



**UPDATE: United States Supreme Court Stays OSHA’s COVID-19 Emergency Temporary Standard**– January 13, 2022

*Felicity Fowler – Eric Johnston – Traci Clements – Ashton Cumberbatch – Daniel Atkinson*

On January 13, 2022, the United States Supreme Court issued a *per curiam* opinion reinstating the stay (previously entered by the Fifth Circuit) prohibiting enforcement of the Occupational Safety and Health Administration’s (“OSHA”) emergency temporary standard (“ETS”) regarding COVID-19 and vaccination of the nation’s workforce. The ETS was challenged by a number of applicants, including the National Federation of Independent Business, *et al.* and several states, on the basis that OSHA did not have the statutory authority to enact the ETS. The Supreme Court’s opinion can be accessed [here](#).

Among other things, the ETS mandated that all businesses who employ 100 or more employees to either require their workers to be fully vaccinated (defined as 14 days after receiving all required doses of any vaccine) against COVID-19 or assure that all unvaccinated employees are tested for COVID-19 at least once a week and wear approved face coverings in the workplace. Notably, the ETS contained substantial penalties for businesses that violated the ETS.

The majority opinion of the Supreme Court outlined that the “[a]pplicants [seeking to invalidate the OSHA ETS] are likely to succeed on the merits of their claim that [OSHA] lacked authority to impose the mandate.” The Supreme Court further opined that, “[a]lthough Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly.” Consequently, “[r]equiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category” and thus, the ETS was stayed nationwide pending disposition of the petitions for review (and writs of certiorari) in the Sixth Circuit.

While enforcement of the ETS is prohibited by the stay pending further review, the ETS still remains tied up in litigation before the Sixth Circuit until a final ruling.

Please note that today’s opinion does not prevent private employers from developing their own vaccination/testing/face covering policies (which can be based on the ETS requirements, even though stayed), as long as the policies do not run afoul of any federal or state laws (including gubernatorial executive orders that may be to the contrary).

## **CMS Interim Final Rule Regarding Medicare and Medicaid Providers/Suppliers and Mandatory Vaccination**

On November 29, 2021, and November 30, 2021, respectively, the Eastern District of Missouri and the Western District of Louisiana issued orders granting preliminary injunctions prohibiting enforcement of the Centers for Medicare & Medicaid Services (“CMS”) interim final rule (effective on November 5, 2021) regarding Medicare and Medicaid COVID-19 Health Care Staff Vaccination. Today, the Supreme Court issued an opinion, which can be accessed [here](#), holding that both of these preliminary injunctions will be stayed pending disposition of the Government’s appeal in the Eighth Circuit and Fifth Circuit.

Thus, the CMS interim final rule requiring that certain providers and suppliers participating in Medicare and Medicaid programs ensure their staff are fully vaccinated for COVID-19 (unless exempt) is still in effect pending disposition of these appeals. CMS may now seek to enforce this rule nationwide given the Supreme Court’s January 13, 2022 Order. Currently, the following deadlines are in place for jurisdictions that were not subject to the preliminary injunctions: Phase 1 implementation by January 27, 2022, and Phase 2 implementation by February 28, 2022. We anticipate that these deadlines will be applied nationwide. The CMS interim final rule (as updated) can be accessed [here](#).

**For more information on how this ruling and these regulations could impact your business, contact:**

Felicity A. Fowler, Partner

- ([ffowler@mcginnislaw.com](mailto:ffowler@mcginnislaw.com), 214-307-6961)

Eric A. Johnston, Partner

- ([ejohnston@mcginnislaw.com](mailto:ejohnston@mcginnislaw.com), 512-495-6064)

Traci M. Clements, Partner

- ([tclements@mcginnislaw.com](mailto:tclements@mcginnislaw.com), 214-307-6962)

Ashton G. Cumberbatch, Jr., Special Counsel

- ([acumberbatch@mcginnislaw.com](mailto:acumberbatch@mcginnislaw.com), 512-395-6063)

Daniel R Atkinson, Attorney

- ([datkinson@mcginnislaw.com](mailto:datkinson@mcginnislaw.com), 214-307-6963)