Healthcare Law Alert: CMS COVID-19 Vaccine Mandate in Flux

12/21/2021

As we previously reported to you in our November 2021 *Healthcare Law Update*, on November 5, 2021, the Centers for Medicare & Medicaid Service (CMS) issued an Interim Final Rule with comment period, mandating COVID-19 vaccination of healthcare workers of certain Medicare-certified healthcare providers and suppliers including, but not limited to, hospitals, long-term care facilities, home health agencies, and hospices. On November 29 and November 30, 2021, the U.S. District Court for the Eastern District of Missouri and the U.S. District Court for the Western District of Louisiana issued preliminary injunctions against the implementation and enforcement of the Interim Final Rule against such providers and suppliers. Together, these injunctions covered all states, the District of Columbia, and the U.S. Territories.

Resultingly, on December 2, 2021, CMS published a Memorandum to State Survey Agency Directors, in which CMS advised it "will not enforce the new rule regarding vaccination of healthcare workers or requirements for policies and procedures in certified Medicare/Medicaid providers and suppliers (including nursing facilities, hospitals, dialysis facilities and all other provider types covered by the rule) while there are court-ordered injunctions in place prohibiting enforcement of this provision."

On December 15, 2021, the U.S. Court of Appeals for the Fifth Circuit partially upheld and partially reversed the Louisiana court's decision. As a result, the injunction now applies only to 14 states: Louisiana, Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Carolina, Utah, West Virginia, Kentucky, and Ohio. Although the injunction does not cover the remainder of states, including New Jersey, as of the date of this Alert, CMS has not revised the Memorandum or otherwise issued guidance on how the Fifth Circuit decision will affect CMS' enforcement of the Interim Final Rule. We will continue to monitor the status of the Interim Final Rule.

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