

The Supreme Court Has Blocked Vaccine and Testing Mandate for Large Businesses but Allows Health Care Worker Vaccine Mandate.

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Porzio Client Alert

On Thursday, the United States Supreme Court blocked the Occupational Safety and Health Administration (OSHA) mandate that required workers at businesses with 100 or more employees to get vaccinated or submit to weekly COVID-19 testing. **Recall** that the Fifth Circuit initially entered a stay but when the cases were consolidated before the Sixth Circuit, that court lifted the stay and allowed OSHA's rule to take effect. OSHA's rule went into effect four days ago.

Pursuant to this 6-3 decision, the Court concluded that although Congress has given OSHA the power to regulate occupational hazards, it has not given that agency the power to regulate public health more broadly. The Court specifically stated, "[r]equiring 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 Court ordered that OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard (hereinafter "regulations") is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the Sixth Circuit and possibly by the Supreme Court again. While, legally, the challenge still is pending, as a practical matter, the regulations are unlikely to be revived by the Sixth Circuit. The Court unequivocally determined that the applicants (who are challenging the regulations) "are likely to succeed on the merits of their claim that the [OSHA] Secretary lacked authority to impose the mandate." The Court further noted that it is "telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace." These statements foreshadow the likely result should the matter make its way to the Supreme Court again. Therefore, for employers who question what this means for their organization, it means that OSHA cannot enforce this set of regulations as to their organization.

OSHA's regulations preempted any contradictory state or local laws that would ban or limit an employer's authority to require vaccination, masks, or testing requirements. Therefore, any state or local mandates must now be followed, as there is no preemption. This requires careful consideration of state and local COVID-related requirements. For example, New York City has imposed a vaccination mandate on local employers while Florida has placed restrictions on employers seeking to impose vaccination mandates on their employees. Employers operating in multiple locations will need to review each location's COVID-related mandates or restrictions carefully. In the absence of federal, state and local mandates, employers may still choose to institute their own vaccine or testing requirements.

In a separate decision, also issued yesterday, the Court allowed the Secretary of Health and Human Services' regulation requiring facilities that participate in Medicare and Medicaid to ensure that their employees are vaccinated against COVID-

19. The court stated that the vaccine mandate for health care workers is just the kind of detailed regulations that the Centers for Medicare and Medicaid Services has long imposed as a condition for health care providers getting federal funds. Further, the court stated that the purpose of the regulations is to "ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety. Such providers include hospitals, nursing homes, ambulatory surgical centers, hospices, rehabilitation facilities, and more." Based on the reasoning in these two decisions, it is possible that OSHA may issue a new rule that is more tailored to specific workplace settings.

Porzio, Bromberg & Newman will continue to keep employers updated on any developments.