



## Supreme Court Upholds CMS Vaccine Mandate, Blocks OSHA Vaccine or Test Mandate

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January 14, 2022

Click [here](#) for the Court's 5-4 opinion in *Biden v. Missouri* allowing the CMS vaccine mandate to go into effect nationwide and [here](#) for the Court's 6-3 opinion in *NFIB v. OSHA* blocking the OSHA vaccine or test mandate for employers with 100+ employees.

The Court's decision in the CMS case means that healthcare workers in facilities covered by the CMS rule must be fully vaccinated or receive a medical or religious exemption by February 28, 2022. Click [here](#) for the White House statement noting that the Administration will enforce the CMS vaccine mandate. Click [here](#) for the CMS press release. States that were under the stay - Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia and Wyoming – are now required to comply with the deadlines in the December 28, 2021 CMS Guidance.

Click [here](#) for our January 4 memo outlining the December 28, CMS Guidance that is provider specific. For hospitals, key deadlines are:

- 1/27/22 – Policies and procedures to be developed, with 100% of staff having at least one dose or exempted; if at least 80% vaccinated with a plan to reach 100% within 60 days, no additional enforcement action
- 2/26/22 – Policies and procedures developed and implemented, with 100% of staff fully vaccinated or exempted; if at least 90% vaccinated and a plan to reach 100% within 30 days, no additional enforcement action
- 3/28/22 – Policies and procedures developed and implemented, facilities failing to maintain 100% vaccination may be subject to enforcement action

Click [here](#) for the Interim Final Rule with comment published November 5, 2021.

### *Biden v. Missouri*

The Court granted the Government's request for a stay of two preliminary injunctions ordered by the U.S. District Courts for the Western District of Louisiana and the Eastern District of Missouri that prevented application of the CMS vaccine mandate in half the states.

In the per curiam opinion, the Court held that it agreed with the Government that the HHS Secretary's rule falls within the authorities that Congress conferred upon him. Congress authorized the Secretary to impose conditions on the receipt of Medicare and Medicaid funds that "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services." According to the Court, the rule "fits neatly within the language of the statute." The Court also referenced the overwhelming support for the rule by healthcare workers and public-health organizations.

The Court held that the interim rule is not arbitrary and capricious, noting that the rulemaking record contained sufficient data and satisfactory explanation for the decisions taken in the rule and rejected other statutory objections to the rule.

Note that the underlying cases brought in Missouri and Louisiana remain on appeal in the US Court of Appeals for the Eighth Circuit and the US Court of Appeals for the Fifth Circuit, respectively. The Supreme Court's ruling stays the injunction until final disposition of the underlying cases either by decisions in the Appellate Courts or a decision following writ of certiorari by the US Supreme Court. The Court's ruling is a strong indication that it would uphold the rule should the underlying cases be brought before the Court.

Justice Thomas wrote the dissent with Justice Alito, Justice Gorsuch and Justice Barrett joining. The dissenting justices do not believe the Government established that it had authority to impose a vaccine mandate; they argued that if Congress had wanted to grant CMS the authority to impose a nationwide vaccine mandate, and alter the state-federal balance, it would have clearly said so.

Justice Alito, writing separately and joining Justice Thomas' dissent, also objected to the "extraordinary departure" from ordinary principles of administrative procedure.

### ***NFIB v. OSHA***

The Supreme Court, in a 6-3 decision, reversed the stay of the vaccine mandate for employers with more than 100 employees granted by the U.S. Court of Appeals for the Sixth Circuit, holding that applicants are likely to succeed on their claim that the Secretary lacked the authority to impose the vaccine mandate. The Court reasoned that the Secretary of Labor is empowered to set workplace safety standards, not broad public health measures. The Court found that while COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most. It is a universal risk, beyond the reach of OSHA's authority without express Congressional authorization.

The majority did, however, note that where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible, suggesting that a more narrowly tailored rule might be upheld.

Justice Gorsuch wrote a separate concurrence, with Justice Thomas and Justice Alito joining, arguing that the power to take such action belongs to Congress and the states, not OSHA.

Justice Breyer, Justice Sotomayor and Justice Kagan dissented, arguing that OSHA was within its statutory authority in promulgating a vaccinate or masking and testing requirement for workers and that nothing within the OSHA statute permits the limitations on its regulatory authority applied by the majority.

*For additional information, please contact our General Counsel Diane Turpin at [diane.turpin@shcare.net](mailto:diane.turpin@shcare.net) or 202-578-5444.*