

VACCINE SHOWDOWN AT THE SUPREME COURT: FISHER PHILLIPS LAWYERS PREVIEW AND PREDICT OUTCOME OF PIVOTAL BATTLE

Insights
Jan 3, 2022

Perhaps no workplace law issue has generated more controversy in recent memory than the battle over the Biden administration's vaccine rules currently being waged at the Supreme Court. The good news? By accelerating the docket to hear oral arguments on January 7, you can feel confident that we should gain clarity about employers' compliance obligations related to the OSHA ETS and the CMS Healthcare Vaccine Mandate before too long. This Insight will cover three areas: we'll provide a preview of the main arguments being raised by both sides, we'll offer up our predictions for what we expect to have happen, and we'll give employers a step-by-step plan for what to do while waiting for the rulings.

Quick Overview of Two Rules at Issue

There are two rules at play here: [a general Emergency Temporary Standard \(ETS\) issued by OSHA](#) that covers employers with over 100 workers, and the [CMS's Healthcare Mandate which is specific to the healthcare industry](#). The main difference between the two: whereas OSHA's general ETS provides an option for employers to test employees for COVID-19 at least weekly in lieu of mandating the vaccine, the CMS mandate does not allow for a testing option and requires a vaccination policy.

Without delving too deeply into legal technicalities, the Supreme Court is not being called upon to rule on the validity of either of these two rules. Instead, SCOTUS accepted the cases to review whether the temporary injunctions that had been issued to block the rules were

Related People



Phillip C. Bauknight

Partner

908.516.1059



Cheryl L. Behymer

Senior Counsel

803.255.0000

properly put into place. The legal standard to determine whether these injunctions (also known as “stays”) are proper includes an analysis of whether the party seeking to block the rule is “likely to succeed on the merits” of the case they brought to strike down the rule, so the Supreme Court will inherently examine the underlying validity of the ETS and the CMS. Other questions SCOTUS will examine include whether the parties involved will be “irreparably injured” by the rule and where “public interest” lies – look for discussion of these additional points in the Court’s rulings.

Main Arguments Related to OSHA Vaccine ETS

These five main arguments will take center stage during oral argument and in the written opinion handed down by the Court:

- ***Does OSHA have the authority to issue the ETS?*** The statute granting OSHA the power to create an emergency standard indicates that the agency needs to demonstrate that “grave danger” exists such to justify it. The challengers claim no such emergency exists, while the government points 153 pages of evidentiary support to back its position.
- ***Is the ETS underinclusive?*** In an ironic twist, the challengers point to the rule’s main limitation – that it only covers workplaces with 100 or more employees – as evidence that no grave danger exists. After all, if the danger were so significant, shouldn’t all workplaces be covered? OSHA responds by saying the threshold need only be sufficiently expansive to meaningfully curb COVID-19 transmission, and larger employers are better equipped to administer the rule.
- ***Does the ETS raise a “major question” that should instead be handled by Congress?*** Those challenging the rule argue that elected lawmakers need to have provided a clear expression of intent in order for OSHA to have taken such a significant step. The government responds by saying the ETS is not an enormous expansion of its authority, having regulated workplace safety on a national scale for over 50 years.
- ***Did OSHA move too slowly to justify an ETS?*** The challengers contend that OSHA’s delay in issuing the rule – waiting 18+ months after the start of the pandemic – proves it is no emergency. OSHA responds by noting it



Myra K. Creighton

Partner

404.240.4285



Alexa Greenbaum

Associate

916.210.0405



Megan L. Janes

Partner

954.847.4717

took progressive steps tailored to each stage of the pandemic, including consideration of the growing and changing virus, the nature of the industries and workplaces involved, and the availability of effective tools (such as the vaccine) to address COVID-19.

- ***Will the rule cause irreparable harm?*** The challengers point to the high compliance costs, the “mandate” that will require employees to get vaccinated against their will, and the inevitable need to terminate unvaccinated employees as evidence of damage that cannot be undone if the ETS proceeds. OSHA points out that employers may choose to comply with the standard by enforcing the mask-and-test component as a temporary alternative, proving the rule is no “vaccine mandate.”

Main Arguments Related to CMS Healthcare Vaccine Mandate

Some of those same arguments will be raised at SCOTUS regarding the CMS Healthcare Mandate, but four main differences between the two cases mean we could see the Court carve a slightly different path when it comes to this rule:

- ***CMS is not OSHA.*** The first main distinction: the Centers for Medicare and Medicaid Services (CMS) is a federal agency that only regulates organizations that choose to participate in the Medicare and Medicaid systems. An employer’s choice to voluntarily subject itself to CMS’s rules could reduce its basis for challenging any of CMS’s rules.
- ***The mandate is actually a mandate.*** The second key difference: whereas many inaccurately label the OSHA ETS a “mandate” (either ignoring or unaware of the testing alternative), the CMS rule is a strict mandate. There is no option for CMS-covered employers to escape a vaccination requirement other than through religious or medical accommodations.
- ***Healthcare facilities are at the tip of the spear in the pandemic fight.*** We expect the Court to consider the fact that healthcare facilities subject to the CMS mandate are front and center in the fight against COVID-19. This results in a far greater need for workplace safety measures at hospitals, nursing homes, and other medical facilities as compared with your average office space. It is worth



Emily N. Litzinger

Partner

502.561.3978



Todd B. Logsdon

Partner

502.561.3971



Richard R. Meneghello

Chief Content Officer

503.205.8044

noting, however, that critics of this mandate argue that CMS improperly extrapolated COVID-19's devastating impact in nursing homes into other healthcare settings without supporting data.

- **Acute staffing shortages could be exacerbated by the mandate.** A related point: perhaps no industry has been harder hit by the Great Resignation than healthcare, and the vaccine mandate could worsen the crisis by a dramatic degree. Especially during a time when hospitals could soon be overrun by Omicron cases, SCOTUS may determine that additional hurdles should not be erected to hamper efforts to battle the virus. Several parties opposing the mandate, in fact, have produced affidavits substantiating the impact of mandates on their staffing.

FP Predicts: What Will Happen?

We polled 33 attorneys most active on Fisher Phillips' Vaccine Subcommittee to determine what we expect to see from SCOTUS. The results: a vast majority (79%) believe that the CMS Healthcare Mandate will be permitted to move forward, while only a slim majority (55%) believe the OSHA ETS will be given the green light.

1. Outcome No. 1: SCOTUS permits both OSHA ETS and CMS Mandate to proceed – 46%

Whether it's by denying the challengers' requests for injunctive relief that would block the rules from going forward pending further litigation, or by taking the extra step of ruling that the rules are legitimate, 15 of the 33 attorneys polled (46%) believe we will see SCOTUS hand a double victory to the Biden administration. Some of the reasoning behind these votes:

- **Cheryl Behymer:** "I believe that the Omicron variant has elevated concerns significantly enough to impact the Court's thinking on these cases."
- **Emily Litzinger:** "I'm with you. The current state of the pandemic, with Omicron surging outside the courthouse doors, will weigh in on SCOTUS's determination."
- **Megan Janes:** "I think it will be a close 5-4 decision, but I don't believe the challengers will be able to show likelihood of success on the merits of their claims, nor the



Samantha J. Monsees

Partner

816.842.8770



Robert M. Robenalt

Partner

614.453.7611

Service Focus

Workplace Safety

irreparable harm that would occur if the stays are not put in place.”

- **Jeff Shapiro:** “Concur – we’ll see a 5-4 ruling upholding both rules.”
- **Arthur Wolfson:** “I think the Court will ultimately minimize what the federal government is required to produce in order to justify the rules.”
- **Phil Bauknight:** “I agree with all that – but I’m going to hedge my bets here. Social sentiment could change in the course of the coming weeks before SCOTUS issues its decisions, especially if Omicron slows – or if people believe that mandates won’t stop the spread. There seems to be a greater focus on what will keep the economy running than on workplace safety, which is evidenced most recently by [the CDC’s new quarantine guidance that limits isolation and quarantines](#). If Omicron deaths stay minimal, I think the Supreme Court will be hard pressed to push the mandate through.”

2. Outcome No. 2: SCOTUS permits the CMS Healthcare Mandate, but either blocks or strikes down the OSHA ETS – 33%

The second likeliest outcome according to our attorneys: SCOTUS gives the green light to the CMS Healthcare Mandate, but either blocks the OSHA ETS from taking effect while the underlying litigation takes place or takes the extraordinary step of striking it down altogether. Out of 33 attorneys polled, 11 of them (33%) believe this will take place. We turn to several attorneys operating in the healthcare field to help explain the reasoning behind this prediction:

- **Kevin Troutman:** “It would not surprise me to see the CMS mandate survive because Medicare and Medicaid participants agreed to abide by conditions of participation from the outset. Protecting the safety of patient populations is another compelling distinction between the OSHA ETS and the CMS mandate. But as for the OSHA ETS, I expect a slim majority of the Court to recognize that a federal agency has exceeded its authority here and should not substitute its judgment regarding these issues for that of employers and states, all of whom are making decisions based upon their circumstances in their business and in their locations. Employers’ knowledge of

how best to deal with this virus has continually evolved and as a result, employers and states know more than anyone else about how to protect those in their workplaces – certainly better than a federal agency’s sweeping one-size-fits all mandate.”

- **Bob Robenalt:** “I think the Court will conclude that serious questions exist as to the constitutionality of the OSHA ETS, especially on the issue of federal overreach. I see SCOTUS rejecting it because such a sweeping rule was not clearly delegated by Congress to OSHA. But I do not see a successful executive overreach argument when it comes the healthcare rule. The nature of the delegation there is more direct when it comes to CMS.”
- **Todd Logsdon:** “But it will be close – I see a 5-4 decision in both cases.”
- **Samantha Monsees:** “Agreed: 5-4 vote.”
- **Myra Creighton:** “I think it will be a 6-3 decision, and the primary reason SCOTUS will rule against the OSHA ETS is the lack of ‘grave danger’ posed by the virus at the workplace.”

3. Outcome No. 3: SCOTUS okays the OSHA ETS but either blocks or strikes down the CMS Healthcare Mandate – 9%

The next outcome flips the switch – the Court allows the OSHA ETS to proceed but strikes down or blocks the CMS Healthcare Mandate. Only 3 of our 33 attorneys (9%) believe we’ll see this scenario play out.

- **Chad Zimlich:** “This will be close, coming down to a 5-4 vote, but I see Chief Justice Roberts and Justice Kavanaugh joining the liberals allowing the OSHA ETS to go into place because it presents the vaccine as an option for employers. You can comply with the ETS by testing your workers for COVID-19 as opposed to the CMS’s mandate, which provides no testing option. I also think as public opinion starts to go the other direction with the rise in the Omicron variant, Chief Justice Roberts may be able to persuade Justice Kavanaugh to vote this way to attempt to avoid directly wading into the fight and seeming overtly political. I believe that’s been the Chief Justice’s intention all along and why we’ve seen him siding with the liberal justices more often in the last few years”

4. Outcome No. 4: SCOTUS Says No to Both the OSHA ETS and the CMS Vaccine Mandate – 12%

Finally, 4 of our 33 attorneys (12%) believe the Court will reject both vaccine rules, either by striking them both down or reinstating national injunctions blocking them from being enforced while the underlying court battles over the merits play out.

- **Alexa Hanlon:** “I do think it will be a close call, though – a 5-4 vote.”
- **Teresa Hardyman:** “I agree, they will be rejected by a 5-4 vote. I believe Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett have historically demonstrated an interest in limiting the authority of federal agencies, and this case gives them a bright spotlight to do just that. We’ll see the majority opinion centered on the limited role federal agencies should take instead of the health/religious/moral arguments against the mandates.”

What Should Employers Do While We Wait?

The oral arguments take place on January 7, and the Court could rule at any time thereafter. We could see a ruling issued later that day, over the weekend, the next week, or whenever the Court decides to publish its opinions.

To demonstrate reasonable good faith efforts to comply with the OSHA ETS between now and January 10, employers subject to the rule should follow this five-step game plan:

1. **Are You Covered?** Determine if you are covered by the ETS. Work with your workplace safety counsel to answer the following questions: Is your workplace covered by OSHA normally? If so, do you have more than 100 employees nationwide? Or are you exempt because you are covered by either the Healthcare [COVID-19 ETS](#) or Federal Contractor mandate? (More on this below).
2. **Check Vaccine Status.** If you are covered, gather vaccine status information on your workforce and develop the required vaccination roster for employees, noting whether or not they are fully vaccinated as defined under the ETS. This information (the percentage of vaccinated workers) will allow you to determine if you will mandate vaccines or conduct testing under the ETS.

3. **Choose: Vaccine Mandate or Test?** Depending on your decision, develop the required mandatory vaccine and/or testing/masking policies required under the ETS – and make sure they are adapted to your own unique workplace. While you don't necessarily need to implement these policies before January 10, you should be ready to implement them as soon as possible and be prepared to demonstrate good faith efforts to put them into place. Of course, if your organization has low risk tolerance, you could proceed with implementing the policies before January 10. Employers in [OSHA "state plan" states](#) face the further complication of needing to wait for states to adopt the ETS – OSHA told state plans yesterday that they will need to act by January 24 to adopt the ETS or otherwise ensure that their state plans are "as effective" as the federal rule. The ETS will generally not be effective in state plan states until they do so.
4. **Compliance Training.** Develop programs that would allow you to conduct compliance training for your managers and deliver information about your policies to your employees as required under the ETS. You may want to conduct this training and start your informational campaign before the January 10 deadline to further demonstrate your good faith efforts.
5. **Testing Proof.** If you decide to provide the COVID-19 testing option, then in addition to implementing the above requirements by January 10 you should be prepared to have unvaccinated employees demonstrate proof of a negative test as of February 9.

If you are subject to the CMS healthcare mandate, the following five steps, [described in further detail here](#), are critical parts of a successful plan:

1. **Safeguard Information.** Adopt systems and procedures to determine and safeguard all information regarding employees' vaccination status;
2. **Communicate Policies.** Communicate applicable policies and procedures to everyone who may work on-site, including but not limited to the particulars of your vaccine requirement and the process for requesting exemptions;
3. **Accommodation Requests.** Develop a non-discriminatory, streamlined process to handle vaccine

accommodation requests;

4. **Accommodation Precautions.** Review and confirm additional COVID-19 precautions that apply to individuals who are granted accommodations; and
5. **Prepare for Pushback.** Prepare to respond to some inevitable pushback and complaints, as well as likely on-site CMS inspections, by communicating clearly and maintaining detailed records of your processes.

Conclusion

We will continue to monitor this litigation and provide updates as warranted. Until then, Fisher Phillips has created [a set of comprehensive FAQs for employers on the ETS](#) to help you navigate through this process. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information.

If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our [FP Vaccine Subcommittee](#) or in our [Healthcare Industry Group](#).