

Supreme Court Rejects OSHA Mandate

On January 13, 2022, the Supreme Court issued a highly anticipated decision blocking the Occupational Safety and Health Administration's (OSHA) emergency temporary standard (ETS), which required employers with 100 or more employees to implement a COVID-19 vaccination or weekly testing policy, in addition to other requirements. Employers were required to comply with most provisions by January 10, 2022; employers had to comply with the testing requirement by February 9, 2022. In a 6-3 decision, the Court blocked the ETS. The Court could theoretically revisit its decision to block the ETS after the Sixth Circuit issues a subsequent decision on the legal challenges to the ETS. However, the basis for the Court's decision—that the Secretary of Labor lacked authority to issue the vaccine-or-test mandate—is unlikely to change. Therefore, even if the Court has further occasion to consider the legality of the ETS, its decision strongly indicates that it would be unlikely to reach a different outcome.

Although OSHA cannot enforce the ETS while the Sixth Circuit reviews the validity of the emergency rule, absent any state or local rule forbidding vaccine mandates, employers still have the right under the Equal Employment Opportunity Commission guidance to mandate the initial vaccine dose(s) if they choose to do so, subject to religious and medical accommodations in accordance with applicable law. Furthermore, employers must still comply with any state or local vaccine mandates, which are not impacted by the Supreme Court's recent decision. For example, all New York City employers must comply with the Mayor's vaccine mandate, which required all employees to provide proof of a first vaccine dose, or have requested an accommodation under applicable law, by December 27, 2021. NYC guidance on the order specifically states that the mandate is still in effect regardless of the ETS: "Covered entities or individuals who are covered by the OSHA rule that allows either employee vaccination or testing must comply with this order – their workers must be vaccinated if they do not have a reasonable accommodation." Additionally, all employers in New York state must comply with Governor Hochul's declaration requiring vaccination or masking in indoor workplaces, which is currently in effect through February 1, 2022.

Importantly, the Supreme Court issued a separate decision on the same day allowing the Secretary of Health and Human Services to mandate vaccinations for covered employees of facilities that receive Medicare and Medicaid funding until the lower courts render final decisions on the issue. The interim rule applies to all covered staff, regardless of patient contact. Under this rule, which is separate from OSHA's ETS, covered providers and suppliers must implement mandatory vaccination policies, among other requirements. There is no "test" option, but covered staff can request exemptions based on religious or medical reasons. Facilities that do not comply with the interim rule risk losing funding. The Centers for Medicare & Medicaid Services (CMS) released guidance on December 28, 2021 that requires covered staff in certain states, including New York, to receive their first dose of a COVID-19 vaccine by January 27, 2022. By February 28, 2022, all covered staff must be fully vaccinated or have an approved exemption.

Providers and suppliers that are covered by the CMS mandate should continue to take steps to ensure compliance.

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