

U.S. Supreme Court Issues Rulings on Challenges to OSHA ETS and CMS Interim Final Rule

Alert

01.13.2022

By Brittany Barrientos, Erin Naeger, Greta Bauer Reyes and Luke VanFleteren

In prior alerts, we detailed the scope of the [interim final rule](#) issued by the Centers for Medicare & Medicaid Services (CMS) and [Emergency Temporary Standard](#) (ETS) announced by the Occupational Safety and Health Administration (OSHA). Previously, the application of both the CMS interim final rule and the OSHA ETS was stayed by federal appellate courts, although the Sixth Circuit later lifted the stay of the OSHA ETS and made the ETS effective pending further action. On January 7, 2022, the Supreme Court held oral argument on an expedited basis on petitions to stay the appellate court rulings which were entered regarding the interim final rule and ETS.

THE SUPREME COURT'S JANUARY 13, 2022 RULINGS

The Court Stayed the OSHA ETS

In an [Opinion](#) issued on January 13, 2022, the Court determined that the Sixth Circuit's decision to lift the stay of the OSHA ETS was not warranted, and re-imposed a stay on the ETS. This decision makes the OSHA ETS ineffective during the pendency of the litigation at the Sixth Circuit, and any further appeals. In addition to the per curiam opinion, Justices Gorsuch, Thomas and Alito concurred in a separate opinion. Justices Breyer, Sotomayor and Kagan dissented.

In its majority opinion, the Court determined that a stay was warranted for two principle reasons: (1) OSHA lacked the authority to impose the mandate; and (2) the balance of equities favored staying the regulation.

U.S. Supreme Court Issues Rulings on Challenges to OSHA ETS and CMS Interim Final Rule

In determining that OSHA lacked authority to issue the ETS, the Court noted that COVID-19 is not exclusively an *occupational* hazard, but rather one of daily life. Given that OSHA is tasked with regulating *occupational* safety and health, the Court determined that the regulation was likely beyond OSHA's legitimate reach. And, in determining that the equities favored issuing the stay, the Court opined that employers stood to incur billions of dollars in unrecoverable compliance costs, and the ETS would cause hundreds of thousands of workers to leave their jobs. The Court found that, while the vaccine mandate would likely save lives and prevent hospitalizations, it was not the Court's role to weigh such trade-offs, and instead, that responsibility is for those chosen through democratic processes. Given OSHA's limited authority to regulate only *occupational* hazards, the Court found that the ETS operated outside of that power by regulating public health more broadly, rather than regulating an occupational danger.

Accordingly, the Court found it proper to stay the ETS while the litigation progresses at the Sixth Circuit.

The Court Allowed CMS Interim Final Rule to Take Effect

The Court also issued an [Opinion](#) lifting the injunctions that were entered on the CMS interim final rule by a District Court in the Eastern District of Missouri and a District Court in the Western District of Louisiana. The effect of the Court's Opinion is that the interim final rule will be allowed to take effect during the pendency of the litigation in the Fifth and Eighth Circuits and any further appeals. Justices Thomas, Alito, Gorsuch and Coney Barrett dissented.

In the majority opinion, the Court determined that a stay was not warranted because the interim final rule falls within the authorities that Congress has conferred upon the Secretary of Health and Human Services 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 determining the interim final rule fell within the Secretary's authority, the Court determined that "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."

The Court also determined the interim final rule did not rise to the level of being arbitrary and capricious, and the majority concluded that the Secretary had good cause to delay notice and comment. Accordingly, the Court found it proper to stay the preliminary injunctions and allow the CMS interim final rule to take effect while the litigation progresses at the Fifth and Eighth Circuits.

NEXT STEPS: WHAT DOES THIS MEAN FOR EMPLOYERS?

Importantly, the issues before the Supreme Court were limited in nature. The Court's rulings related to motions to (1) stay the application of the OSHA ETS and (2) stay the injunction of the CMS interim final rule (which would make the CMS interim final rule effective pending a final ruling). However, the Supreme

U.S. Supreme Court Issues Rulings on Challenges to OSHA ETS and CMS Interim Final Rule

Court's rulings did not go to the merits of the interim final rule and ETS. Those issues have been, and continue to be, before the federal appellate courts. Accordingly, the Court's rulings do not decide – ultimately – whether the ETS and the interim final rule will be upheld on the merits. And, it also does not mean that OSHA will not continue to follow its regular rulemaking process – including the current notice and comment period – in the lead-up to issuing a final rule.

However, for now, the Supreme Court's ruling gives employers a moment of pause with respect to the requirements of OSHA's ETS. OSHA has not yet updated its compliance deadlines, but pursuant to its past practice related to the ETS, OSHA will likely push back or suspend indefinitely the compliance deadlines associated with the ETS. Employers should remember, however, that OSHA intends to incorporate the ETS language in a final rule, promulgated through its regular rulemaking process. Accordingly, employers who have done the leg work of putting tracking systems in place, collecting vaccination status, and preparing to test their employees may not have done so in vain. OSHA is currently in the process of promulgating a final rule, and the Court decisions on the ETS do not preclude them from doing so. That rule could be issued as soon as May 2022 and will likely come with similar requirements and a refreshed set of compliance deadlines. Moreover, the viability of the ETS on its merits (as opposed to the limited stay issue before the Supreme Court) has not yet been determined by the Sixth Circuit.

The Secretary of Labor issued a statement on the Supreme Court's ruling on January 13, 2022, stating: "We urge all employers to require workers to get vaccinated or tested weekly to most effectively fight this deadly virus in the workplace. Employers are responsible for the safety of their workers on the job, and OSHA has comprehensive COVID-19 guidance to help them uphold their obligation. Regardless of the ultimate outcome of these proceedings, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the Covid-19 National Emphasis Program and General Duty Clause."

Health care employers covered by the CMS interim final rule will need to resume compliance with the rule's requirements, including:

- Create and document policies and processes as required by the rule
- Determine the scope and application of COVID-19 vaccination requirements
- Manage collection of employee's vaccination status information, as well as confidentiality and document retention considerations

In addition to the preliminary injunctions entered in Missouri and Louisiana, which were consolidated for purposes of the Supreme Court's review on the applications for stay, a District Court in Texas also entered an injunction prohibiting enforcement of the CMS interim final rule in Texas. This separate injunction was not explicitly mentioned in the Supreme Court's January 13, 2022 Opinion.

U.S. Supreme Court Issues Rulings on Challenges to OSHA ETS and CMS Interim Final Rule

CMS issued additional [guidance](#) on January 14, 2022 which applies to the states who were involved in the litigation pending before the Supreme Court: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia and Wyoming. Within 30 days after issuance of the memorandum, [February 14, 2022](#), facilities in those states must implement policies and processes as required by the rule, and staff must have received at least their first dose of COVID-19 vaccine. Within 60 days of the memorandum, [March 15, 2022](#), staff must have completed the necessary doses to complete the vaccine series. Within 90 days after the memorandum, [April 14, 2022](#), facilities failing to maintain compliance may be subject to enforcement action. This memorandum does not apply to Texas, and surveyors in Texas are directed by the memorandum not undertake any efforts to implement or enforce the interim final rule at this time. Facilities in the remaining states continue to be subject to the deadlines previously set forth by CMS in its December 28, 2021 [memorandum](#). Stinson's COVID-19 Task Force is closely following these developments and has been working tirelessly to help employers understand and implement COVID-19 safety requirements throughout the pandemic.

For more information on the Supreme Court's decision, please contact [Brittany Barrientos](#), [Amy Conway](#), [Alisa Ehrlich](#), Jenni Ives, [Molly Keppler](#), [Pat Konopka](#), [Erin Naeger](#), Kristin Berger Parker, Greta Bauer Reyes, [Stephanie Scheck](#), [Luke VanFleteren](#) or the Stinson LLP contact with whom you regularly work.

CONTACTS

Brittany Barrientos

Erin M. Naeger

Greta Bauer Reyes

Luke VanFleteren

RELATED CAPABILITIES

Environmental & Natural Resources

Labor, Employment & Benefits

STINSON

STINSON LLP  STINSON.COM