



Supreme Court Set to Resolve Vaccine ETS and Healthcare Mandate: What Employers Should Do Until Decision is Reached

Insights

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The nation's highest Court has announced it will step in and rule whether the Biden administration's aggressive workplace vaccine strategy – including a mandate-or-test rule for larger employers and a strict mandate for certain healthcare organizations – should be temporarily blocked or are permitted to move forward as planned. In a pair of brief orders issued late Wednesday afternoon, the Supreme Court accepted review of the challenges to both OSHA's ETS and CMS's healthcare mandate and announced that oral argument will be held for both cases on January 7. So what should you be doing in the meantime? Here is a review of what has happened, along with our five-step survival guides for employers subject to either the OSHA ETS or the CMS mandate.

Brief Overview and Recap

There are two rules at play here: a general ETS issued by OSHA that covers employers with over 100 workers and the CMS's Healthcare Mandate which is specific to the healthcare industry. Whereas OSHA's general ETS provides an option for employers to test employees for COVID-19 at least weekly in lieu of mandating the vaccine, the CMS mandate does not allow for a testing option and requires a vaccination policy.

General OSHA ETS

After workplace safety officials at the Occupational Safety and Health Administration (OSHA) unveiled the mandate-or-test ETS on November 4, many groups opposing the rule filed actions in several federal courts to block the rule. The conservative Fifth Circuit Court of Appeals was the first to act by issuing a temporary "stay" that preliminarily blocked the ETS. This was followed by a November 12 extension of that stay which ordered OSHA to take no steps to implement or enforce the ETS.

But the Judicial Panel of Multidistrict Litigation announced on November 16 that it would consolidate all of the legal challenges and send them to the conservative Sixth Circuit Court of Appeals to decide the outcome of the rule. Then, on December 17, a surprise decision from a three-judge panel of the Sixth Circuit once again jolted employers back into scramble mode, as the court dissolved the stay and cleared OSHA to enforce the ETS across the country.

CMS Healthcare Mandate

The history and procedural status of the healthcare vaccine mandate are a bit messier. In early November, the Centers for Medicare & Medicaid Services (CMS) published a vaccine mandate, requiring all employees of healthcare facilities participating in Medicare and Medicaid – more than 17 million workers – to be fully vaccinated by January 4. Then, a pair of federal court decisions issued in late November blocked the mandate. First, on November 29, a federal judge in Missouri temporarily blocked the agency from enforcing the mandate in 10 states. And then, on November 30, a Louisiana federal court took one giant step further and blocked the rule from taking effect in any healthcare facility across the country that was not already covered by the Missouri decision.

Serving up yet another curveball for healthcare employers, the Fifth Circuit Court of Appeals effectively reactivated the CMS vaccination mandate with a surprise decision on December 15 – but only for employers operating in nearly half of the country. And that's where things stand now. You can review this most recent Insight for a list of states where the CMS mandate has been kept alive and a list of states where the CMS mandate is currently blocked.

What Happened Yesterday?

While the orders from SCOTUS were brief and to the point, three significant takeaways can be gleaned from the announcements:

1. First and foremost, **the Supreme Court agreed to entertain challenges to both rules**. That in and of itself is significant. While many might believe that the nation's highest Court must render a definitive ruling in this matter, its decision to accept review of the challenges was far from certain. In fact, many observers thought the Court might even duck the cases and avoid wading into what is sure to be perceived as a political dispute. At the very least, employers can take some solace in knowing that we will soon have a decisive answer about the immediate enforceability of both vaccine rules.
2. Second, **the Court rejected the chance to block the rules** pending the outcome of their final rulings. The slew of challenges filed with SCOTUS not only asked the justices to fast-track the matter but also to pause the rules while the appeal was being decided. The Court declined to do so, keeping the rules alive for the time being.
3. Third, by setting the oral argument for January 7, **the Court has essentially forced employers to invest time and resources in preparing their compliance efforts**. In the case of the general OSHA ETS, the first compliance deadline is January 10 – and employers not preparing in “good faith” could actually feel an enforcement sting before that date according to recent guidance from OSHA. Of course, there's no telling when the Court will rule on the ETS, but even if it issued a decision immediately after oral argument, that would leave precious little time for employers to comply and demonstrate good faith before January 10 – meaning you need to prepare now. And for those healthcare employers subject to the CMS mandate in about half the country, the deadline for full compliance still appears to be the January 4 date to aim for (because the agency has still not provided any further clarification about deadlines despite the appeals court rulings).

described above). This means that you need to keep that deadline in mind and operate under the presumption that the Court will uphold the mandate.

What Should You Do? 5-Step Survival Guides

To demonstrate reasonable good faith efforts to comply between now and January 10, employers subject to the OSHA ETS should follow this five-step game plan:

1. **Are You Covered?** Determine if you are covered by the ETS. Work with your workplace safety counsel to answer the following questions: Is your workplace covered by OSHA normally? If so, do you have more than 100 employees nationwide? Or are you exempt because you are covered by either the Healthcare COVID-19 ETS or Federal Contractor mandate? (More on this below).
2. **Check Vaccine Status.** If you are covered, gather vaccine status information on your workforce and develop the required vaccination roster for employees, noting whether or not they are fully vaccinated as defined under the ETS. This information (the percentage of vaccinated workers) will allow you to determine if you will mandate vaccines or conduct testing under the ETS.
3. **Choose: Vaccine Mandate or Test?** Depending on your decision, develop the required mandatory vaccine and/or testing/masking policies required under the ETS – and make sure they are adapted to your own unique workplace. While you don't necessarily need to implement these policies before January 10, you should be ready to implement them as soon as possible and be prepared to demonstrate good faith efforts to put them into place. Of course, if your organization has low risk tolerance, you could proceed with implementing the policies before January 10. Employers in OSHA "state plan" states face the further complication of needing to wait for states to adopt the ETS – OSHA told state plans yesterday that they will need to act by January 24 to adopt the ETS or otherwise ensure that their state plans are "as effective" as the federal rule. The ETS will generally not be effective in state plan states until they do so.
4. **Compliance Training.** Develop programs that would allow you to conduct compliance training for your managers and deliver information about your policies to your employees as required under the ETS. You may want to conduct this training and start your informational campaign before the January 10 deadline to further demonstrate your good faith efforts.
5. **Testing Proof.** If you decide to provide the COVID-19 testing option, then in addition to implementing the above requirements by January 10 you should be prepared to have unvaccinated employees demonstrate proof of a negative test as of February 9.

If you are subject to the CMS healthcare mandate, the following five steps, described in further detail here, are critical parts of a successful plan:

1. **Safeguard Information.** Adopt systems and procedures to determine and safeguard all information regarding employees' vaccination status;
2. **Communicate Policies.** Communicate applicable policies and procedures to everyone who may work on-site, including but not limited to the particulars of your vaccine requirement and the

process for requesting exemptions;

3. **Accommodation Requests.** Develop a non-discriminatory, streamlined process to handle vaccine accommodation requests;
4. **Accommodation Precautions.** Review and confirm additional COVID-19 precautions that apply to individuals who are granted accommodations; and
5. **Prepare for Pushback.** Prepare to respond to some inevitable pushback and complaints, as well as likely on-site CMS inspections, by communicating clearly and maintaining detailed records of your processes.

Conclusion

We will continue to monitor this litigation and provide updates as warranted. Until then, Fisher Phillips has created [a set of comprehensive FAQs for employers on the ETS](#) to help you navigate through this process. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information.

If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our [FP Vaccine Subcommittee](#) or in our [Healthcare Industry Group](#).

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