

LEGAL UPDATES

PUBLISHED: JANUARY 14, 2022

Services

Healthcare Labor &
Employment and
Immigration

Labor & Employment

Industry

Healthcare

Professionals

BARBARA A. GRANDJEAN
DENVER:
303.892.4458
BARBARA.GRANDJEAN@
HUSCHBLACKWELL.COM

TOM O'DAY
MADISON:
608.234.6017
MILWAUKEE:
414.273.2100
TOM.ODAY@
HUSCHBLACKWELL.COM

SCOTUS Lifts Nationwide Injunctions on CMS Vaccine Requirement for Healthcare Workers

On Thursday, January 13th, in *Joseph R. Biden et al., v. Missouri, et al.*, the United States Supreme Court released its decision lifting the injunctions imposed by two District Courts that had enjoined enforcement of the Centers for Medicare & Medicaid Services (CMS) emergency rule (Rule) that requires healthcare workers at facilities participating in Medicare and Medicaid programs to receive a COVID-19 vaccine (the Rule). The Supreme Court's decision requires all covered healthcare entities to comply with the CMS Rule. As we stated in our earlier commentary, the CMS deadline for Phase 1 implementation is January 27, 2022, and the deadline for Phase 2 implementation is February 28, 2022.

CMS acted within its statutory authority

In a *per curiam* (majority, with no named author) opinion, the Court agreed that the Rule falls within the authority granted to CMS, stating that it “fits neatly within the language of the statute.” It noted that “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.” The Court went on to discuss the “litany of health-related participation conditions” that CMS has required in the past before concluding that CMS “did not exceed [its] statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule must ensure that their employees be vaccinated against COVID-19.”

CMS statement following Supreme Court decision

Shortly after the decision's release, CMS issued a press release reminding covered facilities that "today's decision will enable us to fully implement this rule" and stating it looks "forward to working with healthcare providers and their workers to protect patients" and to "get their workers vaccinated," and that it "will continue our extensive outreach and assistance efforts encouraging individuals working in healthcare to get vaccinated."

The dissents

Justice Thomas (joined by Justices Alito, Gorsuch and Barrett) dissented from the decision, stating that CMS has not established that the statutory grant of authority to CMS includes what Justice Thomas described as "the omnibus rule." The Thomas dissent also comments that CMS requirements are limited to those that bear an "actual and discernable nexus" to the programs' practical management and opined that "to the extent the rule has any connection to the management of Medicare and Medicaid, it is at most a 'tangential' one."

Justice Alito (joined by Justices Thomas, Gorsuch and Barrett) wrote a separate dissent stating that "even if the Federal Government has the authority to require the vaccination of healthcare workers, it did not have the authority to impose that requirement in the way it did." The Alito dissent discussed the role of the notice and comment rulemaking process and expressed doubt that CMS could meet its affirmative burden to show good cause for following emergency rulemaking process, rather than going through the notice and comment period.

What this means to you

As discussed in more detail here, the Rule, promulgated by CMS, is being challenged in numerous states and has been enjoined from enforcement in some jurisdictions. Thursday's decision means that the Rule is now in effect throughout the nation and covered employers and employees should ensure they are in compliance. **Thursday's decision does not end the challenges to the Rule,** however. The Supreme Court decision is limited to the request to stay an injunction granted in the early part of the litigation challenging the Rule. Courts will continue hearing the pending challenges to the Rule, and future impact on healthcare employers is anticipated.

Contact us

Reach out to Husch Blackwell's Labor and Employment and Healthcare teams, including Barb Grandjean, Tom O'Day, Larissa Whittingham or Jessica Brown, for more information on Thursday's decision, requirements of the Rule and possible medical or religious exemptions, or any questions on the impact of ongoing challenges to the Rule for your organization.

Your comprehensive COVID-19 legal resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.