

SCOTUS HALTS EMPLOYER “VACCINATE-OR-TEST” MANDATE FOR PRIVATE EMPLOYERS WHILE GREEN- LIGHTING VACCINATION MANDATE DIRECTED TO CERTAIN HEALTH CARE WORKERS

January 19, 2022

In a much anticipated set of decisions, the U.S. Supreme Court delivered a mixed ruling on two key vaccination mandates issued by the Biden Administration: (1) [Occupational Safety and Health Administration’s \(OSHA\) “vax-or-test” mandate through OSHA’s Emergency Temporary Standard \(ETS\)](#), which targets employers with 100 or more employees; and (2) [the Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule issued by the Centers for Medicare and Medicaid Services \(CMS\)](#), which targets providers of Medicare and Medicaid.

The OSHA Ruling

By a split along traditional ideological lines, the Supreme Court halted OSHA's ETS. The court agreed with the several states, businesses and non-profit organizations challenging OSHA's mandate that OSHA exceeded its statutory authority with the ETS. The court granted the challenger's application to “stay” or halt the enforcement of the ETS while the lower courts rule on the merits. While this order is not a final ruling on the matter, the Supreme Court's decision made clear that the challengers of OSHA's ETS are “likely to succeed on the merits of their claim that the Secretary [of Labor] lacked authority to impose the mandate.”

The CMS Health Care Ruling

In a closer decision, the Supreme Court held the CMS had the authority to mandate vaccination for workers of employers that are Medicare and Medicaid providers. The court acknowledged CMS's vaccination mandate went further than any rule in the past “[b]ut [that the Secretary of Health and

Human Services] has never had to address an infection problem of this scale and scope before." The court also focused on how common vaccination requirements are within the health care industry generally.

What Do These Rulings Mean for Employers?

While the Supreme Court's ruling on OSHA's ETS does not end the vaccine debate or make a final determination, it provides certain employers much desired clarity of the federal government's requirements. The ruling tells employers with 100 or more employees what they are not required to do from a federal standpoint. However, it does not prohibit employers from instituting vaccination or testing requirements, subject to any applicable state laws and religious or disability-related exemptions.

Employers that provide or supply Medicare or Medicaid services will need to proceed with a vaccination program for their employees. This includes developing and implementing policies and procedures to ensure all employees have at least one dose of the COVID-19 vaccine or a pending exemption request or grant by January 27. By February 28, all staff at covered facilities must be identified as either fully vaccinated or exempted or identified as having a temporary delay. The CMS's guidance on its rule can be found [here](#) and [here](#).

For the time being, the Supreme Court's CMS ruling does not apply to the Northern District of Texas' separate injunction on the CMS rule, which that court entered after appeal of the broader challenge the Supreme Court ruled on last week. However, given the Supreme Court's decision, Medicare and Medicaid service providers would be wise to prepare for the Fifth Circuit to rule consistently with the Supreme Court's decision and mandate a vaccination program for their employees.

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