



Episode 7: “SCOTUS Strikes Down OSHA Vaccinate-or-Test Rule, but Allows CMS Mandate to Proceed”

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[Ari Kwiatkowski]: Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[AK]: Hey, guys, welcome back. I am coming in hot today on a special episode: the Supreme Court of the United States strikes down the OSHA vaccinate or test out rule, but allows the CMS mandate to proceed. If you have listened to our prior podcasts, we have told you pretty much everything you need to know both about OSHA’s mandatory vaccination or test out rule and the CMS mandates. We got some really important updates from the United States Supreme Court last week.

Before we dive in, if you are watching this on YouTube, I will apologize in advance for my formal appearance today. I had a couple of court appearances this morning before I recorded, so that’s why I’m looking a little bit more fancy than I usually am. And, you know, people that know me know that I am a SCOTUS nerd. If you follow me on LinkedIn, you will see that my cover photo or my background photo is a picture of me in front of the doors of the Supreme Court. So, you know, as I was thinking about recording this episode, I was pretty excited because this really speaks to my inner interests. But, you know, I’m keeping in mind, calm down, Ari, this is not a Supreme Court–related podcast. So I was going to skip today telling you something fun or interesting about me, but it looks like I just shared something interesting about me, or at least what I like to think is interesting, but I think that the jury’s out on that. So.

But anyway, guys, let’s just dive in and let’s talk about these two decisions. So let’s talk about the Supreme Court’s decision as it relates to the OSHA rule first. You know, as I mentioned, if you listen to our first few episodes or the episodes that we had with Mike Sciotti, we really took a hard look at all the OSHA requirements and we really went through all of those requirements.

So as our listeners know, the OSHA rules basically said that if you had 100 or more employees, you had to implement a mandatory vaccination policy or a weekly test-out rule, with some limited exceptions that, you know, we went through in pretty good detail on the episode with Mike Sciotti. We also talked about the status of the litigation at that time. So just as a refresher, last time we spoke, the Sixth Circuit had issued the previously issued injunction on OSHA the rule, basically citing, you know, the increased risk associated with the spread of COVID and resulting deaths due to the Omicron and Delta variants.

You know, as we let you guys know, the court heard oral argument on the case on January 7 and issued its decision last week on January 13. So the name of the case is National Federation of Independent Business v. Department of Labor. And what you guys need to know essentially, is this: a 6-3 majority of the court struck down OSHA’s rule, basically calling it a blunt instrument that exceeded OSHA’s authority under the Occupational Safety and Health Act and its regulations, and basically emphasized the fact that the OSHA rule drew no distinctions between different industries, different professions, different types of employees.

You know, basically, the court acknowledged that under the Occupational Safety and Health Act and its regulations, you know, OSHA does have the authority to enact workplace safety standards. But OSHA does not have the authority under the statute and its regulations to enact broader public health measures. So, you know, basically the solicitor general had argued that, you know, the risk of contracting COVID-19 in the workplace is a workplace safety risk or should be addressed by OSHA's workplace safety standards because it really is a danger or risk associated with being in the workplace. And basically, the court did not buy that argument. In fact, the court said, and I'm quoting here, "although COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most. The kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution or any number of communicable diseases." So essentially, the court said that, you know, this was beyond OSHA's authority to issue this type of mandate because this really is in the realm of public health; is really not a "workplace safety related standard" or is not a standard that is aimed to reduce risk in the workplace. So definitely, you know, in my opinion, a kind of interesting take.

You know, in what was interesting is that the court also basically said that this mandate or this rule was not similar to other, you know, workplace safety standards that OSHA had issued in the past. So, you know, our listeners or employers that are covered, employees that are covered by this mandate, you know, it really it really is a novel or a more far-reaching mandate than OSHA really has issued in the past. And the court basically said a vaccination, after all, cannot be done at the end of the work day. So, you know, essentially the court really took a hard look at OSHA's authority or its ... OSHA's explicit authority under the statute and also the regulations and basically said that OSHA exceeded its authority in issuing the mandate. You know, if you if you're listening to our podcast and you've listened to other podcasts, you're probably wondering, OK, great, what's next?

So I wanted to note, and I think it's important to note, that this decision issued by the Supreme Court is not the "be all end all" as it relates to these issues. And in fact, the court's opinion at the end directed the Sixth Circuit to resolve the merits of the case and basically the stay is in place until the merits of these issues are addressed by the Sixth Circuit.

I also wanted to point out that, you know, while the OSHA ETS mandate at this point is stayed, nothing prevents an employer who wishes to enact a mandatory vaccination policy from doing so. If you are one of those employers, definitely take a listen to our last episode. You know, in our last episode, we talked about what to do if you are an employer and you want to enact a mandatory vaccination policy, but you're not covered by OSHA's rule or the CMS mandate. So you know that episode, if you are an employer, you've already gone through all of the requirements of the OSHA mandate and you want to continue with having a mandatory vaccination policy, you are able to do so—provided you do provide for the exemptions that we've discussed before. So definitely take a listen to our last episode if you are an employer and you're kind of wondering what you can and what you should do next.

OK, guys. So, let's transition now to talking about the court's decision as it relates to the CMS mandate. So, you know, the court basically went the opposite way in issuing its decision or opinion in the *Biden v. Missouri* and *Becerra v. Louisiana* cases—one opinion addressing the issues in both of those cases. And basically what the court said—and we'll get into it a little more detail—is that, you know, the CMS mandate can proceed. So if you listened to our third episode, I talked with Maggie Surowka about the CMS mandate requirements, as well as if you're in New York, the New York vaccine rules and basically the CMS mandate says that if you're a covered health care facility and you receive Medicare and Medicaid funding, that staff within the facility, need to be vaccinated for COVID-19. So, you know, in examining this ... these issues, the court did go the opposite way of the way it went in the ... in deciding or analyzing the OSHA rule. And, you know, there were a few reasons for that.

So. So basically, you know, in this decision, the court held that in contrast to the authority that OSHA had in the context of the OSHA rule, the secretary of health and human services has the express

authority to promulgate regulations that the secretary finds necessary in the interest of the health and safety of individuals who are furnished Medicaid and Medicare services. And basically, the court noted that the secretary had found in its research and analyzation that the COVID-19 vaccine mandate would substantially reduce the likelihood that health care workers would contract COVID-19. And then, you know, spread COVID-19 or give COVID-19 or transmit the virus to their patients. And as a result, you know, in the secretary's view, the mandate was necessary.

So, you know, basically, the court noted that—unlike the Occupational Safety and Health Act—here, Congress authorized the secretary of health and human services to impose conditions on the receipt of, you know, benefits or those individuals who are receiving services that receive Medicare and Medicaid funding. And basically, the court recognized that COVID-19 is a highly contagious disease and that the secretary made a determination that a COVID-19 vaccine mandate would substantially reduce the risk of the spread of it. And the court also noted that the secretary concluded that a vaccine mandate is necessary under these circumstances, as we just discussed a few minutes ago to, you know, decrease or prevent the spread of COVID-19 among staff and also among patients who are who are receiving Medicare and Medicaid services.

So, you know, definitely the court relied on express authority or in the court's view express authority that is conferred upon the secretary of health and human services under these circumstances. And you know, the court did acknowledge that this this mandate does go farther than what CMS has done in the past or what the secretary has done in the past. But with that acknowledgment, you know, the court also recognized that, you know, this particular pandemic or the circumstances surrounding this pandemic are really novel. And you know, that is probably the reason why, you know, these issues have not come up before.

And, you know, the court also acknowledged that the standard in analyzing the mandate or the decision to implement the mandate is one of arbitrary and capriciousness. And you know, in the legal world, that's definitely a specific term or a term of art, a term of art. But here the court said, yes, that's the standard but it cannot be said that the secretary failed to examine the relevant data. And you know, the secretary did also consider the, you know, that the rule might cause staffing shortages, particularly in rural areas, and we talked about that with Maggie Surowka as well. But really, the standard is whether, you know, the decision to implement the mandate was reasonable and the court basically determined that it was.

So, you know, this is a little bit different, of course, than the opinion ... the way the opinion turned out on the OSHA ETS vaccination mandate. But, you know, I don't think it's particularly surprising, especially given that the Supreme Court has heard challenges to state vaccination rules or laws or mandates, including in New York. So not a huge surprise here. You know how the court ruled, just given how the court has treated other challenges to similar vaccination mandates. So, you know, if you're listening to the podcast and you're a health care provider, you're probably wondering what's next?

If you're in New York and you're a provider, the chances are that you're probably already complying with the mandate because of the New York vaccine rule. But, you know, CMS did issue updated guidance in late December, basically saying that, you know, the timeline had shifted a bit if the—updated guidance by CMS says that, you know, employees covered under the mandate have to receive at least the first dose of vaccination by January 27. And that by Jan..., excuse me that by February 28, 100% of employees at covered facilities need to be vaccinated. So like I said, you know, definitely take a listen to our episode with Maggie Surowka as it relates to the New York vaccine rule. But again, unless you're, you know, a very specific subset of health care providers, you're probably already complying with the CMS mandate.

So guys, that's everything I wanted to tell you today, everything I wanted to go through and these opinions ... definitely really important news. If you're an employer covered by either the OSHA rule or

the CMS mandate. But you know, just to reiterate, this is not the be all end all. As we mentioned a few minutes ago, the court directed that the Sixth Circuit hear the OSHA rule, and the lower courts will also need to address the merits of the CMS mandate. So, you know, as of right now, the OSHA rule is stayed and the CMS mandate is permitted to move forward, but we definitely anticipate that these issues will come up again. So, you know, we'll do everything we can, of course, to keep you informed. Definitely take a listen next week, we're going to go through all the requirements of the New York mask mandate. And as I mentioned before, if you are an employer who is subject to the OSHA rule, definitely take a listen to our prior episodes. You still have the ability to enact, you know, a mandatory vaccination policy if that's something you want to do. Thanks so much for listening, guys. I'll see you next week.

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