

Services

[Employment Law](#)

[OSHA Compliance & Defense](#)

[Employment Litigation and Arbitration](#)

[FLSA Litigation and Wage and Hour Defense](#)

[Immigration](#)

[Unfair Competition and Trade Secrets](#)

[Labor Law](#)

[Employment Advice, Counseling and Risk Management](#)

The U.S. Supreme Court Blocks Vaccine Mandate for Large Employers, Allows Mandate for Healthcare Workers To Proceed

On January 13, 2022, the conservative majority of the U.S. Supreme Court blocked President Biden's COVID-19 Vaccination and Testing Emergency Temporary Standard ("ETS") applicable to large employers, finding the ETS appeared to exceed the Occupational Safety and Health Administration's ("OSHA") authority. In contrast, two of the conservative Justices sided with the three more liberal Justices in allowing the Centers for Medicare and Medicaid's ("CMS") vaccine mandate applicable to certain healthcare workers.

OSHA's Vaccine Mandate for Large Employers

In 2021, President Biden announced a plan to get more Americans vaccinated against COVID-19, primarily supported by the ETS. Among other things, the ETS required most employers with 100 or more employees to implement a vaccine policy with or without a weekly testing option. The ETS was published in November 2021 and was initially stayed by the Fifth Circuit, but that stay was later dissolved by the Sixth Circuit in December. The Sixth Circuit held that the ETS was consistent with OSHA's statutory and constitution authority.

Yesterday, a majority of the U.S. Supreme Court Justices disagreed, finding the employer mandate was "no 'everyday exercise of federal power.'" The Court further found that COVID-19 was not an occupational hazard since risk of COVID-19 transmission could occur in a variety of other contexts outside the workplace. The Court, however, acknowledged that OSHA would have the power to regulate more vulnerable workplaces "[w]here the virus poses a special danger because of the particular features of an employee's job or workplace," such as "researchers who work with the COVID-19 virus" or "in particularly crowded or cramped environments." Justices Breyer, Sotomayor, and Kagan dissented.

Federal Vaccine Mandate for Healthcare Workers

In a separate opinion issued on the same day, the Court dissolved injunctions that had blocked enforcement of CMS's Interim Final Rule ("CMS Rule"), which requires certain covered healthcare workers to be vaccinated. The CMS Rule applies to specified healthcare services, support services or suppliers receiving Medicare or Medicaid funding, and covers clinical and non-clinical staff at covered facilities, including those providing services to covered facilities pursuant to a contract or other arrangement.

In the majority opinion, the Court found CMS has the authority to issue regulations to healthcare providers receiving federal funding where CMS finds it necessary "in the interest of the health and safety of individuals who are furnished services in the institution." The Supreme Court further found the CMS Rule was within CMS's Congressional authority since "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."

Finally, the Court determined there was not adequate support for an injunctive stay of the CMS Rule where: (1) the CMS Rule was not arbitrary or capricious; (2) a two month delay in promulgating the rule was not inconsistent with the finding of good cause; (3) CMS was not obligated to "consult with appropriate State agencies,"; and (4) the CMS Rule did not violate a federal standard prohibiting federal officials from controlling medical services, or selection of employees at facilities. Justices Thomas, Alito, Gorsuch, and Barrett dissented.

Vaccination Policies Moving Forward

Employers may wonder what to do now, particularly since portions of the OSHA ETS had already taken effect earlier this week. As a result, many large employers covered under the OSHA ETS had already rolled out or were in the process of rolling out vaccination policies. With the stay reinstated, OSHA is once again unable to enforce the ETS. Although the Sixth Circuit will at some point rule on the merits of the underlying litigation, there is a strong likelihood it will follow the clear direction from the Supreme Court and hold that OSHA exceeded its congressional authority.

While the litigation proceeds, covered employers are no longer legally required to comply with the ETS's requirements. They, however, remain free to voluntarily proceed with implementing and administering mandatory vaccine policies with or without a testing option. Employers who chose to do so must ensure their policies comply with all other applicable laws, including state and local laws that restrict or limit vaccination, testing and masking requirements. Because states are continuing to limit or restrict employers' ability to implement vaccination, testing and masking policies, employers who choose to proceed with such mandates will need to monitor the relevant legal developments.

For example, in May 2021, Montana adopted legislation prohibiting discrimination against employees based on vaccination status. Illinois has also been dealing with an interesting legal dilemma centering around the 1998 Health Care Rights of Conscience Act. This act prohibits employment discrimination based on an individual's "conscientious refusal to receive [or] obtain ... any particular form of health care services contrary to his or her conscience." This legislation originally was meant to protect healthcare providers that did not want to perform abortion-related medical services, but now litigants are using this as justification for refusing COVID-19 vaccination.

Other states have adopted or proposed legislation requiring employers to offer additional exemptions beyond those recognized by the OSHA ETS if they implement a mandatory vaccine policy. For example, in Nebraska a bill was recently proposed that, if adopted, would require employers to offer exemptions based on an employee's or job candidate's "strong moral, ethical, philosophical belief or conviction."

Employers covered by the CMS Rule, on the other hand, must comply with CMS's vaccine mandate in light of the Supreme Court's ruling. While CMS's position is that the CMS Rule preempts conflicting state laws, such as those that require additional exemptions or which preclude discrimination based on vaccination status, employers may want to consult with legal counsel to evaluate specific local and state requirements where conflicts with the CMS Rule appear to exist.

If you have questions about the U.S. Supreme Court's recent rulings or how they impact your organization's management of COVID-19, please contact a member of Kutak Rock's [OSHA Compliance & Workplace Safety Group](#) or [National Employment Law Group](#). You may also visit us at www.KutakRock.com.

