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Insights

U.S. Supreme Court Issues Key Decisions on OSHA's Vaccine-or-Test Rule and CMS's Mandatory Vaccination Rule

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Yesterday afternoon, the U.S. Supreme Court issued two key rulings relating to mandatory COVID-19 workplace measures. The rulings contain important implications for private and certain other employers with 100 or more employees and for health care entities subject to conditions of participation established by the U.S. Centers for Medicare and Medicaid Services ("CMS"). The basics of the two emergency regulations at issue are discussed in our prior **client alert**.

Ruling on OSHA ETS

In ***NFIB v. OSHA*** the Supreme Court granted a preliminary stay of enforcement of the U.S. Occupational Safety and Health Administration's ("OSHA") Vaccination or Test Emergency Temporary Standard (the "OSHA ETS"). The Supreme Court held, among other findings, that "applying a vaccine mandate on 84 million Americans" is not within OSHA's power; neither OSHA nor Congress has previously imposed such a mandate; COVID-19 is not an "occupational hazard" in most workplaces; OSHA does not have the authority to regulate public health beyond occupational dangers; and the parties challenging the mandate are likely to prevail in the litigation. Yesterday's stay will remain in place pending additional court proceedings in this matter. OSHA promptly issued a statement which indicated an intention to "evaluat[e] all options to ensure workers are protected from this deadly virus [and] … do everything in [OSHA's] existing authority to hold businesses accountable for protecting workers, including under the **COVID-19 National Emphasis Program** and **General Duty Clause**."

Ruling on CMS Interim Final Rule

In ***Biden v. Missouri*** the Supreme Court stayed two injunctions previously issued by federal courts in Missouri and Louisiana which had blocked implementation of the CMS interim final rule ("CMS Rule") in 24 states, including Indiana. Yesterday's ruling allows the CMS Rule to go into effect in those states. The Supreme Court held, among other findings, that Congress has authorized the Secretary of CMS (the "Secretary") to impose conditions on the receipt of Medicaid and Medicare funds; the Secretary routinely imposes conditions of participation; these unprecedented circumstances provide no grounds for limiting the long-recognized exercise of CMS's authority; and the parties challenging the CMS Rule are unlikely to prevail in the litigation. Yesterday's ruling will remain in place pending additional court proceedings in this matter. CMS promptly issued a **statement** regarding the decision:

> As a result of today's decision, health care providers subject to the **Omnibus Health Care Staff Vaccination rule** in the 24 states (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) covered by this decision will now need to establish plans and procedures to ensure their staff are vaccinated and to have their employees receive at least the first dose of a COVID-19 vaccine.

CMS's statement does not establish a unique timeline for health care facilities in states affected by the Supreme Court decision to comply with the CMS Rule, although it does note that the decision "does not affect compliance timelines for providers in the District of Colombia, the territories, and the 25 states where the preliminary injunction was previously lifted." On December 28, 2021 CMS issued **guidance** establishing phased compliance deadlines of January 27, February 28[1], and March 28, along with detailed requirements for specific provider types (e.g., long-term care and skilled nursing facility, hospital, hospice, home health agency).

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For employers subject to the OSHA ETS and health care facilities subject to the CMS Rule, here are some key takeaways:

- Keep in mind that yesterday's decisions are not permanent; affected entities should monitor ongoing legal proceedings and seek advice as needed to determine their compliance obligations as litigation progresses and in light of the non-permanent nature of the regulations.
- With respect to the CMS Rule, covered health care facilities should promptly review the CMS guidance, evaluate current policies and protocols, and implement a compliance plan and strategy.
- With respect to the OSHA ETS, yesterday's decision, by itself, does not prohibit voluntary implementation of a mandatory vaccination or vaccination-or-test program by private employers. There may be other applicable standards, such as those imposed by state law, which will affect an employer's rights or obligations. There may also be compelling risk management considerations in deciding whether to voluntarily implement such a program.
- Clear, consistent communication with employees and other staff members regarding next steps is always important. This is particularly critical with respect to compliance deadlines for covered health care facilities that are newly subject to the CMS Rule.
- Organizations should consider and continue to monitor all COVID-19 related guidance and applicable legal and regulatory standards.

Should you have questions about what these recent Supreme Court decisions mean for your organization, please contact **Elizabeth M. Roberson**, **Shelley M. Jackson**, or another member of our **Employment Law Practice**.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.

[1] The 60-day deadline of February 26 falls on a Saturday, so CMS will exercise enforcement discretion and begin enforcement on February 28.