher costs from enforcing the mandate or losing federal funding. The constitutional and liberty interests outweigh the federal government’s interests in public safety, the judge found.

The judge extended the injunction beyond the 14 states involved in the case and applied it nationwide to protect unvaccinated health care workers in the other states.

Judge Doughty was appointed by former President Donald Trump.

The long-term care industry reacted favorably to the ruling. Mark Parkinson, president and CEO of the American Health Care Association and National Center for Assisted Living, AHCA/NCAL, issued this statement: “We appreciate the U.S. District Court in the Western District of Louisiana issuing this injunction. We have always supported vaccinating as many residents and staff as possible. However, we are deeply concerned that the current mandate issued by CMS will cause nursing homes to lose staff at a time when we are already grappling with a historic labor crisis. We continue to urge CMS to allow a regular testing option for unvaccinated staff and, therefore, support any legal remedy or CMS action that would bring about this solution.”

A separate vaccine mandate from the U.S. Labor Department, applying to private employers of 100 or more workers, has also been temporarily blocked by court action.

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