



COMPLIANCE ALERT



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US Supreme Court Stays OSHA's ETS for Private Employers with 100 or More Employees; Upholds CMS' Interim Final Rule for Health Care Workers

On January 13, 2022, the United States Supreme Court released its much anticipated opinions in the ongoing challenges to OSHA's November 5, 2021 Emergency Temporary Standard (ETS) requiring private employers with 100 or more employees to either mandate employees be vaccinated or submit to weekly testing and mask mandates, and CMS' November 5, 2021 Interim Final Rule requiring health care workers working at facilities that receive funding from Medicare or Medicaid to be vaccinated unless they are eligible for a medical or religious exemption.

OSHA ETS

In a 6 to 3 majority, with only Justices Kagan, Breyer, and Sotomayor dissenting, the Supreme Court held that the petitioners (various states and private businesses) were likely to succeed on the merits of their claims that OSHA's ETS exceeds OSHA's statutory authority and is otherwise unlawful.

Among other things, the majority recognized that OSHA's statutory authority is limited to occupational hazards, and a global pandemic extends well beyond the workplace, such as creating risks in schools, at home, in churches, and in recreational facilities. Therefore, OSHA has no statutory authority to regulate workplaces with a public health mandate using such a broad stroke; however, the Court recognized OSHA may have the authority to address COVID-19 risks in the

workplace for specific, targeted industries, such as workplaces where research on COVID-19 is being conducted.

Accordingly, the OSHA ETS is stayed for private employers with 100+ employees while the issue is fully reviewed and briefed in the 6th Circuit and any resulting petitions for writ of certiorari to the US Supreme Court, if any, are resolved. Therefore, OSHA cannot enforce its ETS at this time, and may not be able to do so for months, if at all.

CMS Interim Final Rule

On the other hand, the Court upheld the Centers for Medicare and Medicaid Services (CMS) Interim Final Rule, which added a new requirement to existing conditions of participation in Medicare and Medicaid, that requires facilities to ensure that their staff who work on site are vaccinated against COVID-19 unless a staff member is exempt for religious or medical reasons. This requirement was successfully challenged by two groups of states in two separate federal courts; however, the United States Supreme Court held that CMS has the statutory authority to, among other things, impose conditions on entities that receive funding from Medicaid and Medicare that "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services." Further, vaccine mandates for health care workers are not a new concept and many health care workers are already required

to receive a number of other vaccines, subject to the same medical and religious exemptions applicable to the COVID-19 vaccine mandate.

Accordingly, the Court lifted the stay for the remainder of the appeals pending in the 5th Circuit Court of Appeal and the 8th Circuit Court of Appeal, as well as any resulting challenge upon writ of certiorari presented to the United States Supreme Court. Therefore, health care facilities/employers subject to the CMS Interim Final Rule may require employees to be vaccinated unless a medical or religious exemption applies.

What Does This Mean for Employers?

Employers with 100+ employees who are not subject to the Health Care rule are not required to move forward with developing a plan to implement a vaccine mandate or weekly testing and mask mandate for their employees at this time. This would only change if OSHA is successful on the underlying merits of the case pending before the 6th Circuit, which may take months to conclude, and the US Supreme Court upholds that decision. In essence, OSHA has a very steep uphill battle ahead of it should it wish to continue pursuing the ETS.

For employers/facilities subject to the CMS Interim Final Rule, they must comply with the vaccine mandate for employees who are not eligible for an exemption for religious or medical reasons.

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