

CMS Mandate to Take Effect; OSHA Mandate Halted

Last week, the U.S. Supreme Court issued split decisions on whether the mandates issued by the Occupational Safety and Health Administration (OSHA) and the Centers for Medicare & Medicaid Services (CMS) could be enforced now pending litigation over their enforceability. While the Court allowed the CMS mandate to go into effect now, it stayed enforcement of the OSHA mandate in those states challenging OSHA's authority pending a final court ruling.

The CMS mandate, which impacts roughly 17 million workers, requires healthcare facilities that receive Medicare or Medicaid funds to implement a COVID-19 vaccination policy requiring employees (and some non-employees) to be fully vaccinated by February 28, 2022, except those granted a qualifying exemption. In a 5-4 decision, the Court held that implementing similar policies is "perhaps the most basic" function of the CMS "to ensure that the health care providers who care for Medicare and Medicaid patients protect their patients' health and safety." Accordingly, the CMS mandate is now enforceable nationwide, and facilities in states that have challenged the mandate, such as Alabama, Georgia, Louisiana, Mississippi, Missouri, and Texas, will have to wait to see how the courts rule.

The OSHA mandate, which would impact roughly 84 million workers, requires private employers with at least 100 employees to implement a COVID-19 vaccination policy requiring employees to either be fully vaccinated or submit to weekly testing at their own expense and wear a mask at work. In a 6-3 decision, the Court determined those states challenging the OSHA mandate on the basis that the mandate exceeds OSHA's statutory authority and is otherwise unlawful are likely to succeed on the merits. States that have challenged the OSHA mandate include but are not limited to Alabama, Florida, Georgia, Louisiana, Mississippi, Missouri, and Texas.

To be clear, litigation will continue with respect to both mandates, but the Court's decisions could be seen as a preview of how it is likely to rule if and when it reviews each mandate on the merits.

At this point, health care providers subject to the CMS mandate must work toward implementation by the fast-approaching February deadline. And though OSHA's mandate rule will not be enforced at this time, employers will still face the challenges of workplace safety.

More on OSHA guidance:

<https://www.osha.gov/coronavirus/safework>

More on CMS guidance (as of 12/28/21):

<https://www.cms.gov/files/document/cms-omnibus-covid-19-health-care-staff-vaccination-requirements-2021.pdf>

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