

COVID-19 VACCINE MANDATE NEWS – U.S. Supreme Court stays enforcement of the OSHA Emergency Temporary Standard (ETS), but grants Federal Government relief from injunction against CMS Interim Final Rule

Both sides of the COVID-19 vaccine debate obtained victories from the U.S. Supreme Court on Thursday, January 13, 2022, when a divided Supreme Court issued two opinions. The first opinion stayed enforcement against OSHA’s vaccine mandate for private employers with over 100 employees. The second one permits the Government to proceed with enforcing mandatory vaccination(s) for healthcare workers. Both opinions were decided based on the Court’s interpretation of the scope of rulemaking authority conferred by Congress on the respective administrations.

OSHA ETS – What is it?

The OSHA mandate contained in the ETS requires that virtually all employers of 100 or more employees require their employees be vaccinated. Alternatively, employees can test each week on their own time and at their own expense and wear a mask each work day. However, while permitted, nothing in the rule requires employers to offer this alternative to vaccination. Narrow exemptions to the rule also exist for employees who work entirely remotely or exclusively outside, although the majority opinion for the Supreme Court noted that the exceptions are “illusory” with “only nine percent of landscapers and groundskeepers qualify[ing] as working exclusively outside.”

Procedural History

Enforcement of the rule was previously enjoined, but the Sixth Circuit lifted the stay, allowing OSHA to enforce the rule. However, the Supreme Court granted the applications for temporary stay of the rule once more, pending a decision of the case on its merits by the Sixth Circuit and any subsequent appeal to the Supreme Court.

Opinion

Justice Brett Kavanaugh authored the Court’s majority opinion. The majority held that while OSHA is tasked with ensuring “safe and healthful working conditions”, the dangers of COVID-19 are not a harm unique to the workplace. Moreover, OSHA does not have the authority to make broad public health standards. Because the threat of COVID-19 is not unique to the workplace, the Court determined OSHA exceeded its authority to issue the ETS. The Court did, however, acknowledge that OSHA probably does have the authority to implement narrower restrictions related to the workplace, such as “regulate researchers who work with the COVID-19 virus” or “risks associated with working in particularly crowded or cramped environments.”

What does this mean for employers?

At this time, the OSHA ETS is unenforceable against employers and will remain so while the consolidated case is pending before the Sixth Circuit on the merits. The Court's opinion also stays the mandate to the extent the Court grants a writ of certiorari to hear further appeal on the case. In summary, it seems unlikely that OSHA will prevail on the merits at the Sixth Circuit Court of Appeals given the strongly worded majority opinion that OSHA had exceeded its constitutional authority. In other words, the Sixth Circuit is not likely to find contrary to the Supreme Court's rationale.

In the end, the ETS was only a temporary mandate. As a result, employers may expect to see a new mandate take its place in the future. OSHA intends to incorporate a vaccine mandate in making a final rule. Thus, future iterations of the mandate are expected.

CMS Interim Final Rule – What is it?

The CMS Interim Final Rule has broad application to healthcare workers. It was adopted by the Secretary of HHS as a Medicare/Medicaid funding regulation which conditioned funding to facilities on vaccination of all staff without a medical or religious exemption. The mandate does not cover staff who telework full time.

Procedural History

Separate federal district courts for the Western District of Louisiana and the Eastern District of Missouri enjoined enforcement of the mandate by the federal Government. The Government applied to the U.S. Supreme Court for relief from the stay in order to enforce the mandate and was successful.

Opinion

The majority opinion, citing a patchwork of federal statutes allowing comparable regulations of different types of healthcare facilities, lifted the stay and determined that the Secretary of HHS was allowed to issue the vaccine mandate out of his authority to “promulgate rules “require[d] as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution.” The majority rejected the rationale that such rules were meant to relate to only the administration of the Medicare/Medicaid programs and cited examples of quality regulations imposed on health care facilities as a condition of funding, including requirements for adoption of infection prevention and control programs. The Court determined that the winter flu season was “good cause” sufficient to avoid the delay of the normal public notice and comment period.

What does this mean for employers?

Because the stay is lifted, the Government is allowed to let the Interim final rule go into effect during review of the rule on its merits and any subsequent appeal to the Supreme Court. CMS has extended the vaccine compliance date for healthcare workers to January 27, 2022 for the first dose, and February 28, 2022 for the second. Employers will have an obligation to track employee

vaccine status, and develop written policies, including policies related to medical and religious exemptions and/or accommodations.

If you have questions or wish to discuss further, please contact a Fox Smith attorney at 314-588-7000.