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SUPREME COURT REINSTATES CMS VACCINE MANDATE AND SUSPENDS OSHA'S VACCINE-OR-TESTING RULE

On January 13, 2022, the U.S. Supreme Court issued two Orders regarding the Centers for Medicare and Medicaid Services' (CMS) vaccine mandate and the Occupational Safety and Health Administration's (OSHA) vaccine-or-testing emergency temporary standard (ETS). In essence, the Court: (1) reinstated the CMS vaccine mandate in those states where it had been preliminarily enjoined, and (2) it suspended OSHA's vaccine-or-testing ETS.

CMS Vaccine Mandate

Summary of Ruling: On November 29, 2021, the U.S. District Court for the Eastern District of Missouri issued an order granting a preliminary injunction to halt the implementation and enforcement of the CMS [Interim Final Rule](#) (IFR) requiring healthcare employers to mandate COVID-19 vaccinations for staff. In response, the federal government appealed this order to the U.S. Court of Appeals for the Eighth Circuit. The U.S. Supreme Court's Order issued on January 13, 2022, suspended the preliminary injunction during the pendency of the government's appeal to the U.S. Court of Appeals for the Eighth Circuit.

Bottom Line: The Supreme Court's Order allows CMS and the federal government to implement and enforce the IFR against any and all Medicare- and Medicaid-certified providers and suppliers within the states where it had been previously enjoined, including Nebraska and Iowa, pending the appeal to the Eighth Circuit Court of Appeals and pending a trial on the merits of the case. In sum, the IFR is now back in effect in those states where it had been previously enjoined.

Vaccination Deadlines: The IFR required that healthcare workers receive at least their first dose of COVID-19 vaccine prior to December 6, 2021, and their second dose prior to January 4, 2022. As those dates have passed, CMS likely will issue guidance as to new deadlines for compliance. Though we anticipate providing further updates as CMS releases more information, CMS continues to update their [Frequently Asked Questions](#) page.

Enforcement Guidance: On December 28, 2021, CMS issued a Quality, Safety & Oversight (QSO) Memo with further information on how CMS plans to exercise its enforcement discretion. The QSO Memo contains provider specific guidance

and may be accessed [here](#). In its present form, the QSO Memo does not apply to Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, or Nebraska, but we anticipate the QSO Memo will be updated shortly to apply equally to these states.

OSHA's ETS on Vaccination, Masking, and Testing

Meanwhile, on December 17, 2021, the Sixth Circuit Court of Appeals lifted the Fifth Circuit Court of Appeals' prior stay on the ETS requiring employers with at least 100 employees to ensure workers either are vaccinated or undergo weekly testing for COVID-19 and wear masks. The U.S. Supreme Court's Order issued on January 13, 2022, reinstates the stay on the ETS.

In reaching this decision, the Court's majority opinion stated, "Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category." The Supreme Court's Order thereby suspends implementation of the ETS pending further judicial review.

Cline Williams continues to monitor this developing area of law and may provide additional updates and analysis.

For more information on these issues, please reach out to a member of Cline Williams' [Health Care Law](#) or [Labor and Employment Law Section](#).

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