

January 14, 2022

LeadingAge NY Member CEOs, COOs, HR Directors, Administrators, Assistant Administrators, and Directors of Nursing:

As you may know, the Supreme Court issued its decisions last night on the CMS and OSHA ETS COVID-19 vaccine mandates. The CMS Interim Final Rule will be allowed to proceed nationwide, but the OSHA ETS has been blocked.

CMS posted a [press release](#) last night stating that timelines that apply to providers in the states that were required to move ahead with implementing the IFR on Dec. 28th are not changed. While New York is subject to its own State vaccine mandate, components of the CMS mandate relating to documentation and policy implementation will require compliance by providers.

Providers in New York State that are subject to the CMS mandate, including nursing homes, CHHAs, and hospice programs, should be in an excellent position to comply with the CMS mandate as a result of earlier compliance with the New York State HCP mandate. However, providers should take note of the more detailed requirements in the CMS guidance pertaining to documentation of exemptions and vaccination status, additional precautions for unvaccinated staff who have received an exemption or a temporary deferral, and contingency plans for staff who have not completed the primary vaccination series. In addition, the CMS mandate applies to board members, unless the board member participates exclusively remotely and does not have any direct contact with *staff or* patients.

CMS issued guidance on the mandate ([QSO-22-07-ALL](#)) on Dec. 28th. Please be sure to review the attachment(s) specific to your organization's services. A LeadingAge NY article about the CMS QSO with the attachments is available [here](#). More resources and tools from LeadingAge National are available [here](#). The CMS vaccination FAQ is available [here](#).

The OSHA ETS vaccine mandate was stayed on the basis that OSHA lacked authority to seek such a broad mandate. This would have applied to LeadingAge NY members with 100+ employees and not subject to the CMS mandate. It may be likely that OSHA seeks to issue vaccine mandates or COVID-19 protections in the future for more specific workforce populations at risk of infection from COVID-19.

An overview from LeadingAge National:

CMS IFR May Proceed Nationwide

In a 5-4 [decision](#) (Roberts, Kavanaugh, Breyer, Sotomayor, and Kagan), the court stayed the injunctions in place in the Louisiana and Missouri cases that challenged the CMS IFR. Thus, CMS can move forward and enforce the IFR nationwide while the legal challenges make their way through the Fifth (Louisiana case) and Eighth (Missouri case) Circuit Court of Appeals, respectively.

The majority found that the CMS IFR fit within the authority granted to the Secretary of HHS by Congress:

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Congress has authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that “the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.” 42 U. S. C. §1395x(e)(9). COVID–19 is a highly contagious, dangerous, and—especially for Medicare and Medicaid patients—deadly disease. The Secretary of Health and Human Services determined that a COVID–19 vaccine mandate will substantially reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients. 86 Fed. Reg. 61557–61558. He accordingly concluded that a vaccine mandate is “necessary to promote and protect patient health and safety” in the face of the ongoing pandemic. *Id.*, at 61613.

The rule thus fits neatly within the language of the statute. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm. It would be the “very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID–19.” *Florida v. Department of Health and Human Servs.*, 19 F. 4th 1271, 1288 (CA11 2021).

OSHA ETS Blocked

In a 6-3 [decision](#), the court granted a stay of the OSHA ETS and prohibited OSHA from enforcing the ETS pending further legal proceedings in the Sixth Circuit Court of Appeals.

The Court found that OSHA overstepped its authority in issuing such a broad ETS:

Applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate. Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no “everyday exercise of federal power.” *In re MCP No. 165*, 20 F. 4th, at 272 (Sutton, C. J., dissenting). It is instead a significant encroachment into the lives—and health—of a vast number of employees. “We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”....

There can be little doubt that OSHA’s mandate qualifies as an exercise of such authority.

The question, then, is whether the Act plainly authorizes the Secretary’s mandate. It does not. The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures. Confirming the point, the Act’s provisions typically speak to hazards that employees face at work. See, *e.g.*, §§651, 653, 657. And no provision of the Act addresses public health more generally, which falls outside of OSHA’s sphere of expertise.

The practical effect of this will be that OSHA will not be able to enforce the ETS while the legal proceedings make their way through the courts. Because the case will take time to make it through the judicial process and the OSHA ETS only lasts six months, it will likely not be enforced in its current form as it will expire before it makes its way back to the Supreme Court.

We will wait to see how OSHA responds to this decision and how they plan to proceed.

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Please contact us if you have any questions or concerns.

Sincerely,

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