



# SUPREME COURT STAYS OSHA ETS VACCINATION AND TESTING MANDATE FOR LARGE EMPLOYERS, REINSTATES VACCINE MANDATE FOR HEALTH CARE WORKERS

## COMPLIANCE UPDATE

### SUMMARY

- On January 13, 2022, the U.S. Supreme Court issued two highly anticipated rulings regarding the Biden administration's vaccine and testing mandates.
- The Supreme Court ruled to stay the Occupational Safety and Health Administration's (OSHA) vaccination and testing emergency temporary standard (ETS) for large private employers.
- The Supreme Court dissolved the temporary injunctions blocking enforcement of the Centers for Medicare & Medicaid Services (CMS) emergency rule requiring COVID-19 vaccination of certain health care workers. As a result, the emergency rule will now be reinstated and can be enforced as written.
- The rulings take effect immediately and will remain in place until legal challenges over their constitutionality are resolved through the justice system, and possibly through the Supreme Court.

### OSHA ETS VACCINATION AND TESTING MANDATE STAYED

The Supreme Court ruled to stay the Occupational Safety and Health Administration's (OSHA) vaccination and testing emergency temporary standard (ETS). The ETS was developed to establish a mandatory vaccination policy requirement for private employers with 100 or more employees.

Since its release in early November 2021, the ETS has been in litigation. It was previously blocked by the 5th U.S. District Circuit Court of Appeals but was subsequently reinstated by the 6th Circuit in December 2021.

#### THE COURT'S REASONING

In its published decision, the Court stated that OSHA was not given the power to regulate public health more broadly than occupational dangers. The Court further explained that challenges to the ETS were likely to succeed on the merits because the agency lacks the authority to impose the mandate. Specifically, the OSH Act only allows the agency to set workplace safety standards, not broad public health measures.

The majority opinion stated that "OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID-19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here," and the ETS represents a "significant encroachment into the lives – and health – of a vast number of employees."

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## IMPACT ON EMPLOYERS

Given this new stay, employers are not required to comply with the OSHA ETS vaccination and testing mandate at this time. However, because the case has been sent back to the 6th Circuit, employers will need to continue monitoring legal developments.

## VACCINE MANDATE FOR HEALTH CARE WORKERS REINSTATED

The Supreme Court [dissolved](#) the temporary injunctions blocking enforcement of the Centers for Medicare & Medicaid Services (CMS) [emergency rule](#) requiring COVID-19 vaccination of certain health care workers. As a result, the emergency rule will now be reinstated and can be enforced as written.

## COVID-19 VACCINATION REQUIREMENT

The CMS rule applies to Medicare- and Medicaid-certified providers and suppliers that are regulated under the Medicare health and safety standards, including hospitals, clinics and long-term care facilities.

These facilities must establish a policy ensuring that all eligible staff are vaccinated against COVID-19. Under the rule's planned timeline, which is expected to be amended, staff members had to receive the first dose of a two-dose COVID-19 vaccine or a one-dose COVID-19 vaccine prior to providing any care, treatment or other services by December 6, 2021, and the necessary shots to be fully vaccinated—either two doses of Pfizer-BioNTech or Moderna or one dose of Johnson & Johnson—by January 4, 2022.

The regulation provides for exemptions based on recognized medical conditions or religious beliefs. However, it is important to note that there is no weekly testing exception for unvaccinated health care workers.

## THE COURT'S REASONING

The Court ruled 5-4 to uphold for now the rule administered by the Department of Health and Human Services, stating in its majority opinion that “[b]oth Medicare and Medicaid are administered by the Secretary of Health and Human Services, who has general statutory authority to promulgate regulations ‘as may be necessary to the efficient administration of the functions with which [he] is charged.’ One such function — perhaps the most basic, given the Department’s core mission — is to ensure that the health care providers who care for Medicare and Medicaid patients protect their patients’ health and safety.”

## IMPACT ON EMPLOYERS

CMS had previously indicated that it would not enforce the emergency rule while the injunctions prohibited enforcement. In light of the Supreme Court’s ruling, it is likely that CMS will begin enforcement of the emergency rule. As a result, affected health care facilities that have not already implemented a vaccination policy should establish a policy requiring staff to be COVID-19 vaccinated as soon as possible. In addition, affected health care facilities should implement procedures to determine and document workers’ vaccination status.

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