

Labor & Employment Alert
January 14, 2022

The Supreme Court Blocks OSHA Vaccination and Testing Requirements but Upholds HHS Vaccination Requirements

On January 13, 2022, the United States Supreme Court issued a “stay” that prevents OSHA’s Emergency Temporary Standard (“ETS”) from taking effect for the time being. On the same day, the Supreme Court also issued a “stay” that allows the Health and Human Services (“HHS”) mandatory COVID-19 vaccination rule for all Medicare and Medicaid funded facilities to go into effect. Given that both of these rulings involved applications for preliminary or emergency relief, neither of them represents the final word on the enforceability of the vaccine and/or testing mandates, and additional litigation is a certainty as the lower courts further evaluate the legality of the mandates.

The Effect of the Supreme Court Decision on the OSHA Mandatory Vaccination Rule

By way of review, the OSHA ETS requires employers with 100 or more employees to devise, implement, and enforce a mandatory COVID-19 vaccination policy that could also include a testing option allowing employees to undergo weekly COVID-19 testing and wear facial coverings at work in lieu of vaccination. Referring to the ETS as a “blunt instrument,” the Supreme Court telegraphed its demise by holding that the challengers to the mandate were likely to succeed in their challenge because OSHA lacked authority to impose the mandate. In a nutshell, the Court concluded that OSHA is empowered “to set *workplace* safety standards, not broad public health measures.”

While the OSHA ETS as it stands now has been blocked for the foreseeable future, this is not a guarantee that the rule or similar mandatory vaccination policies have been permanently defeated. First, notwithstanding the clear message sent by the Supreme Court, the lower courts still have to consider the legality of the ETS. Additionally, it is possible that OSHA will attempt to issue a more narrowly focused rule to address the issues raised by the Supreme Court. Also, individual states could consider similar rules through their own mini-OSHA plans or similar laws. Of course, employers are still generally free to adopt their own mandatory vaccination policies. At this stage, if they have not already done so, employers should evaluate their plans, particularly in light of the individual risks in their own workplaces, to devise or modify them such that they address any hazards in the workplace while being consistent with the workplace culture.

The Effect of the Supreme Court Decision on the HHS Mandatory Vaccination Rule

By way of review, on November 5, 2021, HHS issued a rule requiring Medicare and Medicaid participating facilities to mandate staff to be vaccinated against COVID-19, with exceptions for full-time remote staff and medical or religious exemptions. A facility’s failure to comply with

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the HHS rule carries significant consequences in that it could lead to monetary penalties, the denial of new funding, and the termination of participation in Medicare and Medicaid programs.

In contrast to its ruling on OSHA’s ETS, the Supreme Court ruled that HHS’ vaccine mandate was within its authority stating that the rule “fits neatly within the language of the statute ... [to] ensur[e] providers take steps to avoid transmitting a dangerous virus to their patients...” The Court concluded that “[t]he challenges posed by a global pandemic ... provide no grounds for limiting the exercise of authorities the agency [HHS] has long been recognized to have.” Again, while this is not the final word, the Supreme Court’s analysis strongly suggests its direction should the issue be presented to it upon further appeal.

In the meantime, because the vaccine mandate is enforceable, it is important for all facilities affected by the HHS rule to revisit their vaccine policies and procedures to ensure compliance. They should be specifically mindful of the requirement that staff at Medicare and Medicaid facilities receive their first dose of the COVID-19 vaccine by January 27, 2022 and be fully vaccinated by February 28, 2022.

This Client Alert was prepared by Katherine Blum and was reviewed by Nan O'Neill and Kier Wachterhauser. If you have any questions, please contact Nan O'Neill, Kier Wachterhauser, the attorney assigned to your account, or call (617) 479-5000.

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