



U.S. Supreme Court halts OSHA vaccine-or-test rule; Upholds CMS vaccine mandate

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A divided Supreme Court delivered two highly-anticipated decisions on January 13, 2022, announcing whether the federal Occupational Safety and Health Administration (OSHA) and Centers for Medicare & Medicaid Services (CMS) rules mandating workplace COVID-19 vaccines remain enforceable while both cases await a final decision on the merits in lower courts.

In [National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration](#), the Supreme Court stayed enforcement of OSHA's COVID-19 emergency temporary standard (ETS), which requires private employers (and certain public employers) with at least 100 employees to institute a policy mandating employees to be vaccinated or undergo weekly testing, and to wear face coverings. The court held that the mandate exceeds OSHA's administrative authority delegated by Congress to set workplace safety standards. The court described the rule as a "significant encroachment in the lives – and health – of a vast number of employees." According to the court, the OSHA vaccine mandate, which would require roughly 84 million workers to be vaccinated, extends beyond OSHA's authority and "takes on the character of a general public health measure, rather than an 'occupational safety standard.'"

The parties opposing the mandate argued it would result in the expenditure of billions of dollars in unrecoverable compliance costs. For its part, the federal government argued the mandate would save over 6,500 lives and hundreds of thousands of hospitalizations. The court declined to weigh such tradeoffs. In the 6-3 decision, the court reasoned, "[i]n our system of government, that [weighing] is the responsibility of those chosen by the people through democratic processes. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate

public health more broadly.” This stay is in place, pending further review of the merits of the claims by the lower appellate courts where the original cases were filed.

Of note, the court’s stay of the OSHA ETS prohibits the government agency from requiring policies, testing and masking; however, it does not prohibit employers of any size from issuing and enforcing their own vaccine-related policies, so long as doing so complies with state and local laws in the jurisdictions where companies operate when it comes to testing, vaccination, face coverings and other aspects of COVID-19 related workplace safety.

In [Biden v. Missouri](#), the court upheld the CMS vaccine mandate, which conditions the receipt of Medicare and Medicaid funds by certain health care facilities on ensuring that staff at CMS-covered facilities are vaccinated. Unlike the OSHA vaccine mandate, the CMS mandate does not permit covered facilities to automatically offer weekly testing as an alternative to vaccinating, unless an employer chooses to provide this as an accommodation for individuals who seek medical or religious exemptions. According to the 5-4 divided court, the CMS vaccine mandate fits squarely within the powers delegated to the Secretary of Health and Human Services by Congress – namely, the Secretary’s authority to impose conditions on 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.” The court agreed that the vaccine mandate ensures CMS providers take steps to avoid transmitting a dangerous virus to their patients. The court reasoned, “[i]t would be the very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID-19.”

The CMS case was also sent back to the lower court for a final decision on its merits. Health care facility employers covered by the CMS vaccine rule have until March 15, 2022, to assure that covered employees are fully compliant.

These issues continue to evolve rapidly, and employers should closely monitor them to maximize the health and safety of their employees and those they serve.

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