

January 14, 2022

U.S. Supreme Court Acts on OSHA and CMS Healthcare Worker Vaccination Mandates

On January 13, 2022, the U.S. Supreme Court (the “Supreme Court” or “Court”) issued its long-awaited decisions for the following two federal vaccination mandates:

- The Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard for COVID-19 Vaccination and Testing (the “OSHA ETS”) for employers with 100 or more employees, which became effective in part on January 10, 2022; and
- The Medicare and Medicaid Programs; Omnibus COVID–19 Health Care Staff Vaccination interim final rule (the “CMS Healthcare Worker Vaccination Mandate”).

On the surface, the Supreme Court only decided whether a stay of enforcement is necessary and appropriate in each matter while litigation proceeds in the respective lower courts. In both instances, the Supreme Court weighed in on the merits of the two mandates and gave an indication on how it would rule if the matters return on appeal. In our view, the end is now in sight for the OSHA ETS. By contrast, we believe the CMS Healthcare Worker Vaccination Mandate will prevail.

OSHA ETS

In short, the Supreme Court [voted 6-3](#) to grant a stay of enforcement and sent the matter back to the U.S. Court of the Appeals for the Sixth Circuit for a full review of the legality of the OSHA ETS. This stay of enforcement is effective until the Supreme Court ends it.

The Supreme Court’s decision left no doubt that the majority believes OSHA exceeded its authority with the OSHA ETS. The Court views it as a broad public health measure outside of OSHA’s scope in the guise of a workplace safety initiative under the Occupational Safety & Health Act. The Court indicated Congress has the authority to enact such a vaccination mandate and has the power to grant OSHA the authority to do so, but Congress did neither.

The Court noted that OSHA likely does have the authority to take certain narrower measures, but it appears clear the Supreme Court will rule against the OSHA ETS if the matter returns from the Sixth Circuit on appeal.

Biden Administration giving up?

OSHA appeared ready to continue defending the OSHA ETS based upon a [statement](#) published shortly after the Court’s ruling. However, President Biden [released a statement](#) later the same day suggesting his administration will not defend the OSHA ETS further:

As a result of the Court’s decision, it is now up to States and individual employers to determine whether to make their workplaces as safe as possible for employees, and whether their businesses will be safe for consumers during this pandemic by requiring employees to take the simple and effective step of getting vaccinated. The Court has ruled that my administration cannot use the authority granted to it by Congress to require this measure, but that does not stop me from using my voice as President to advocate for employers to do the right thing to protect Americans’ health and economy. I call on business leaders to

immediately join those who have already stepped up – including one third of Fortune 100 companies – and institute vaccination requirements to protect their workers, customers, and communities.

Next steps

Employers do not have to comply with the OSHA ETS while the temporary stay of enforcement is in effect. We should know whether the Biden Administration will drop its defense of the OSHA ETS within the next week or two. It seems unlikely the OSHA ETS will ever go back into effect, but employers may wish to discuss this with their legal counsel before abandoning their OSHA ETS compliance efforts.

A number of employers remain subject to state and/or local vaccination mandates based on their places of business operations. Certain employers may be subject to other federal vaccination mandates (e.g. the CMS Healthcare Worker Vaccination Mandate or the currently blocked federal contractor mandate). Employers may also choose to implement their own COVID-19 measures, subject to applicable federal, state, and/or local law.

CMS healthcare worker vaccination mandate

The Supreme Court voted [5-4](#) to remove the stays of enforcement affecting 25 states granted by the U.S. Courts of Appeal for the Fifth and Eighth Circuits for this mandate and sent the matter back to the Fifth and Eighth Circuits for a full review of the mandate's legality.¹

The Court's decision indicates it believes CMS has the authority to issue and enforce its vaccination mandate, and it seems likely the Supreme Court will rule in favor of this mandate if the matter returns from the Fifth and/or Eighth Circuits on appeal.

In the meantime, this decision allows CMS to move forward with its [revised plan](#) requiring mandatory vaccination by **January 27, 2022** for the first dose and **February 28, 2022** for the second in all 50 states (plus the District of Columbia). Full vaccination under this mandate does not require a booster.

¹ This should include Texas, which also had a stay of enforcement from a Texas federal district court.

About the author



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