

# FYI<sup>®</sup> Alert

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### Supreme Court blocks OSHA's vax-or-test mandate but leaves CMS mandate in effect

In November 2021, OSHA issued an Emergency Temporary Standard (ETS) requiring businesses with 100 or more employees to ensure their workers are fully vaccinated or routinely tested for COVID-19. The ETS followed on the heels of a CMS rule requiring COVID-19 vaccination of millions of healthcare workers at facilities that receive Medicare or Medicaid funding. Yesterday, the Supreme Court blocked OSHA's ETS but allowed the CMS mandate to take effect nationwide.

#### Background

Section 6(c)(1) of the Occupational Safety and Health Act (OSH Act or Act) requires the Occupational Safety and Health Administration (OSHA) to issue an ETS when it determines workers are exposed to a "grave danger" from workplace exposure to toxic materials, harmful physical agents, or new hazards and immediate action is necessary to protect them. Concluding that occupational exposure to COVID-19 poses a grave danger to unvaccinated workers, OSHA issued an [ETS](#) on November 5, 2021 establishing minimum vaccination, vaccination verification, face covering and testing requirements for companies with at least 100 employees, regardless of where they work. (See our [November 12, 2021 FYI Alert](#).)

Almost immediately, a number of states, businesses, and non-profit organizations challenged OSHA's authority to issue the ETS. The U.S. Court of Appeals for the Fifth Circuit initially stayed the ETS. As additional challenges were filed in federal appeals courts across the country, the cases were consolidated before the U.S. Court of Appeals for the Sixth Circuit. On December 17, the Sixth Circuit [lifted](#) the stay, allowing the ETS to take effect. The ruling was appealed to the Supreme Court.

The ETS followed the issuance of an [interim final rule](#) by the Centers for Medicare & Medicaid Services (CMS) requiring COVID-19 vaccination of millions of healthcare workers at Medicare- and Medicaid-certified providers and suppliers — unless exempt for medical or religious reasons. Two

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District Courts preliminarily enjoined enforcement of the rule in 25 states. The government sought an emergency stay of those injunctions pending appeal.

## Supreme Court blocks enforcement of OSHA's ETS

Yesterday, by a 6-3 vote, the Supreme Court issued an order blocking OSHA's enforcement of the ETS, pending a final decision on its legality. In granting the stay, the Court stated that administrative agencies possess only the authority that Congress has provided and explained that the OSH Act "empowers the Secretary [of Labor] to set workplace standards, not broad public health measures." Thus, it found that the "[a]pplicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate."

The case now returns to the Sixth Circuit to decide the case on the merits. While the Supreme Court's decision is only a temporary stay, the order signals that the majority of the justices believe that OSHA exceeded its statutory authority in promulgating the broad workplace rule. At least for now, employers subject to federal OSHA are relieved of regulatory obligations under the ETS.

**Buck comment.** The Court's decision to reinstate a stay of the federal ETS does not apply to state OSH plans whose authority arises from state law. Employers must be mindful of their continuing compliance obligations under those plans and under state and local laws where they operate. Notably, some jurisdictions mandate vaccines or weekly testing while others block mask and vaccine mandates which the federal rule would have pre-empted.

## Supreme Court allows CMS vaccine mandate to go into effect

Separately, the Court issued a 5-4 decision staying the injunctions against the CMS interim final rule. The stay allows CMS to now enforce its vaccine mandate nationwide.

In contrast to the ETS ruling, the Court agreed with the government that the CMS vaccine mandate falls within its statutory authority. The majority noted that healthcare facilities that wish to participate in Medicare and Medicaid have always been obligated to satisfy a host of conditions that address the safe and effective provision of healthcare. The Court held that because "[t]he Secretary of [HHS] determined that a COVID-19 vaccine mandate will substantially reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients, [h]e accordingly concluded that a vaccine mandate is 'necessary to promote and protect patient health and safety' in the face of the ongoing pandemic." Thus, CMS did not exceed its statutory authority in requiring that the facilities covered by the interim rule must ensure that their employees be vaccinated against COVID-19 in order to remain eligible for Medicare and Medicaid funds.

## In closing

The Supreme Court has blocked OSHA's vax-or-test ETS, while ruling the CMS vaccine mandate can take effect nationwide. Employers should monitor continuing litigation in the lower courts and look for guidance from CMS regarding an enforcement timeline.

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