

OSHA & CMS VACCINATION RULES MOVE FORWARD AS SUPREME COURT MULLS ARGUMENTS ON INJUNCTIVE RELIEF

Hodgson Russ OSHA and Labor & Employment Alert
January 12, 2022

The United States Supreme Court heard nearly four hours' worth of arguments on January 7, 2022 on whether or not to enjoin the U.S. Occupational Safety and Health Administration's ("OSHA") Emergency Temporary Standard ("ETS") on COVID-19 Vaccination and Testing and the Center for Medicare and Medicaid Services' ("CMS") interim final rule on Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination ("IFR"). While prior to oral argument the Supreme Court had indicated a willingness to resolve the motions swiftly, comments at the January 7 hearing suggest that the Court might need a few weeks. On the other hand, the Court could rule this week. And, while counsel requested during oral argument that the Supreme Court issue at least a temporary stay before enforcement takes effect, it declined to do so. The Supreme Court's failure to direct a stay is no doubt disappointing to employers who would be forced to commit financial and personnel resources to prepare to meet upcoming enforcement deadlines from those agencies in the face of significant legal uncertainties, and to those employees who may be facing life-changing decisions about vaccinations and potential alteration or termination of employment that cannot be reversed.

In December, OSHA indicated its intent to commence enforcement of the ETS on January 10, 2022, stating its expectation that all covered employers with 100 or more employees have their ETS-required plans developed and implemented by that date, with the exception of any applicable testing protocols. OSHA indicated it would not issue citations for non-compliance with the ETS testing requirements until February 9, 2022, so long as the employer is "exercising reasonable, good faith efforts to come into compliance."

For employers subject to the CMS IFR, the story is a little different and has become more complex. As of this writing, CMS is still subject to injunctions in 25 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, Texas, Utah, West Virginia, and Wyoming. Initially, CMS indicated it would hold off on enforcement of the IFR pending further legal developments. But CMS has now changed course, with the release of new guidance on December 28, 2021 in the form of a Frequently

Attorneys

Luisa Bostick
Joseph Braccio
Jane Bello Burke
Glen Doherty
Andrew Drilling
Ryan Everhart
Andrew Freedman
Peter Godfrey
John Godwin
Michael Hecker
Charles H. Kaplan
Karl Kristoff
Christopher Massaroni
Elizabeth McPhail
Lindsay Menasco
Kinsey O'Brien
Jeffrey Swiatek
Michael Zahler

Practices & Industries

Labor & Employment
Occupational Safety & Health Act (OSHA)

OSHA & CMS VACCINATION RULES MOVE FORWARD AS SUPREME COURT MULLS ARGUMENTS ON INJUNCTIVE RELIEF

Asked Questions (“FAQ”) update. The updated FAQ states that employers in the above 25 states are not required to comply with the IFR, but that CMS will exercise its “enforcement discretion” and “will begin monitoring and enforcing compliance” in the other 25 states. It set forth a modified compliance timeline with deadlines of January 27, 2022 for Phase 1 compliance (i.e., employees must have completed a single dose vaccination or the first dose of a two-series vaccination), and February 28, 2022 for Phase 2 compliance (i.e., employees must have completed dose two of a two-dose series). Employers covered by the CMS mandates must also meet other applicable policy requirements for each Phase as may be required by the IFR. The change of direction by CMS translates to inconsistent treatment of employers based on where their business is located, and some businesses with operations in multiple states may face situations where the CMS mandate is subject to enforcement in some of their facilities but not others.

While employers subject to the OSHA ETS or CMS IFR were and are still hoping for a quick decision and clarity on their compliance obligations, the Supreme Court’s ruling may not come soon enough for some.

If you have questions about OSHA’s vaccination ETS or COVID-19 guidance, mandatory vaccination requirements, or other general questions about OSHA compliance, please contact [Jason Markel](#) (716.848.1395), [Glen Doherty](#) (518.433.2433), [Charles H. Kaplan](#) (646.218.7513), or any member of our [Labor & Employment Group](#). For questions about the requirements of the CMS IFR, contact [Jane Bello Burke](#) (518.433.4204).