

Publications

Supreme Court Stays OSHA ETS – Allows CMS Mandate to Take Effect

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Earlier today, the Supreme Court finally brought clarity to the status of the separate COVID-19 Emergency Temporary Standard (ETS) issued by the Occupational Safety and Health Administration (OSHA), which provided a vaccine-or-test requirement for employers with over 100 employees, and the rule issued by the Centers for Medicaid and Medicare Services (CMS), which mandated vaccination for employees of providers who receive Medicaid or Medicare funding. In a 6-3 decision regarding the OSHA ETS, the Supreme Court reinstated the [stay lifted by the Sixth Circuit](#) last month, blocking enforcement of the vaccine-or-test mandate and likely putting a merciful end to that head-spinning saga. In its decision on the CMS mandate, however, by a 5-4 vote, the Court stayed the preliminary injunctions [issued by the Eastern District of Missouri and Western District of Louisiana](#), and permitted the mandate to take effect nationwide.

OSHA ETS

In its [per curiam opinion](#) on the OSHA ETS, the Supreme Court determined that opponents of the ETS were likely to succeed on the merits of their claim that OSHA lacks the authority to impose the mandate. The majority noted that when dealing with “issues of vast economic and political significance,” Congress must clearly authorize the agency to exercise its powers. According to the majority, OSHA is empowered to set “*workplace* safety standards, not broad public health measures.”

The majority did concede that OSHA has the authority to regulate occupation-specific risks related to COVID-19. Specifically, such regulation may be appropriate where the virus poses a special danger because of “the particular features of an employee’s job or workplace.” Nevertheless, the majority held that OSHA’s “indiscriminate approach” failed to take into account that different workplaces present different risks, and, accordingly, that the ETS “takes on the character of a general public health measure, rather than an ‘occupational safety or health standard.’”

Although the Supreme Court returned the case to the Sixth Circuit, it is highly unlikely that the Sixth Circuit will reach a different result on the merits. Even if that were to occur, the Supreme Court's stay will remain in effect through any subsequent petition for certiorari and the Supreme Court's merits ruling, if necessary.

While this likely marks the end of the road for the OSHA ETS, meaning employers need not enforce any vaccine or testing mandate the ETS would have required, it is now expected that OSHA will turn to its General Duty Clause to support its enforcement efforts. Accordingly, employers should continue to maintain robust and up-to-date COVID-19 safety protocols. Of course, employers generally remain free to implement policies they deem necessary or appropriate for their own workplaces, including vaccine, testing, or masking requirements. However, the Supreme Court's decision also means that state and local laws addressing workplace vaccine mandates are not pre-empted, so any such restrictions must be considered by employers contemplating such policies.

CMS Mandate

The CMS mandate, on the other hand, is alive and well. In a 5-4 *per curiam* opinion, the Supreme Court's majority determined that the Department of Health and Human Services, which operates the Medicare and Medicaid programs, did have the authority to issue its vaccine mandate. The majority reasoned that the mandate fits within the language of the agency's authorizing statute, and 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 majority recognized that the mandate went beyond any previous regulation from the agency, but noted that the agency "has never had to address an infection problem of this scale and scope before." The majority noted further that "there can be no doubt that addressing infection problems in Medicare and Medicaid facilities is what the Secretary [of Health and Human Services] does."

The Court fashioned its order consistent with its order in the OSHA case, leaving its stay in effect through the petition for certiorari process, should that occur. Accordingly, regardless of the timing or nature of the Eighth Circuit's eventual decision on the merits, the CMS mandate will take effect. As a reminder, for those states in which the mandate was already in effect, in a December 28, 2022 memorandum, CMS announced a January 27, 2022 deadline for phase 1 implementation, and February 28, 2022 deadline for Phase 2 implementation. Whether CMS will apply this same implementation timeline to the 25 states in which the mandate was previously enjoined remains to be seen.

Providers should expect to hear more from CMS soon. In the meantime, all healthcare providers subject to the CMS mandate should begin implementing their policies and procedures to comply with mandate requirements. Covered entities nationwide should stay tuned for further *Vorys Alerts* regarding CMS' enforcement timeline in light of the Court's decision.

If you have any questions, please contact your Vorys attorney.

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VORYS COVID-19 TASK FORCE

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](https://www.vorys.com/coronavirus).