

U.S. SUPREME COURT ENJOINS OSHA'S COVID-19 VACCINE-OR-TEST REGULATION, BUT ALLOWS CMS VACCINE MANDATE TO PROCEED

Hodgson Russ OSHA and Labor & Employment Alert
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On January 7, 2022, the U.S. Supreme Court heard arguments on emergency motions filed on behalf of several States, businesses, and nonprofits to stay the U.S. Occupational Safety and Health Administration's ("OSHA") vaccinate-or-test requirements imposed upon employers through the agency's Emergency Temporary Standard on COVID-19 Vaccination and Testing ("ETS"). The Court also heard arguments on emergency motions filed by government parties to stay orders entered by two United States District Courts that preliminarily enjoined the Center for Medicare and Medicaid Services' ("CMS") interim final rule ("IFR"), entitled "Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination," which mandated vaccinations in certain healthcare settings, including hospitals, nursing homes, ambulatory surgical centers, hospices, home health agencies, rehabilitation facilities, and others. On the afternoon of January 13, the Court released the two highly anticipated rulings, which enjoin the OSHA ETS, but allow the CMS vaccine mandate to proceed.

With regard to the OSHA ETS, a majority of the Court concluded that the challengers were likely to succeed on the merits of their claim that the Secretary of Labor lacked authority to impose the OSHA ETS. The majority's opinion granted the motions to stay the ETS "pending disposition of the applicants' petitions for review in the United States Court of Appeals for the Sixth Circuit and disposition of the applicants' petitions for writs of certiorari, if such writs are timely sought." As a practical matter, the stay creates uncertainty for the future of OSHA's ETS in its current form, which would only have a six-month life span in the normal course. The matter now proceeds back to the Sixth Circuit for a merits-based review.

The crux of the Supreme Court's majority opinion focused on concerns that while OSHA has authority to set workplace safety standards, no portion of the Occupational Safety and Health Act ("Act") empowers the agency to address public health more generally. The Court's opinion distinguished occupational risk from the "universal risks" and everyday dangers that people face in daily life and observed that permitting OSHA to regulate the hazards of daily life would greatly expand its

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authority without congressional authorization.

Justice Gorsuch penned a separate concurrence, which Justices Thomas and Alito joined, analyzing the issue under the “major questions” doctrine. The concurrence emphasized that the power to respond to the pandemic belongs to Congress, not OSHA, and that Congress has not delegated to OSHA the breadth of authority and power it seeks to exercise over the lives of 84 million Americans.

Justices Breyer, Sotomayor, and Kagan dissented, and their lengthy dissenting opinion focused on concepts of grave danger, the necessity for OSHA to address the ongoing COVID-19 pandemic in workplaces, and administrative deference to OSHA's conclusions in light of the evidentiary support, data, and studies.

OSHA reacted quickly to the Supreme Court's ruling, posting a statement from Secretary of Labor Marty Walsh that expressed disappointment with the ruling and advised that “OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the Covid-19 National Emphasis Program and General Duty Clause.” Thus, OSHA has signaled a clear intent to continue its focus on COVID-19 enforcement activities relying upon the General Duty Clause and other pre-existing regulations and enforcement guidance.

The CMS mandate, by contrast, will be permitted to proceed. The Court's majority opinion acknowledged that Congress delegated to the U.S. Department of Health and Human Services (“HHS”) the authority to impose conditions on the receipt of Medicare and Medicaid funds that “the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.” As the CMS mandate ensures that providers are taking steps to avoid transmission of the virus to patients, the majority concluded that the rule fits within the scope of that authority. The majority opinion further observed that the Secretary of HHS “routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers” and that healthcare workers are commonly subject to vaccination requirements. Accordingly, the Court stayed the preliminary injunctions issued by the two District Courts and allowed the CMS rule to proceed while appeals over the rule's validity remain pending at the U.S. Courts of Appeals for the Fifth and Eighth Circuits.

Justice Thomas issued a dissenting opinion, joined by Justices Alito, Gorsuch, and Barrett, indicating that they would deny a stay and keep the CMS rule on hold. They reasoned that the government had not made a strong showing of authority to issue the rule, and the powers conferred upon CMS by the Medicare Act to issue rules and regulations, and to administer the Medicare and Medicaid programs, do not empower CMS to impose a vaccine mandate.

Justice Alito also wrote a dissenting opinion, which Justices Thomas, Gorsuch, and Barrett joined. That dissent focused on the failure of CMS to seek public input on its mandate, or demonstrate “good cause” to bypass the notice and comment requirements, before taking the unprecedented step of requiring more than 10 million healthcare workers to choose between vaccination and loss of employment. Those healthcare workers who are not fully vaccinated will now face that very decision in the coming weeks.

CMS promptly issued a statement praising the Supreme Court's decision on the IFR, but joined Secretary Walsh in expressing disappointment with the Court's decision to stay OSHA's ETS. Current CMS guidance requires Phase 1 vaccination compliance by January 27, 2022 in the twenty-five states that were not covered by the District Court

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injunctions. CMS will no doubt be updating its guidance and compliance expectations soon in light of the Supreme Court's ruling.

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).