

Return of the CMS COVID-19 Vaccine Rule (in Some States): Fifth Circuit Drops Nationwide Injunction

By: Taylor Freeman Peshehonoff and Sam Clancy

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The Centers for Medicare and Medicaid Services COVID-19 vaccine rule (“[Rule](#)”), which applies to the staff of many Medicare- and Medicaid-certified providers, e.g., hospitals, long-term care facilities, home-health agencies, and hospices (“[Covered Entities](#)”), is back in action—at least in some states. CMS now finds itself looking at a patchwork of states in which it can enforce the Rule because, as of December 15, 2021, the *nationwide* injunction preventing its enforcement has been dissolved just weeks after it went into effect.

CMS issued the Rule on November 4. A few weeks later (as a previous [GableGotwals Alert](#) explained) federal district courts across the country began resolving challenges to the Rule. A nationwide injunction came out of a challenge filed in federal court in Louisiana, where 14 states sought to enjoin CMS from enforcing the Rule. The Louisiana court granted those 14 plaintiff states and 26 others protection by issuing a nationwide injunction. (Another 10 states were protected by an injunction granted by a federal court in Missouri just the day before the Louisiana court’s decision, and they were specifically excluded from the Louisiana court’s order.)

While CMS [acknowledged](#) the legal limitations these orders created, CMS appealed them. Just this week, a [panel in the Fifth Circuit Court of Appeals](#) considered CMS’s request to stay the nationwide preliminary injunction. The Fifth Circuit panel of Judges Southwick, Graves, and Costa refused to stay the injunction in its entirety, but it did pull back the injunction’s reach. Now, instead of a nationwide injunction preventing enforcement of the Rule, the Louisiana court’s injunction order is applicable only to the 14 plaintiff states in that action: (1) Louisiana; (2) Montana; (3) Arizona; (4) Alabama; (5) Georgia; (6) Idaho; (7) Indiana; (8) Mississippi; (9) **Oklahoma**; (10) South Carolina; (11) Utah; (12) West Virginia; (13) Kentucky; and (14) Ohio.

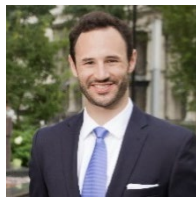
The coinciding preliminary injunction from the federal court in Missouri protects: (1) Alaska; (2) Arkansas; (3) Iowa; (4) Kansas; (5) Missouri; (6) Nebraska; (7) New Hampshire; (8) North Dakota; (9) South Dakota; and (10) Wyoming. The Eighth Circuit Court of Appeals has already denied the stay of that injunction pending appeal. Thus, the Rule is now back in action across a majority of states.

Covered Entities who are again subject to the Rule should proceed with caution. CMS could comment that it will voluntarily pause enforcement across all states until a legal resolution is reached, but until CMS sheds some light on its intended response to a now complicated enforcement scheme, Covered Entities should take the necessary steps to protect themselves.

At a minimum, Covered Entities subject to the Rule should do the following:

- First, identify whether it has staff in any of the states *not* protected by an injunction, *i.e.*, one of the 26 states now resubjected to the Rule.
- Second, Covered Entities should investigate whether that specific state has joined litigation challenging the Rule and review the status of that state-specific litigation. For example, Florida was [denied an injunction](#) of the Rule pending appeal by the Eleventh Circuit Court of Appeals.
- Third, review the Rule and determine what steps you must take to become compliant if no injunction covering your state is created soon, understanding that the initial compliance deadline has already passed.

Should you have specific questions on whether you have been resubjected to the Rule or if you need assistance becoming compliant with the Rule, please contact a member of [GableGotwals's Labor and Employment Team](#).



[Sam Clancy](#)
918-595-4848
sclancy@gablelaw.com



[Taylor J. Peshehonoff](#)
405-568-3316
tpeshehonoff@gablelaw.com

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