

Supreme Court Allows CMS Vaccine Directive To Go Forward

On January 13, 2022, the Supreme Court's decision to reinstate the stay of the Occupational Safety and Health Administration emergency temporary standards (OSHA ETS) was widely reported. While the stay of the OSHA ETS has allowed employers with at least 100 employees to forego implementation as the vaccine rule works its way through the courts, facilities covered under the November 5, 2021, Interim Final Rule by the Centers for Medicare and Medicaid Services (CMS) calling for COVID-19 vaccination requirements and related policies and procedures have not been able to rest. Rather, the Supreme Court in a 5-4 split allowed the CMS vaccine directive to go forward. Although seemingly applicable to Medicare and Medicaid certified providers and suppliers, the impact of this rule stretches much further than merely the clinical staff of such facilities.

Supreme Court Decision

In issuing its decision concerning the CMS vaccine directive, the Supreme Court first examined whether the secretary of Health and Human Services was acting within the scope of its authority as conferred by Congress and found that clear Congressional authority existed for such a directive. Specifically, Congress has authorized the secretary to impose conditions on the receipt of Medicare and Medicaid funds that it finds necessary for the health and safety of the patients. The Supreme Court found that due to the contagious nature of COVID-19, the justification for the CMS directive of substantially reducing the spread among health care workers and to their patients fit appropriately within the Congressionally conferred powers.

Similarly, the Supreme Court did not deny the stay on the lower court injunctions due to the deferred notice-and-comment period. Although generally rulemaking follows standard notice-and-comment procedures that require agencies to review comments prior to implementing rules, in cases where "good cause" is shown, the standard process can be put aside. The Supreme Court found such good cause existed in the secretary's belief that further delay would endanger patient safety with the Delta variant and the winter flu season.

Two separate dissents were issued, both joined by the three other dissenting Justices, penned by Justice Thomas and Justice Alito. Justice Thomas wrote that he would have allowed injunctions of the CMS directive to go forward because the government failed to make a strong enough showing that its case would succeed on the merits. Justice Alito took aim at the decision to issue the vaccine mandate with a deferred notice-and-comment period.

Impact of the Rule

Although the CMS directive most obviously applies to health care services or suppliers regulated under CMS standards such as hospitals, ambulatory surgery centers, clinics, long-term care facilities, end-stage renal disease facilities, and psychiatric residential treatment facilities, the reach is potentially much broader. The CMS directive applies to clinical and non-clinical staff and volunteers but, more notably, the coverage extends to individuals performing services to the facility under contract or other arrangements. In other words, the reach of the CMS directive extends further than the staff of the Medicare and Medicaid certified providers and suppliers, but also potentially includes contractors servicing those providers and suppliers.

Moving forward, employers impacted by the CMS directive should stay aware of extended compliance dates under this rule. CMS has issued two separate memorandums: the first providing compliance dates of January 27 and February 28 for 25 states and Washington DC; and the second providing compliance dates of February 14 and March 15 for the 24 states that fell under the



John S. Ho

Co-Chair,
OSHA-
Workplace
Safety Practice

jho@cozen.com
Phone: (212) 883-4927
Fax: (212) 509-9492



James J. Sullivan, Jr.

Co-Chair,
OSHA-
Workplace
Safety Practice

jjsullivan@cozen.com
Phone: (202) 912-4841
Fax: (267) 507-1571

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federal court injunctions prior to the Supreme Court decision. Specifically, affected individuals must receive their first dose of either a two-dose or single-dose vaccine by the first compliance date (Phase 1), and by the second compliance date all applicable individuals must be “fully vaccinated” (Phase 2). Participation rates less than 100 percent will not be considered compliant, subject to any religious or medical exemptions. Employers should also carefully monitor how “fully vaccinated” is defined for purposes of the CMS directive.

Cozen O'Connor continues to monitor this developing area of the law.

For questions regarding the Supreme Court decision or implementation of the CMS vaccine directive please contact Cozen O'Connor's Workplace Safety Practice.