

Practice Update

U.S. Supreme Court Allows Vaccine Mandate for Healthcare but Blocks Vaccine-Or-Test Rule for Large Private Businesses

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On January 13, 2021, the U.S. Supreme Court prevented President Biden's vaccination or testing mandate for large employers (issued as an OSHA Emergency Temporary Standard (ETS)) from being enforced. The Court allowed the vaccine mandate for certain healthcare workers issued by the Center for Medicare and Medicaid Services (CMS) to go into effect nationwide, initially with the exception of Texas, and now in all 50 states, as explained below. The Court's opinion largely relied on an interpretation of statutory authority—finding OSHA exceeded it and CMS did not. Both issues were sent back to the lower courts of appeal for further determinations, but it is unlikely the appellate courts will come to different conclusions. And, while the ETS is not dead, it was only made effective for six months (until May 5th), and the appeals process doubtfully can be completed by that date.

Without the potentially preemptive ETS effect, employers with similar vaccine or test policies need to monitor state and local requirements, including Florida and Texas, that restricted employer vaccine mandates and New York City, which takes an ETS-like approach. These are just some examples of legal requirements that will continue developing.

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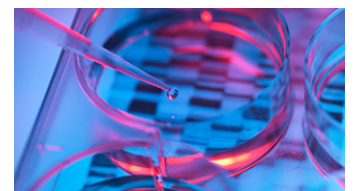
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OSHA's ETS

The effect of the Court's ruling is that all requirements contained within OSHA's large employer ETS are effectively stayed. The Court held that the broad approach by OSHA to regulate all private employers with 100 or more employees was impermissible as the ETS took on "the character of a general public health measure, rather than an occupational safety or health standard." The Court also noted OSHA "has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace."

As it stands, employers are no longer required by the ETS to, among other things, develop, implement, and enforce a written COVID-19 vaccine policy, determine the vaccination status of their workers, or mandate that all unvaccinated employees wear a face covering while indoors at the workplace or within a work vehicle. Again, the ruling does not affect state or local laws imposing those requirements.

Following the OSHA ETS decision, President Biden released a statement on vaccine mandates:

"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. . . . 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."

Nothing in the Court's decision hinders the ability of private employers to impose their own vaccine

mandate, subject to any state or local law prohibiting it. The decision also does not prevent employers from requiring employees to disclose their vaccine status and retaining that information. The Court has not barred employers from refusing to hire unvaccinated candidates. And, states limiting vaccine mandates, other than a limited number like Montana and Tennessee, generally do not prohibit requiring vaccines or testing plus masks to enter workplaces provided employees are not terminated (or an equivalent to termination) for refusing to comply. But, the Court's decision to stay the ETS means that employers cannot argue the ETS has any preemptive effect against contrary state or local laws. Private employers outside healthcare (see below) must continue tracking and complying with those requirements.

CMS Interim Final Rule

The two main injunctions staying the vaccine mandate imposed by the CMS interim final rule for certain healthcare workers also were dissolved by the Supreme Court. As of January 19, 2022, the CMS vaccine mandate can now be enforced in every state nationwide.

The Court held that the CMS vaccine mandate “goes further than what [CMS] has done in the past to implement infection control” but also that CMS “has never had to address an infection problem of this scale and scope before.” The majority opinion also noted that mandatory vaccinations are common for healthcare employees and that “healthcare workers and public-health organizations overwhelmingly support” the CMS mandate, which “suggests that a vaccination requirement under these circumstances is a straightforward and predictable example of the ‘health and safety’ regulations that Congress has authorized [CMS] to impose.”

Because the Court proceedings did not include Texas (Texas had procured its own injunction in a separate proceeding), the Texas injunction was not before the

Supreme Court. Following the Court's ruling, Texas filed a motion to dismiss its case. On January 19, 2022, the judge in the Northern District of Texas granted the state's motion to dismiss, closing the case and effectively lifting the injunction. The CMS vaccine mandate now applies in Texas along with the other 49 states.

Covered facilities and healthcare providers who provide services in hospitals, ambulatory surgery centers, or other covered facilities, should review the CMS guidance and survey procedures for assessing and maintaining compliance with the interim final rule that CMS published on December 28, 2021. The survey guidelines are broken out by type of facility and are [available here](#).

Pursuant to that guidance (which still applies to the 25 states that were never under an injunction):

- By January 27, 2022 (30 days after the guidance publication date), a covered facility will be compliant if it has policies and procedures in place for ensuring that eligible staff are vaccinated, (at least one (1) dose of a vaccine), have a pending request for exemption, have been granted a qualifying exemption, or have a temporary delay in receiving the vaccine as recommended by the CDC. A facility that achieves 80% employee vaccination rate by January 27 and has a plan to achieve a 100% vaccination rate by February 28 will not be subject to enforcement action.
- By February 28, 2022, all eligible staff must complete the full vaccine series (one dose of the J & J vaccine or two doses of the Pfizer or Moderna vaccines), have been granted a qualifying exemption, or be identified as needing a temporary delay as recommended by the CDC. A facility that achieves 90% employee vaccination rate and has a plan to achieve 100% within 30 days will not be subject to enforcement action.

- By March 30, 2022, failure to maintain 100% vaccination rate (fully vaccinated employees and those with qualifying exemptions) will result in enforcement action.

For covered facilities in the 24 states previously under injunction, CMS released updated guidance, including a new timeline for compliance, on January 14, 2022. That guidance is [available here](#). Following dismissal of the Texas case, it is unknown if CMS will issue additional guidance and revised compliance dates for healthcare facilities and providers in Texas.

- By February 14, 2022 (30 days after the guidance publication date plus an additional day as the deadline would otherwise fall on a Sunday), a covered facility in those 24 states must comply with the first phase deadline explained above (requiring at least one dose of a vaccine).
- By March 15, 2022, covered facilities must comply with the second phase deadline detailed above (requiring full vaccination).
- By April 14, 2022, failure to maintain 100% vaccination rate (fully vaccinated employees and those with qualifying exemptions) will result in enforcement action.

Healthcare facilities and providers subject to the CMS mandate should proceed with implementing the requirements of the interim final rule and watch for additional guidance from CMS further clarifying how covered facilities can satisfy their obligations to protect their patients and their workforce.

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