

## U.S. Supreme Court Pauses OSHA Large Employer Vax-or-Test Mandate; Allows CMS Rule To Be Enforced For Now

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On Thursday, January 13, 2022, the United States Supreme Court (the "Court") stayed the Occupational Safety and Health Administration's emergency temporary standard (for employers with 100 or more employees) (the "ETS"), meaning OSHA cannot enforce the ETS until there is a final court ruling on the matter. On the same day, the Court stayed the earlier preliminary injunctions on the Centers for Medicaid and Medicare Services' rule (the "CMS rule"), allowing it to be enforced nationwide.

The ETS required employers to have collected, by January 10, all employees' vaccination statuses and, by February 9, ensure regular testing of all covered, unvaccinated employees. As we previously reported, the Sixth Circuit was chosen through a lottery process to be the court responsible for reviewing the stay of the ETS that was issued by the United States Court of Appeals for the Fifth Circuit. While the Sixth Circuit said the OSHA Mandate was good to go, the Court says "not so fast." Reasoning that OSHA exceeded its authority in passing the ETS, the Court ruled in a 9-page opinion that enforcement of the ETS must be stayed pending full review of the applications and submissions before the Sixth Circuit Court of Appeals, stating:

"Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given

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that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category."

This decision comes at a time when the country continues to struggle with the impact of the COVID-19 pandemic and the emergence of new variants, such as the Omicron variant. As cases across the nation surge, we are seeing public and private facilities shuttering or implementing safety protocols in a manner reminiscent of the early pandemic.

In light of this development, affected large employers will not be subject to OSHA enforcement of the ETS unless the Court's stay is lifted.

The CMS rule, on the other hand, remains alive and well for now. Those health care facilities in the Eighth Circuit, including Nebraska and Iowa, are no longer subject to the Eighth Circuit's stay of enforcement. The same goes for facilities in the Fifth Circuit. In other words, the CMS rule is now enforceable in all 50 states, pending full review of the petitions before the Eighth and Fifth Circuits. Affected health care employers should proceed as planned, complying with the CMS vaccination mandate, which incorporates rules on mandatory employee vaccination into the terms and conditions of receiving of federal dollars.

As always, the Koley Jessen Employment, Labor, and Benefits Department continues to monitor the developments on the COVID-19 front and will provide additional guidance as needed. Employers with questions are welcome to contact a member of our Department with any questions they may have about this ETS or other COVID-19-related workplace matters.