



Labor & Employment Issues

Client Alert

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For Clients and Friends
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SUPREME COURT HEARS ORAL ARGUMENTS ON OSHA & CMS MANDATES

On Friday, January 7, 2022, the Supreme Court heard arguments regarding two challenges to the Biden Administration’s responses to the COVID-19 public health crisis. The first of the consolidated cases was the broader mandate issued by the Department of Labor’s Occupational Safety and Health Administration (“OSHA”). The OSHA Emergency Temporary Standard (“ETS”) requires employers with 100 or more employees to make certain their employees are fully vaccinated or tested weekly and wearing masks at work. The mandate covers 84 million employees. The second of the consolidated cases that the Court considered involved the mandate issued by the Centers for Medicare & Medicaid Services (“CMS”) at the Department of Health and Human Services (“HHS”). The CMS mandate requires healthcare workers at Medicare & Medicaid facilities to be fully vaccinated absent religious or medical exemptions. The mandate affects more than 17 million workers. Implementation of both mandates had been stayed pending the Supreme Court’s decision. While the narrow legal issue on both cases involved whether to lift lower court stays, much of the arguments in the OSHA matter involved the broader question of who can act, specifically whether the mandate could be issued by OSHA or required Congressional approval.

OSHA Vaccine & Testing Mandate

In the OSHA matter, the attorneys for the various plaintiffs asked the Court for a stay and argued that: “a single federal agency tasked with occupational standards cannot commandeer businesses economy-wide into becoming de facto public health agencies.” The Supreme Court’s conservative majority appeared sympathetic and expressed skepticism over whether the Biden Administration has the authority to require large employers to be vaccinated against COVID-19 or to be frequently tested and wearing masks, suggesting that the states or Congress – and not a federal agency – are in a better position to address the pandemic. The three more liberal judges appeared flabbergasted by the conservative majority’s arguments. For example, Justice Elena Kagan at one point asked: “Why isn’t this necessary to abate a grave risk?” Later in the argument, Elizabeth Prelogar, the U.S. Solicitor General, returned to Justice Kagan’s question by stating that OSHA was acting appropriately given the grave danger posed by COVID-19.

The arguments lasted over two hours; it is expected that the Court’s ruling is imminent. Unless stayed by the Court, as of January 10th, employers with 100 or more employees are required to implement masking while recordkeeping and testing will kick in on February 9th.

CMS Vaccine Mandate

In the challenge to Biden’s vaccine mandate for healthcare workers in the consolidated cases, some of the justices seemed more open to the CMS mandate than the OSHA vaccine and testing mandate. Justice Sotomayor further noted that the Secretary’s general authority is well

documented in rules that reference health and safety directly. U.S. Principal Deputy Solicitor General Brian Fletcher explained the Secretary of HHS required healthcare providers to ensure workers were vaccinated to prevent transmission to ill patients absent religious exemptions but the preliminary injunctions are delaying that urgently needed protection for Medicare and Medicaid patients in half the country. Fletcher also addressed the plaintiffs' argument that imposition of the mandate would result in staffing shortages and cited studies that workers do not actually end up leaving their jobs when vaccine mandates are imposed and any temporary staffing shortages are likely to be relatively minor in an industry that typically faces significant turnover every year.

Jesus Osete, a Missouri Deputy Attorney General representing one of the plaintiffs in the case, argued that the vaccine mandate would be fatal to small healthcare facilities and absent a stay, rural communities would face an imminent crisis. Justice Breyer referenced the staggering increase in COVID-19 numbers and said: "It seems to me that every minute that these things are not in effect, thousands of more people are getting this disease." Justice Kagan also questioned the potential disruption to the rural healthcare industry, observing that the Secretary had examined the issue and found data that it was not as devastating as Osete postured.

Elizabeth Murrill, Louisiana Solicitor General argued the case was about whether a federal agency had the power to force people to "undergo an invasive irrevocable forced medical treatment – a COVID-19 shot" and called it a "bureaucratic power move that is unprecedented." Justice Sotomayor asked why the federal government did not have a right to pay for the services it wants to pay for and expressed difficulty understanding the difference between the mandate and other rules requiring healthcare workers to wear gloves to avoid infections. Justice Brett Kavanaugh also asked what the Court was to make of the fact that healthcare workers overwhelmingly seem to support the CMS mandate.

The first deadline for compliance with the CMS mandate is not until January 27th so it is expected the Court may take until then to issue a ruling on the CMS mandate. As matters stand, regulated entities have 30 days to come into compliance as to the first shot and 60 days to come into compliance as to the second shot and even if the entity has not met full compliance by 60 days – if it is at 90% compliance and it has a plan to come into compliance within 30 days – then the Secretary will not take enforcement action.

The OSHA cases are *National Federation of Independent Business v. Department of Labor*, 21A244, and *Ohio v. Department of Labor*, 21A240. The CMS cases are: *Biden v. Missouri*, 21A240, and *Becerra v. Louisiana*, 21A241.

NYSDOH ISSUES NEW GUIDANCE

On January 4, 2022, the New York State Department of Health (“NYSDOH”) published [“Interim Updated Isolation and Quarantine Guidance.”](#) Stating that NYSDOH is “aligning with the [Centers for Disease Control and Prevention’s \(“CDC’s\) updated isolation and quarantine recommendations,](#)” the NYSDOH reiterated the guidance promulgated by the CDC and issued the following protocols for isolation and quarantine of the general population:

- Isolate for 5 days, “where day 0 is the day of symptom onset or (if asymptomatic) the day of collection of the first positive specimen.”
- At the end of 5 days, if you are asymptomatic or if symptoms are resolving, you may cease isolation; however, you “should wear a well-fitting mask while around others for an additional 5 days.”
- If you are moderately to severely immunocompromised, then you should follow [standard isolation guidance.](#)
- If you are unable to wear a mask for a period of 5 days after 5 days of isolation, then you should follow [standard isolation guidance](#) as well.

If you are exposed to COVID-19, quarantine depends on your vaccination status, as detailed below, where day 0 is the last date of exposure:

- If you are not fully vaccinated or if you are fully vaccinated and eligible for a booster but not yet boosted, “quarantine for 5 days and wear a well-fitting mask while around others for an additional 5 days.”
- If you are fully vaccinated “and boosted (with the booster at least 2 weeks before the first date of exposure) or not yet eligible for a booster, no quarantine is required but [you] should wear a well-fitting mask while around others for 10 days after the last date of exposure.”
- If feasible, “test at day 5 with either a nucleic acid amplification test (NAAT, e.g., PCR) or antigen test.”
- Should symptoms appear, “quarantine and seek testing. In this situation, quarantine would end when the test is negative. If testing is not done, isolate according to the guidance above.”

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