

Electronic Alert

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U.S. Supreme Court Stays OSHA ETS—Upholds CMS Vaccine Mandate

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After much anticipation, the U.S. Supreme Court has released two key decisions on vaccinations in the workplace: The Court upheld the Center for Medicare & Medicaid Services (CMS) vaccine mandate, and it blocked enforcement of the Occupational Safety and Health Administration's (OSHA's) COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS).

CMS Rule

The Court upheld the CMS vaccine mandate, which requires vaccines and testing for select healthcare workers, including workers in nursing homes, hospitals, and other facilities that receive Medicare and Medicaid payments from the federal government. Covered facilities should ensure compliance with the rule as soon as possible.

OSHA's ETS

In a separate decision, the Court voted 6-3 to stay enforcement of OSHA's ETS requiring private employers with 100 or more employees to require vaccination or weekly testing pending disposition of the matter in the Sixth Circuit Court of Appeals. In other words, the ETS will not take effect until further notice.

The Court's decision on OSHA's ETS centered on the question of whether OSHA—a federal agency whose governing statute does not explicitly authorize vaccine requirements—had the authority to enact the mandate in the first place. Specifically, the majority opinion, writing *per curiam*, states:

The question before us is not how to respond to the pandemic, but who holds power to do so. The answer is clear: Under the law as it stands today, that power rests with the States and Congress, not OSHA. In saying this much, we do not impugn the intentions behind the agency's mandate. Instead, we only discharge our duty to enforce the law's demands when it comes to the question who may govern the lives of 84 million Americans.

The majority further states, "Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization[.]" Essentially, the majority views the COVID-19 pandemic not as an "occupational hazard," but rather a "kind of universal risk [that] is no different from the day-to-day dangers that all face[.]"

In dissent, Supreme Court Justices Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan argued that OSHA did precisely what Congress mandated it to do: “It took action to address COVID-19’s continuing threat” in the workplace, adding that the ETS falls within the scope of OSHA’s mission, which is “to ‘protect employees’ from ‘grave danger’ that comes from ‘new hazards’ or exposure to harmful agents[.]”

Oregon OSHA

In light of the Court’s decision on federal OSHA’s ETS, Oregon OSHA posted a notice on their website announcing they will not be moving forward with adopting the same or similar standard in Oregon.

What Now?

While private employers that were covered under OSHA’s ETS need not worry about complying with the rule for now, employers should stay up to date on any changes as the matter continues to evolve. Further, employers should pay careful attention to state and local mandates, as the Court’s decision does not dispute the states’ authority to issue their own rules pertaining to vaccine mandates and testing requirements.

Note, the Court’s decision does not restrict an employer’s ability to implement their own vaccine or testing mandates, so long as the policy complies with applicable federal and state law, including Title VII and the ADA.

In light of these updates, here are a few steps employers can take right now:

- Familiarize yourself with any vaccine mandates that are still in effect and how they may apply to your employees.
- Update your company’s current policies around vaccination and testing, if needed, and communicate any changes to employees.
- Stay tuned! Stay alert to legal updates at both the federal and state level.

For questions about responding to vaccine mandates or for any other matters related to navigating COVID-19 in the workplace, contact Natalie Pattison at 503-228-0500, or at npattison@barran.com.