Client Alert: Supreme Court Rules on COVID-19 Vaccine/Testing Requirements – Big Business Mandate Blocked, Health Care Mandate Revived

BY TRACY THOMAS BOLAND AND PETER J. MARTIN • JANUARY 18, 2022

OSHA'S COVID-19 VACCINATION AND TESTING EMERGENCY TEMPORARY STANDARD

Yesterday, the United States Supreme Court issued an emergency stay of the Biden Administration's COVID-19 vaccination and testing and masking requirements for employers with 100 or more employees (the "ETS").

In writing the decision for the majority, Justice Kavanaugh noted, "[a]dministrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." While acknowledging that Congress has "indisputably" given the Occupational Safety and Health Administration ("OSHA") the power to regulate occupational dangers, "it has not given that agency the power to regulate public health more broadly." The opinion went on to describe the ETS as a "blunt instrument" that was not tailored in any way to particular workforces or opportunities for exposure. The Supreme Court noted that the challengers to the ETS are likely to succeed on the merits of their claim that OSHA lacked the authority to impose the ETS in the first place.

In the concurrence, Justice Gorsuch, joined by Justices Thomas and Alito, criticized the ETS as federal overreach, observing that the federal government's powers, "are not general but limited and divided." Referring to OSHA's attempt to, "regulate not just what happens inside the workplace but induce individuals to undertake a medical procedure that affects their lives outside the workplace," Justice Gorsuch observed that such matters have typically been regulated at the state level. The concurrence concluded by noting:

> The question before us is not how to respond to the pandemic, but who holds the power to do so. The answer is clear: Under the law as it stands today, that power rests with the States and Congress, not OSHA. In saying this much, we do not impugn the intentions behind the agency's mandate. Instead, we only discharge our duty to enforce the law's demands when it comes to the question who may govern the lives of 84 million Americans.

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In a scathing dissent, Justices Breyer, Sotomayor, and Kagan, observed that, in granting the challengers' request to stay the ETS for the duration of the underlying litigation, the majority was, "contravening clear legal principles and itself causing grave danger to the Nation's workforce." The dissent dismissed the majority's distinction between dangers that occur only in the workplace versus dangers that are endemic, "[t]he statute does not require that employees are exposed to those dangers only while on the workplace clock. And that should settle the matter…what the majority today does impose a limit found no place in the governing statute." The dissenting Justices noted that courts may not issue a stay unless the balance of the harms and the public interest support doing so. "Here they do not. The lives and health of the Nation's workers are at stake. And the majority deprives the Government of a measure it needs to keep them safe."

What does this mean for employers of 100+ employees?

For now, these employers are under no obligation to comply with the ETS.

The case now goes back to the Sixth Circuit to make a decision about whether OSHA did have the authority to issue the ETS. (Remember, the question that went to the Supreme Court was just the issue of whether the *stay* should remain in place). While no one can predict the ultimate outcome with certainty, it is safe to assume the Supreme Court's decision will at least influence the Sixth's Circuit next ruling.

However, the Supreme Court's decision leaves open the questions of whether the states will take steps to regulate employers with respect to vaccine mandates, and whether OSHA will pursue other options such as issuing a COVID-19 standard using its full, non-emergency regulatory authority. In the meantime, this is one thing to remove from your to-do list.

CMS RULE MANDATE RELATING TO HEALTH CARE FACILITIES

In a companion decision, the Supreme Court upheld the vaccine mandate issued by the Secretary of Health and Human Services (commonly referred to as the "CMS Rule"). The Supreme Court held that the CMS Rule simply amplifies existing conditions of participation in federal health care programs for a limited set of health care providers whose contractual participation in those programs was already subject to an obligation to maintain infection control programs. As noted in the Opinion, the CMS Rule did not seek to expand CMS's authority beyond those categories of facilities or beyond the realm of "address[ing] the safe and effective provision of healthcare," in a manner parallel to the asserted attempt of OSHA to expand its writ beyond workplace hazards to environmental hazards. Those physician practices and other providers which participate in federal health care programs but are not considered "facilities" are still not subject to the CMS Rule, so this ruling does not affect their ongoing participation in those programs. The CMS Rule will now be returned to the lower courts for a decision as to whether it will be upheld permanently. In the meantime, employers subject to the CMS Rule should continue to comply with it.

Bowditch will closely monitor any developments on this issue and update you promptly. Employers with questions should consult with their Bowditch Labor & Employment attorneys.

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