



## Supreme Court Issues Vaccination Mandate Decisions: Where We Stand Today

### Big Picture

Today the United States Supreme Court issued a [decision](#) staying implementation and enforcement of the Emergency Temporary Standard (“ETS”) issued by the federal Occupational Safety and Health Administration (OSHA) requiring employers with 100 or more employees to adopt policies mandating COVID-19 vaccination and testing, at least while legal challenges to the ETS proceed through lower courts. This means that for now, employers covered by the federal ETS are not required to comply with it.

It remains unclear at this time, however, how states with OSHA-approved State Plans that have already independently adopted (or were planning to adopt) either the federal ETS or their own equivalent standard will respond. Theoretically, those states could proceed based on that state’s statutory authority, or signal that the state-approved ETS will not be enforced (which [Minnesota has already done](#)). Employers with offices in states with OSHA-approved State Plans will want to consult with the state occupational health office to confirm. Moreover, all covered employers should remain mindful of the OSH Act General Duty Clause, which requires employers to furnish each worker with employment that is free from recognized hazards that are causing or likely to cause death or serious physical harm. OSHA has taken significant enforcement under the General Duty Clause for workplaces that did not adequately protect workers from COVID risks.

Meanwhile, in a separate [decision](#), the Supreme Court is permitting the federal Department of Health and Human Services (“HHS”) to proceed with enforcement of its interim final rule imposing vaccination mandates for the workers of covered

Medicare and Medicaid facilities. This means that employers covered by the HHS rule must comply with the rule's requirements or they risk, among other repercussions, "monetary penalties, denial of payment for new admissions, and ultimately termination of participation in the [Medicare and Medicaid] programs."

## **Breakdown of the Court's ETS Decision**

In the fall of 2021, OSHA issued a temporary emergency standard (the "OSHA ETS") that, among other things, required private employers with at least 100 employees "to ensure their workforces are fully vaccinated or show a negative test at least once a week" (the "Vaccinate-Or-Test Rule"). Numerous affected entities challenged the rule and asked that its implementation be stayed. All of those cases were ultimately consolidated into a single action before a three-judge panel in the Sixth Circuit Court of Appeals. In a 2-1 decision, that panel ruled that staying the implementation of the Vaccinate-Or-Test Rule was not justified. But, in a per curiam majority opinion, the Supreme Court reversed the panel and held that a stay was justified because OSHA likely lacked authority to impose the rule.

The majority opinion begins by noting that the OSH Act "empowers the Secretary to set *workplace* safety standards, not broad public health measures." (emphasis original) (citing 29 U.S.C. §§ 655(b), (c)(1)). It then goes on to reason that just because a health hazard impacts the vast majority of workplaces does not automatically mean OSHA has the power to regulate that hazard: "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance. . . . [N]o provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise. . . . 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."

The majority opinion concludes by noting that the likely lack of statutory authority justified staying the implementation of the Vaccinate-Or-Test Rule, and the Court refused to take a position on whether the "equities" did or did not justify interim relief: "It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic process."

Therefore, the implementation of the Vaccinate-Or-Test Rule is now stayed pending disposition of the various petitions for review pending in the Sixth Circuit Court of Appeals.

But in a dissenting opinion, Justices Breyer, Sotomayor, and Kagan disagree and argue that there was sufficient statutory authority for OSHA to implement the Vaccinate-Or-Test Rule. Specifically, they argue that the Act “*requires* OSHA to issue ‘an emergency temporary standard to take immediate effect upon publication in the Federal Register if [the agency] determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.’ §655(c)(1).” In their view, OSHA’s rule perfectly fits the language of the applicable statutory provision.

## **Breakdown of the Court’s HHS Rule Decision**

In a majority opinion issued by the Supreme Court’s three liberal justices (Breyer, Kagan, and Sotomayor), along with two conservative justices (Roberts and Kavanaugh), the Court held that HHS can enforce its vaccine mandate rule while legal challenges opposing the rule proceed through lower courts. The majority held that unlike the OSHA ETS, the HHS rule “falls within the authorities that Congress has conferred upon [HHS],” particularly the Congressional authorization for HHS “to impose conditions on the receipt of Medicaid and Medicaid funds that [HHS] finds necessary in the interest of the health and safety of individuals who are furnished services” (quotations omitted).

In so holding, the majority of the Court reasoned that the HHS vaccine mandate rule “fits neatly” within HHS’s authority because “ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm.”

The majority pointed out that healthcare facilities desiring to participate in the Medicare and Medicaid programs “have always been obligated to satisfy a host of conditions that address the safe and effective provision of healthcare,” including the implementation of programs governing the surveillance, prevention, and control of infectious diseases. Although the majority acknowledged that “the vaccine

mandate goes further than what [HHS] has done in the past to implement infection control,” the court justified the HHS vaccine mandate rule by recognizing that HHS “has never had to address an infection problem of this scale and scope before.”

Ultimately, the majority of the Supreme Court concluded that HHS “did not exceed [its] statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule must ensure that their employees be vaccinated against COVID-19.”

In two dissenting opinions written by Justices Thomas and Alito, which were joined by two other conservative justices (Gorsuch and Barret), the minority of the Court disagreed with the conclusion that HHS acted within its Congressional authority in issuing the vaccine mandate rule. Noting that HHS “has effectively mandated vaccination for 10 million healthcare workers,” the dissenting justices argue that HHS is not authorized under any existing federal laws to impose a national vaccination mandate on such a sweeping array of healthcare facilities and workers.

The dissents also point out that “[v]accine mandates ... fall squarely within a State’s police power, and, until now, only rarely have been a tool of the Federal Government” (citations omitted). Last, the dissenting justices believe HHS failed to show “good cause” for issuing a vaccine mandate as an interim rule without following standard procedural safeguards, including public notice and comment periods.

## **Key Takeaways**

Many employers with 100 or more employees can breathe a collective sigh of relief because they no longer risk the “hefty fines” that could result from failing to comply with any aspect of the federal ETS’s many detailed and technical requirements, at least for now.

On the other hand, covered healthcare facilities that fail to comply with the vaccine mandate requirements of the HHS interim rule could face serious repercussions with respect to their continued receipt of Medicare and Medicaid funds. Of course, the majority of the Supreme Court believes that “healthcare workers and public health organizations overwhelmingly support” the HHS interim rule, and in this respect, today’s victory for HHS may be less noteworthy than OSHA’s loss on the ETS.

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