

## Opponents of Health Worker Vaccine Mandate Aim for Right Court

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- ‘Tactical decision’ where to sue seeks to block rule on appeal
- But facilities should move toward compliance, some lawyers say

The second and third challenges from Republican-led states to the Biden administration’s vaccine mandate for health-care workers are strategic plays to maximize the chances that a federal appeals court blocks the rule, legal observers said.

Republican-led states are pushing back against President Joe Biden’s sweeping vaccine mandates, with an Occupational Safety and Health Administration vaccine-or-test rule for large employers being the main [target](#). The Fifth Circuit [blocked that rule](#), making the Centers for Medicare & Medicaid Services’ health-care worker rule the next priority.

The two lawsuits against the health-worker rule make similar claims to the first that the vaccine mandate will worsen health-care staffing shortages. If enough workers leave their jobs rather than get the job, the states claim, the mandate could jeopardize access to care, particularly in rural communities.

The [second](#) suit was filed on behalf of 12 states with Republican attorneys general in federal court in Louisiana. Texas filed the third federal suit. The Fifth Circuit, which would hear appeals of both lawsuits, has 19 judges appointed by Republican presidents out of 26 active or senior judges.

“It’s a tactical decision,” said Frank Morris Jr., a member of Epstein Becker & Green. The strategy is to get the Fifth Circuit to view the health-worker rule “in the same light and hopefully get the same result” as the OSHA rule, Morris said.

Florida suffered a quick [denial](#) after filing a fourth lawsuit requesting a temporary restraining order or injunction. A district court judge argued that the state hasn’t proven irreparable harm. If appealed, the decision would be heard by the Eleventh Circuit, which has 12 judges appointed by Republican presidents out of 20 active or senior judges.

The [first](#) lawsuit was filed by 10 states, nine of which have Republican attorneys general, in federal court in Missouri. An appeal would land in the Eighth Circuit, which has just one active or senior status judge appointed by a Democrat out of 14.

Health-care facilities must have a fully [vaccinated](#) workforce by Jan. 4, 2022, under the CMS' mandate that the states are contesting. The CMS mandate does not include a testing option like the OSHA rule and has been predicted to be on [firmer](#) legal ground.

The number of workers who will actually leave the field won't be clear until the deadline for vaccination has passed. About 30% of health-care workers in over 2,000 hospitals were unvaccinated as of mid-September, according to an [analysis](#) from the Centers for Disease Control and Prevention.

The CMS has argued that the mandate will have a positive impact on staffing since employees will use less sick leave and any job openings could attract new workers into the industry.

Health-care facilities shouldn't hold their breath on the rule being blocked or altered. The penalty for noncompliance is termination from Medicare and Medicaid programs, and "gambling on your main source of revenue" is "a very dangerous game to play," said Kristin Ahr, a partner at Nelson Mullins Riley & Scarborough LLP who practices employment litigation.

## Legal Strategy

The lawsuits claim the CMS violated the Administrative Procedure Act and the Social Security Act by not giving impacted facilities the chance to comment on the rule before it took effect. The rule went through an expedited rulemaking process [due to](#) the public health emergency and took effect as soon as it was released.

The CMS is soliciting comments now that the rule is out, but the end of the comment period coincides with the deadline for vaccination, so there's "very little opportunity for commenters to provide meaningful comment back to CMS that would have any effect on implementation," Christopher Kenny, a partner at King & Spalding, said at a recent webinar.

The lawsuits also allege the CMS does not have the statutory authority to "impose a broad vaccine mandate that Congress has not authorized," the Missouri complaint said.

The fact that the CMS has never mandated a vaccination before is not enough to show that the CMS exceeded its authority, Morris said. “Although this is a serious and far-reaching rule, and is, essentially, unprecedented, that alone doesn’t make it impermissible,” Morris said.

It’s quite clear that federally administered programs can choose the terms of participation for facilities they fund, so “I’d expect that ultimately this rule is upheld,” said Colin McCarthy, counsel at McGuireWoods.

A judge could perhaps view the Administrative Procedure Act arguments as “more persuasive than the statutory arguments,” Kenny said. If a court did decide the CMS is in violation of the APA, the CMS would likely have to shift the deadlines, receive comments, “and, in all likelihood, adopt the exact same policy that it’s issuing now,” Kenny said.

Whether the lawsuits have shown harm could be “questionable,” said Katie Ervin Carlson, a senior attorney at Dorsey & Whitney LLP. It’s still unclear whether vaccine mandates lead to mass resignations, and plenty of facilities and states have already implemented their own mandates and seen a minute impact on staffing, she said.

The staffing claims seem “speculative at this point,” McCarthy said.

## Don’t Wait

Facilities need to ramp up their efforts to comply with the rule regardless of the legal battles. “Stays can be lifted, and unprepared employers could find themselves in a real bind if they are not prepared to comply at a moment’s notice,” Carlson said.

The CMS has said it will provide facilities more guidance on how to handle medical and religious exemptions, said Yvette Gatling, shareholder at Littler Mendelson PC. Employers need a process for tracking them in the meantime.

There are also still gray areas for facilities in states like Texas that prohibit vaccine mandates, and “there’s a pretty good likelihood” that states could penalize providers who fire or threaten to fire their staff, Kenny said. This will most likely prompt legal challenges against state rules from providers.

Until the CMS and the courts give providers more clarity, “I certainly wouldn’t terminate anyone,” Morris said.

—*With assistance from Jasmine Han*

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[CMS frequently asked questions list on rule](#)

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