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# SCOTUS Considers Arguments Regarding Stay of CMS Vaccine Mandate

On Friday, January 07, 2022, the United States Supreme Court heard oral arguments on a rule promulgated by the Centers for Medicare & Medicaid Services (“CMS”) requiring healthcare workers at specific facilities participating in Medicare and Medicaid to be fully vaccinated against COVID-19 (the “Rule”), with exemptions based on medical or religious reasons permitted. The Rule is being challenged by numerous states and CMS is currently enjoined from enforcing the Rule in half the country. The government petitioned the Supreme Court to stay the injunctions in the lower courts and allow the Rule to go into effect.

Brian Fletcher, U.S. Principal Deputy Solicitor General, argued on behalf of the government. He argued that the Secretary of Health and Human Services (“Secretary”) has the clear authority to impose requirements to protect the health and safety of Medicaid and Medicare patients. He went on to argue that the vaccine mandate at issue is not unlike the numerous other infection control standards the government imposes on recipients of Medicare and Medicaid funds and that the Secretary already determined that the risk of labor shortages is outweighed by the need to protect vulnerable patients. Fletcher noted that CMS has both general rulemaking authority under the Social Security Act to enact the vaccine mandate and authority based on facility-specific statutes.

Chief Justice Roberts questioned “which is a more acute danger...OSHA, CMS, or the federal contractor vaccine mandate?” The Chief Justice suggested that the CMS rule, which addresses healthcare concerns, is most closely related to the COVID-19 health problem as opposed to the OSHA Emergency Temporary Standard and the federal contractor vaccine mandate. Fletcher did his best not

to undermine the OSHA and federal contractor vaccine mandates but generally agreed that COVID-19 poses an acute threat in healthcare settings.

Justice Sotomayor signaled her support for the Rule throughout the argument, suggesting that the case hinges on the Secretary's authority under the Spending Clause to establish conditions of participation for CMS providers.

Justice Barrett's questions focused on the statutory authority under the facility-specific statutes to require vaccination. While Fletcher countered that the text of the various facility-specific statutes would support the mandate, he also offered that for the limited number of facilities in which the text was less detailed, the Court could exclude such facilities from the Rule under a severability clause and lift the injunctions as to the remaining facilities. Fletcher emphasized, though, that the Secretary's authority to establish patient health and safety requirements arises from its broader authority to establish conditions for participation.

Justice Alito questioned whether there are limits on the Secretary's power to protect the health and safety of patients in CMS covered facilities. Fletcher answered affirmatively that the requirement must relate to the health and safety of patients.

Following Fletcher's argument, Missouri's Deputy Attorney General, Jesus Osete, argued on behalf of a coalition of states challenging the vaccine mandate. Osete argued that the Secretary's action was expansive, unlawful, and arbitrary and capricious under the Administrative Procedure Act. He stated that permitting the mandate to go into effect would devastate rural America. He took the position that many healthcare facilities in rural states are small local facilities and that losing even one percent of staff due to the mandate would be devastating to those local communities and patients.

Justice Kagan pushed Osete to explain how the infection control measures in the Rule are improper given the Secretary's primary responsibility to protect vulnerable populations. She went so far as to say that the Secretary was simply requiring that healthcare providers must be vaccinated so that they would not kill patients. Justice Breyer forcefully asserted that if the Secretary can require handwashing as an infection control measure or other measures to prevent the spread of diseases such as diphtheria, it can prevent the spread of COVID-19 through vaccination. Osete responded that the Secretary could not act unlawfully by exceeding its federal authority and reiterated that if the injunctions are lifted, local communities will be devastated. Justice Kagan pushed back, stating that it is the Secretary's role to balance potential labor disruptions with the risk of harm COVID poses to patients, and she asked what role the Court has in questioning the Secretary's assessment.

Justice Kavanaugh noted that regulated parties such as hospitals and healthcare organizations were not before the Court and inquired why this Rule is different than other infection control procedures, such as wearing gloves or washing hands.

Ultimately, the Justices appeared poised to permit the Rule to go into effect. Fletcher highlighted that CMS will exercise enforcement discretion with respect to the Rule and will enforce the Rule in states where it is not enjoined on the following modified timeline: the deadline for Phase 1 implementation is January 27, 2022 and the deadline for Phase 2 implementation is February 28, 2022.

### **What this means to you**

Based on the Justices questions, it sounded as if there are at least four votes in favor of the Rule and possibly more. With the first compliance deadline set for January 27, 2022, entities covered by the Rule should be prepared to comply with the CMS Rule.

### **Contact us**

If you have questions regarding the CMS Rule and the best strategy for your facility, contact Tom O'Day, Courtney Steelman, Tracey O'Brien, Jennifer Ralph or your Husch Blackwell attorney.

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