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Supreme Court Blocks OSHA Emergency Temporary Standard, but Upholds CMS Mandate

The Supreme Court ruled today that the OSHA rule that required employers with 100 or more workers to mandate either vaccination or masking and weekly testing exceeded the agency's authority and could not be enforced. The majority ruled that the ETS mandating either vaccination or masking and testing was a regulation of public health rather than occupational dangers.

The Court clarified that if the virus poses a special danger because of particular features of an employee's job or workplace, then targeted regulations are permissible. As an example, the Court suggested OSHA could undoubtedly regulate researchers who work with the COVID-19 virus. OSHA could also regulate risks associated with working in "particularly crowded or camped environments." Consequently, employers may face future OSHA policies that target particularized environments that pose an increased risk to contracting COVID-19.

However, the CMS rule that required mandatory vaccination for certain classes of healthcare workers was upheld. The majority determined that Congress had authorized CMS to issue rules that will protect the health and safety of Medicare and Medicaid recipients.

CMS Vaccine Mandate Guidance

CMS issued guidance for the COVID-19 vaccine mandate. The enforcement will come in three phases. Phase 1 requires that facilities be able to show the following by January 22.

- Develop and implement policies and procedures that ensure all staff are vaccinated for COVID-19, regardless of clinical responsibility or patient contact;
- That all staff either:
 - o Receive at least one dose of the COVID-19 vaccine;
 - o Have a pending request for qualifying exemption;
 - o Have been granted a request for qualifying exemption; or
 - o Have identified as meriting temporary delay as recommended by the CDC.

For a facility to be considered compliant, all staff must be vaccinated, unless they fall within an exemption or are identified as meriting a temporary delay. Enforcement action will not be taken if a facility is more than 80% compliant and has a plan to achieve full compliance within 60 days.

Phase 2 requires covered facilities to show the following by February 28:

- Develop and implement policies and procedures that ensure all staff are vaccinated for COVID-19, regardless of clinical responsibility or patient contact;
- That all staff have either:
 - o Received the necessary doses to complete the vaccine series (one-dose of a single dose vaccine or all doses of a multi-vaccine series);
 - o Been granted a qualifying exemption; or
 - o Been identified as meriting a temporary delay as recommended by the CDC.

For a facility to be considered compliant, all staff must be vaccinated, unless they fall within an exemption or are identified as meriting a temporary delay. Enforcement action will not be taken if a facility is more than 90% compliant and has a plan to achieve full compliance within 30 days.

Phase 3 requires facilities to achieve full compliance by March 28:

The survey process will assess compliance by reviewing the facility's COVID-19 vaccination policies and procedures; list of all staff and their vaccination status; and contingency plan to mitigate the spread of COVID-19. Surveyors can also request a random sample of records for staff who have been identified as unvaccinated due to contraindications or a qualifying exemption.

CMS has provided provider-specific guidance, as well. This guidance can be found at: <https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and-memos-states-and/guidance-interim-final-rule-medicare-and-medicaid-programs-omnibus-covid-19-health-care-staff-0>

CMS will enforce compliance through sanctions, which can include the following: plan of correction, civil monetary penalties, denial of payment, and/or termination from the Medicare/Medicaid program. If you have any questions, please contact Jenny Teeter or Brianna Cook.



425 West Capitol Avenue Suite 3800, Little Rock, Arkansas 72201

www.gill-law.com

[501.376.3800](tel:501.376.3800)

