

EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

Established 1844

OSHA Emergency Temporary Standard blocked by US Supreme Court but CMS Vaccine Mandate Permitted to Proceed

Sarah E. Pawlicki, Esq., SHRM-SCP and James B. Yates, Esq. SHRM-SCP

On Thursday, January 13, 2022, the US Supreme Court issued another stay of the Occupational Safety and Health Administration's Vaccine or Test Emergency Temporary Standard (ETS). As a result of this most recent stay, it is unlikely that the current ETS will ever be enforced. On the same day, however, the Supreme Court upheld the mandate from the Centers for Medicare & Medicaid Services (CMS) requiring vaccination of all staff of Medicare and Medicaid-certified providers and suppliers.

OSHA's ETS required all employers covered by OSHA with 100 or more employees to adopt one of two policies. Employers could have a policy mandating that all employees (excepting those that have medical or religious exemptions) be vaccinated against COVID-19. In the alternative, employers could adopt a policy that all unvaccinated employees must wear a mask and submit a negative COVID-19 test every 7 days. All employers with 100 or more employees were required to provide up to 4 hours per dose of paid time off for employees to get vaccinated. Additionally, employers were required to provide up to 2 days of paid time off for side effects related to vaccination. Employers were also required to collect and store data about employee vaccination and testing and provide it to OSHA upon request.

As a result of the Supreme Court's decision, employers are no longer required to comply with the ETS. However, OSHA released a response to the Supreme Court's decision on January 14, 2022, reminding all employers that they have a responsibility to provide a safe workplace to all employees and that employers should continue to follow OSHA's guidance on COVID-19. OSHA indicated they will continue to enforce employer response to COVID-19 through its National Emphasis Program and the General Duty Clause.

On the other hand, the Supreme Court upheld the mandatory vaccine requirement for staff of Medicare and Medicaid-certified providers and suppliers. The CMS mandate requires all staff at facilities to be vaccinated or receive a medical or religious exemption. The CMS mandate defines "staff" broadly to include employees that do not have patient contact and individuals, like employees of contractors, that visit the facility on a regular basis. The deadline for compliance in the 24 states that were involved in the Supreme Court's decision, including Ohio, has been extended to March 15.

Employers that would have been subject to the ETS now have to decide how they are going to respond to the continued COVID-19 pandemic. Although mandatory vaccination is no longer required, all employers should be mindful of providing employees with a safe workplace and taking precautions to minimize the possible transmission of COVID-19 in the workplace.

James Yates and Sarah Pawlicki are Members in Eastman & Smith Ltd.'s Labor and Employment group and are both SHRM Certified Senior Professionals in Human Resources (SHRM-SCPs). Between them, they have over 30 years of experience partnering with human resource professionals to make workplaces better (and legally compliant). They can be reached at 419-241-6000 or jbates@eastmansmith.com and sepawlicki@eastmansmith.com.

The article in this publication has been prepared by Eastman & Smith Ltd. for informational purposes only and should not be considered legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney/client relationship.