

U.S. Supreme Court Lifts Injunctions on CMS Vaccine Mandate: Healthcare Employers Should Plan for Compliance by Month's End

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On Thursday, January 13, 2022, the U.S. Supreme Court upheld the CMS vaccine mandate for healthcare workers in a 5-4 *per curiam* opinion. The majority included Chief Justice Roberts and Justices Kavanaugh, Breyer, Sotomayor, and Kagan. Justices Thomas, Alito, Gorsuch and Barrett dissented. The Court's opinion can be found here: [21A240 Biden v. Missouri \(01/13/2022\) \(supremecourt.gov\)](https://www.supremecourt.gov/opinions/21A240/Biden-v.-Missouri). The Court lifted the stay on two injunctions blocking the rule previously published on November 5. Any healthcare entity that put compliance efforts on hold pending the Court's disposition because it was in one of the 25 states previously covered by an injunction, should immediately re-institute the same. Unless updated guidance issues from CMS, January 27 is the current first shot deadline.

The crux of the Court's opinion is best summarized in this singular sentence from its conclusion:

"The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it. At the same time, such unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have." Op. p. 9.

Q: What is the Court's ruling?

A: (a) The Secretary of Health and Human Services did not exceed his statutory authority in requiring the facilities covered by the interim rule to ensure that their workers be vaccinated against COVID-19 in order to be eligible for Medicare and Medicaid funds. *Op. p. 8.*

(b) The interim rule is not arbitrary and capricious, nor does it violate other procedural statutory objections raised. *Op. pp. 8-9.*

Q: On what legal grounds did the Supreme Court lift the injunctions?

A: In short, (a) the statutory authority to protect the health and safety of Medicare and Medicaid patients and (b) the long history of regulatory infection and control program requirements in the healthcare setting, which has commonly required vaccines.

The Court repeatedly forecasted during the January 7 oral argument its strong belief that the Secretary, who administers Medicare and Medicaid, had the most basic fundamental authority to ensure healthcare providers could provide safe and effective care for Medicare and Medicaid patients—and has long-established conditions of compliance and health and safety protocols participating entities must follow.

The Court's resulting opinion is in accord. It holds that Congress has authorized the Secretary to compose conditions on the receipt of program funds that "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services." *Op. p. 5* (citing 42 U.S.C. § 1395x(e)(9)). To this end, the Court opined, "The rule fits neatly within the language of the statute. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm." *Op. p. 5*.

The Court noted that conditions of participation have "long included" regulatory requirements such as infection prevention and control programs to help prevent communicable diseases and infections. *Op. p. 2*. The Court specifically noted that counsel for Missouri admitted during oral argument that the Secretary could, using this same statutory authority, "require hospital employees to wear gloves, sterilize instruments, wash their hands in a certain way and at certain intervals, and the like . . ." *Op. p. 7*. The Court noted, "Vaccination requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella." *Op. p. 7*.

Q: What Does the Opinion Mean?

A: The Court's opinion means that, in order to receive Medicare and Medicaid funding, participating facilities covered by the interim rule must ensure that their staff, unless an exemption has been both requested, and approved for medical or sincerely held religious reasons, must receive a COVID-19 vaccine. The injunctions previously in place covering 25 states are now lifted. While the Court's ruling only addresses the injunctions and not the actual merits of the challenges to the mandate itself, the opinion makes abundantly clear that the Court views the mandate as statutorily lawful.

Q: What is the new compliance deadline for healthcare employers subject to the mandate?

A: As of the date of this alert's publication, workers in the 25 states who were not covered by the injunctions were already required to receive at least one shot by **January 27** and their second shot (of a two-dose series) by **February 28**. CMS announced this timing on December 28 in Guidance for the Interim Final Rule, found here, and FAQs found here.

While CMS may update this timing in the coming days following the Supreme Court's ruling in order to give workers in the 25 states who were previously covered by court injunctions more time, healthcare employers should not bank on that possibility. In the absence of new guidance, healthcare entities covered by the rule nationwide should now assume these fast-approaching dates of January 27 and February 28 apply to them.

Q: Remind me, which healthcare entities are subject to the interim rule?

A: Our earlier article discussing the scope of the CMS vaccine mandate and which entities are -- and are not -- covered can be found here.

Nexsen Pruet is prepared to assist healthcare employers in navigating the ever-changing COVID-19 vaccine developments, including this mandate, policies, and analysis of requested exemptions or EEOC challenges resulting therefrom. Please let us know if there is anything we can do to help you move forward in a practical and compliant way.