

Employee Benefit Plan Review

U.S. Supreme Court Splits on Vaccine Mandates

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The U.S. Supreme Court has issued two opinions on COVID regulations impacting employers and workers across the country.

- In the first, the Court stayed the Occupational Safety and Health Administration’s (“OSHA”) “vaccine or test” mandate for employers with 100 or more employees, finding that OSHA had overstepped its authority in promulgating the rule.
- In the second, the Court allowed a rule implemented by the Centers for Medicare and Medicaid Services (“CMS”), requiring healthcare facilities to ensure vaccination of their entire workforces, with no testing alternative.

The seemingly contradictory opinions have set the world of legal commentary aflame, but more importantly, have left employers asking: what do we do now?

This article provides a guide to the Court’s decisions and what employers should do now.

BLOCKING OSHA

On September 9, 2021, President Biden announced his plan to increase vaccination rates among Americans. Two months later, on November 5, OSHA issued its emergency temporary standard (“ETS”), mandating workforce

vaccination for all employers with 100 or more employees across the country. In lieu of vaccination, an employee might submit to masking and testing, at their own expense. By OSHA’s estimate, 84.2 million employees, or roughly half the U.S. workforce, would be subject to its mandate. Across the country, legal challenges to the ETS were filed almost simultaneously with the rule.

In a 6-3 opinion, with the liberal justices dissenting, the Court quibbled over whether COVID is a “work-related danger” subject to OSHA’s statutory authority. Because “COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather,” the Court concluded that it would be beyond OSHA’s authority to manage the spread of COVID in workplaces. The Court dismissed the dissent’s argument that, like fire hazards, excessive noise, or unsafe drinking water, COVID is not a harm exclusive to the workplace but one which OSHA nonetheless has the authority to regulate. Moreover, the Court concluded that Congress’s having appropriated \$100 million to the agency in order “to carry out COVID-19 related worker protection activities,” did not stipulate the promulgation of a vaccine mandate.

Legal discourse aside, the end result is that President Biden’s largest vaccine mandate is dead in the water.

HOW DO BUSINESSES REACT?

That does not mean that businesses have to scrap their plans to comply with the ETS. In most states, employers remain free to implement their own “vaccine or test” policies. Generally speaking, employers are still allowed, but are no longer required, to implement their own vaccination policies, which may still be even more restrictive than the stymied OSHA policy (so long as there are mechanisms for employees seeking religious or medical exemptions).

The Supreme Court has repeatedly supported businesses that choose to implement their own worker-related policies. The exceptions are employers in Montana and Tennessee, where the states have effectively banned employers from instituting COVID vaccine mandates. Those businesses will no longer be able to implement vaccination policies using the pre-emption offered by the OSHA ETS as legal cover.

The inverse remains true as well – businesses may still be required to implement vaccine mandates depending on local or state laws. For instance, New York City now requires that most employees going into a workplace be vaccinated. Without a federal mandate, employers across the country must once again assume the burden of finding out which state or local laws apply to them.

WHAT MIGHT OSHA DO?

Department of Labor (“DOL”) Secretary Marty Walsh commented on the heels of the decision that OSHA would “do everything in its existing authority to hold businesses accountable for protecting workers.” He also implied that businesses could implement the ETS on a voluntary

basis. OSHA may well issue a narrower ETS targeted toward certain high-risk businesses and industries. However, that will certainly take time and be subject to more court challenges.

In the interim, all employers in states where mandates are not prohibited should consider what is right for their business and their workforce.

THE HEALTHCARE MANDATE

Like OSHA, CMS in 2021 published a rule requiring that health-care facilities receiving Medicare and Medicaid funding would have to ensure that all staff are vaccinated against COVID-19 (subject to religious or medical exemptions) by February 2022. According to CMS, the mandate is “necessary for the health and safety of individuals to whom care and services are furnished.”

The CMS mandate was stayed by one federal circuit court. In a seemingly contrary opinion, the Supreme Court lifted that stay, and held this rule was proper.

It was apparent that the narrower nature of the mandate appealed to the justices. The opinion noted that CMS was authorized by Congress “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,’” and further noted that Medicare and Medicaid recipients are typically at higher risk for COVID. Accordingly, the Court found that “the rule thus fits neatly within the language of the statute.”

Across two separate dissents, Justices Thomas, Alito, Gorsuch, and Barrett argued that (a) CMS has no such authority, and (b) even if such

authority existed, the rule was promulgated improperly.

CMS had issued guidance¹ on the implementation of this rule in late December, which required covered employers to have policies in place by January 27, so that staff who are not granted an exemption are in the process of getting vaccinated. Everyone who is not exempt should have been vaccinated by February 28, 2022. We will have to wait to see whether CMS will require a receipt of a booster shot in order to be considered “fully vaccinated.”

Many healthcare entities already have such policies in place. But, for those who do not, the clock is ticking and you should be moving swiftly to implement and publish these policies.

OTHER COVID ISSUES

In addition to vaccine mandates, be aware that under new rules, employer-sponsored health plans must now cover the costs of certain over the counter COVID testing. The DOL issued FAQs² on those requirements on January 10. 🌟

NOTES

1. <https://www.cms.gov/COVIDvax>.
2. <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-51.pdf>.

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