
Omicron, Vaccine Mandates, and Separation of Powers

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No state currently requires private employers to mandate coronavirus vaccination or weekly testing, but will a vaccination-or-test mandate take effect soon? On January 4, 2022, Governor Cooper announced that he plans to extend Executive Order 224, which requires cabinet-level employees to be vaccinated or undergo weekly coronavirus testing. While the cabinet-level rule does not impact most North Carolinians, two federal mandates may reach much of the state's workforce.

On January 7, 2022, the United States Supreme Court heard, in a special session, arguments surrounding two contested federal mandates seeking to regulate healthcare workers and employees working for large employers:

(1) The mandate issued by the Occupational Safety and Health Administration (OSHA) in November requires businesses with 100 or more employees to verify the vaccination status of each employee and require weekly coronavirus testing for employees who are not fully vaccinated. The mandate does not require employers to pay for weekly tests, but does require employers to provide reasonable time, up to four hours of paid time, for employees to receive a vaccination dose, and sick leave to recover from the side effects of each dose. Unless the Supreme Court rules in *Nat. Fed. of Indep. Bus. v. Depart. of Labor, Occupational Safety and Health Admin.* before close of business today,[1] employers with 100 or more employees must begin enforcing mask mandates for unvaccinated employees and require proof of vaccination or testing compliance by February 9, 2022.

(2) An emergency order issued by the Centers for Medicare & Medicaid Services (CMS) in November requires workers at healthcare facilities receiving Medicare and Medicaid program funding to be vaccinated against the coronavirus, unless a religious or medical exemption applies. Injunctions prevented the order from taking effect, which would have required employees at these facilities to receive their first dose by December 6, 2021, so in the interim period, facilities cannot be penalized for refusing to implement a vaccine mandate. Depending on how the Supreme Court rules in *Biden v. Missouri*, CMS may require almost immediate vaccination for healthcare workers at Medicare and Medicaid-funded facilities.

The conservative-dominated Supreme Court signaled in oral arguments on Friday that it may uphold the mandate for healthcare workers in Medicaid and Medicare-funded facilities but reject the large employer mandate. Chief Justice Roberts emphasized his distaste for OSHA's broad regulatory overreach and usurpation of power and implied that, since the requirement will impact an estimated 80 million workers, states and Congress should determine how to address COVID-19 in America's workplaces:

“It seems to me that the more and more mandates pop up in different agencies,” he said, “I wonder if it’s not fair for us to ask the questions of, well, why doesn’t Congress have a say in this, and why doesn’t this be the primary responsibility of the states.”

Justice Barrett implied the OSHA mandate casts too wide a net in covering all large employers, which parallels arguments made by the challengers that the mandate does not address a workplace issue, since “Covid-19 is not an occupational danger that OSHA may regulate.” Justice Thomas echoed a similar sentiment in the danger of a one-size-fits-all approach: “There’s been some talk ... that the vaccinations are efficacious in preventing some degree of infection to others . . . [a]s I remember in the filings ... that younger workers, the 20-year-olds who are unvaccinated are actually safer than the older workers who are vaccinated. So there are obviously some differences.”

Even so, Justice Kagan and the liberal minority expressed the countervailing positive effects of COVID-19 vaccines and their proportionality to the public health crisis: “We know that the best way to prevent spread is for people to get vaccinated,” “and to prevent dangerous illness and death is for people to get vaccinated. That is by far the best. The second best is to wear masks.”

Although the large employer mandate did not garner unanimous support from the justices on Friday, the United States Solicitor General argued that OSHA more than satisfied its statutory authority to issue the mandate in November 2021.

“Workers are getting sick and dying every day because of their exposure to the virus at work. OSHA amassed substantial evidence of widespread workplace outbreaks across industries. It studied the science of how this virus is transmitted and found that workers are exposed to danger when they’re inside together for as little as 15 minutes.” *Elizabeth Prelogar, United States Solicitor General*

What is OSHA’s statutory authority to issue a vaccine requirement? A 1970 law enables the Secretary of Labor to enact an emergency temporary standard effective immediately if:

- (1) employees are exposed to **grave danger** from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and
- (2) the emergency standard is necessary to protect employees from such danger.

29 U.S.C. § 655(c) (emphasis added). The Biden administration contends the vaccine-or-test rule is necessary to protect employees from COVID-19, which poses a *grave danger*, but the fate of the mandate lies in the hands of nine justices who are under pressure to issue a ruling before part of the mandate requiring masks for unvaccinated employees goes into effect today.

Even if the Supreme Court decides to reject the OSHA mandate, the healthcare worker mandate may survive. The Biden Administration asserts the text of the Medicare Act, 42 U.S.C. § 1302(a), grants the Secretary of Health and Human Services the broad authority to impose regulations “necessary to the efficient administration” of Medicare and Medicaid programs. Lawyers for Missouri and other states argued in their brief that the “mandate would force millions of workers to choose between losing their jobs or complying with an unlawful federal mandate” such that if an injunction was not issued, “last year’s health care heroes would have become this year’s unemployed.”

The Supreme Court has not said when it expects to issue a ruling in the above two cases, but given the rapidly evolving nature of the pandemic and the Omicron variant, a ruling may come this week.

Young Moore will continue to monitor the status of the aforementioned Supreme Court decisions. Check back for an update soon.

Related Links:

- [Sydney C. Plummer](#)
- [New OSHA Rule Regarding COVID-19 Vaccination Requirements for Employers with 100 or More Employees](#)
- [Can My Employer Require Me to Get a COVID-19 Vaccine?](#)

[1] After the Sixth Circuit overturned the stay on the federal OSHA COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS) in late December 2021, the United States Supreme Court announced that it would hear oral arguments on the stay of the OSHA and healthcare worker mandates at a special session on January 7, 2022. Therefore, unless the Supreme Court rules today, OSHA's ETS remains in effect, and employers must move toward compliance, although OSHA suggested it would be lax about enforcing the mandate until the Supreme Court issues a ruling.

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