

SCOTUS Blocks Biden OSHA Vaccine or Test Mandate and Gives the Green Light to CMS Vaccine Mandate



By Curry Sexton and John Vering

On Thursday, the United States Supreme Court simultaneously issued two important opinions regarding vaccine mandates previously imposed by the Biden Administration:

1. The Occupational Safety and Health Administration's Emergency Temporary Standard requiring COVID vaccination or weekly testing ("OSHA ETS"); and
2. The CMS Medicare and Medicaid Programs Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule ("CMS Mandate").

Court Blocks OSHA ETS

As it relates to the OSHA ETS, under which private employers with 100 or more workers would have otherwise been required to make employees get vaccinated or be tested weekly for COVID-19, a 6-3 majority of the Court blocked the mandate, ruling that OSHA had exceeded its authority. The Court determined: "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. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category."

The Court further stated: "Although COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases.

Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA’s regulatory authority without clear congressional authorization.”

As a result of this ruling, the OSHA ETS is on hold pending resolution of the underlying case in the United States Circuit Court for the Sixth Circuit, where the circuit court will hear the case on the merits. In the meantime, private employers with 100 or more workers are not under a federal mandate to require their employees to get the COVID-19 vaccine or be tested regularly. However, private employers of any size have the discretion to impose company-wide vaccine mandates and COVID testing requirements—or not—if they so choose, subject to potential religious, medical and disability exemptions and some state and local laws which may require or prohibit vaccinations, testing and/or mask wearing depending upon the jurisdiction.

Court Upholds CMS Mandate

On the other hand, in a 5-4 decision, the Court ruled that, pursuant to the CMS Mandate, healthcare facilities that participate in Medicare and Medicaid programs must require employees to get the COVID-19 vaccine, with the exception of those who obtain religious and/or medical exemptions.

The Court noted that “Congress has authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that ‘the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.’” In light of the foregoing, the Court ruled: “The [CMS Mandate] thus fits neatly within the language of the statute. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm. It 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.’”

As a result, healthcare facilities subject to the CMS Mandate must comply. On December 28, 2021, CMS released guidance ([QSO-22-07-ALL \(cms.gov\)](https://www.cms.gov/medicare/coverage/guidance/qa-item-10000)) concerning the CMS Mandate to covered healthcare facilities. Healthcare facilities subject to the CMS Mandate should move expeditiously to come into compliance if they have not already done so, given that the first of several compliance deadlines is coming up on January 27, 2022.

We will continue to monitor this situation and keep you informed as to key future developments.

This article is general in nature and does not constitute legal advice. Readers with legal questions should consult the authors, Curry Sexton (CSexton@sb-kc.com) or John Vering (JVering@sb-kc.com), or any other shareholders in Seigfreid Bingham’s Employment Law Group, including: John Neyens (JNeyens@sb-kc.com), Mark Opara (MOpara@sb-kc.com), Shannon Johnson (SJohnson@sb-kc.com) or Brenda Hamilton (BHamilton@sb-kc.com), or your regular contact at Seigfreid Bingham at 816-421-4460. Specific questions about the CMS mandate and CMS Guidance regarding same should be directed to John Neyens (JNeyens@sb-kc.com) or Mark Opara (MOpara@sb-kc.com).