

Insights, News & Events

SCOTUS KEEPS EMPLOYERS IN VACCINE LIMBO – HOW SHOULD YOU PROCEED WHILE WE AWAIT DECISIONS

Insights
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In a surprise move, the Supreme Court failed to resolve either of the two pending workplace vaccine cases this morning despite having announced a special decision day that [led most Court observers to think that today was the day](#). This means that [the OSHA ETS continues to proceed as scheduled](#) with one critical deadline already having passed earlier this week and another deadline looming on February 9. Meanwhile, the CMS Healthcare Vaccine Mandate, which applies to certified Medicare and Medicaid providers, continues to proceed toward its effective date in about half the states [due to a complex series of lower court decisions](#). When should we expect rulings from SCOTUS on these two critical cases – and more importantly, what should you do in the meantime?

When Should We Expect Rulings?

The bottom line is that we have no definitive answer as to when the Supreme Court will issue these two rulings. [As we noted earlier this week](#), all signs pointed to Thursday being the day after the Court released a special decision announcement for a day that is not typically reserved for rulings. But SCOTUS pulled the proverbial football away from us all as we lined up for the kick and simply [announced the decision on a Social Security case](#).

The only silver lining for employers is that we do not necessarily need to wait until the next or any future announcement day on the SCOTUS calendar. Because these two vaccine cases are on the Court's emergency docket (sometimes referred to as the "shadow" docket), the

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Justices can release their opinions at any time. That means we could hear an announcement from SCOTUS releasing the rulings at any point in the future without any prior fanfare.

Regardless of when the decisions are announced, you can be sure that Fisher Phillips will release a quick Insight in the hours after the decisions are released providing employers with a specific game plan to follow. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to receive this update.

What Should You Do in the Meantime?

To demonstrate reasonable good faith efforts to comply with the OSHA ETS, 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: Do you have more than 100 employees nationwide?
- 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. Employers in [OSHA "state plan" states](#) face the further complication of needing to wait for states to adopt the ETS – OSHA told state plans recently 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.



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5. **Testing Proof.** If you decide to provide the COVID-19 testing option, you should be prepared to have unvaccinated employees demonstrate proof of a negative test as of February 9.

If you want a paint-by-numbers solution to these obligations, [reach out to your Fisher Phillips attorney](#) and request to purchase an ETS Compliance Package, a one-stop answer to your worries that includes sample policies and related required documents.

If you are subject to the CMS 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.

Employers who are subject to the CMS mandate, including those in states where the CMS rule is currently blocked, should keep in mind that those with 100 or more employees are also subject to the requirements of the OSHA ETS. As explained above, those rules are now in effect in all states subject to federal OSHA.

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](#)



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[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](#).