

## The next steps for US vaccine mandates

As the Supreme Court blocks one of the Biden Administration's plans to raise COVID-19 vaccination rates but approves another, Susan Jaffe looks at the next steps.



President Joe Biden's efforts to encourage the most reluctant Americans to get fully vaccinated against COVID-19 have hit one legal roadblock after another. About one in four adults have still not received either the two-dose or single regimen of the vaccine, according to the Centers for Disease Control and Prevention. However, the path to greater vaccination uptake is shrinking as federal courts muddy his Administration's pro-vaccine message, cases of infection driven by the Omicron variant continue to rise in many parts of the country, and the president's popularity ratings fall.

In the first of two rulings on Jan 13, the Supreme Court decided 6–3 to block the Biden Administration's mandate for private companies with more than 100 employees to require weekly COVID-19 tests for employees who have not been fully vaccinated. It removed what would have been the only such requirement for large private sector employers, according to an analysis of state vaccine rules by the National Academy for State Health Policy.

The justices agreed with the 27 mostly Republican-led states and several business associations that brought the lawsuit and claimed the federal Department of Labor's Occupational Safety and Health Administration (OSHA) was authorised to regulate workplace hazards not public health threats. "Although COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most", declared the court's majority, fortified by the three conservative justices appointed by former President Donald Trump. "COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather".

Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan, the court's liberal faction, contended that OSHA acted responsibly. "Underlying everything else in this dispute is a single, simple question", they wrote in a dissenting opinion. "Who decides how much protection, and of what kind, American workers need from COVID-19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?"

Constitutional law expert and Harvard Law School's distinguished University Professor Laurence Tribe called the court's decision "an outrageously mistaken decision because, as the three dissenters pointed out, when Congress created the OSHA, it gave it very broad power to regulate health hazards as well as general hazards in the workplace. It never insisted that those hazards be unique to the workplace."

Yet in a pair of lawsuits the court heard along with the employer mandate cases, the court came to the opposite conclusion. In a 5–4 decision, they upheld the Biden Administration's requirement of vaccination for 10.4 million workers at 76 000 health-care facilities that treat patients covered by the government's Medicare or Medicaid health insurance. It was a small win, compared with the private employer rule which would have applied to 84 million people.

Both opinions came less than a week after the court held an emergency hearing on the lawsuits, which was fast-tracked due to the continuing pandemic. Yet despite the urgency, neither decision is likely to tamp down the vaccine controversy.

The Administration suffered another defeat on Jan 21, 2022, when a federal judge in Texas halted Biden's September, 2021, order requiring more than 3.5 million federal employees nationwide get vaccinated by Nov 22. The judge, appointed by former President Donald Trump, said people should get the vaccine but agreed with challengers who claimed the president could not require employees of the federal government to "undergo a medical procedure as a condition of their employment". Even though nearly 98% of federal workers have complied, a White House spokeswoman said the Administration plans to appeal that decision. In December, another federal judge blocked the Administration's requirement for employees of federal contractors to be vaccinated.

However, although the decision in the employer case was a sharp rebuke of OSHA, it might not be a death knell for the vaccinate-or-test mandate. Some experts say the critique hints at how OSHA could revise it in ways that might gain approval from the justices.

### What's next?

The six-justice majority said the mandate—issued as a temporary emergency order—was too broad, applying to companies with 100 or more employees regardless of their risk of exposure to the virus. "It draws no distinctions based on industry or risk of exposure to COVID-19", the justices said. "Thus, most lifeguards and linemen face the same regulations as do medics and meat-packers. OSHA estimates that 84.2 million employees are subject to its mandate".

The majority even conceded "that OSHA could regulate researchers who work with the COVID-19 virus. So too could OSHA regulate risks associated with working in particularly crowded

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For the Supreme Court's OSHA decision see [https://www.supremecourt.gov/opinions/21pdf/21a244\\_hgci.pdf](https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf)

For more on the Supreme Court's health-care workers decision see [https://www.supremecourt.gov/opinions/21pdf/21a240\\_d18e.pdf](https://www.supremecourt.gov/opinions/21pdf/21a240_d18e.pdf)

or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID-19 that all face”.

OSHA could focus on work environments that pose a high risk of COVID-19 infection, such as meat and poultry packing facilities and especially health-care facilities where COVID-19 patients are treated, said former OSHA Director David Michaels, an epidemiologist, and professor at the George Washington University Milken Institute School of Public Health (Washington, DC). “OSHA can move forward and issue a risk-based standard that’s focused on workplaces where the risk of COVID exposure is elevated”, said Michaels.

Labor Secretary Marty Walsh has not indicated whether OSHA would issue a new rule. “OSHA will be evaluating all options to ensure workers are protected from this deadly virus”, he said in a written response to the court decision.

Earlier this month, the AFL-CIO and other national unions representing health-care workers, asked a federal appeals court to force OSHA to issue a comprehensive permanent standard requiring employers to protect them against COVID-19.

One of those unions, National Nurses United (NNU), representing 175 000 registered nurses nationwide, praised the Supreme Court’s decision upholding vaccinations for health-care workers. But the vaccine requirement “must be part of the total program of infectious disease containment measures NNU has long outlined”, its president, Zenei Triunfo-Cortez, said in a written statement.

Even without a vaccinate-or-test mandate, private employers in most states can still require employees to get vaccinated or tested for the virus, said Tribe. “Some companies are going to continue to protect the health of both their employees and the public by doing voluntarily what OSHA had required them to do”, said Tribe. But

other companies will not, “depending on where they see their bottom line, and how socially responsible or irresponsible they are”.

More than half of the 543 private employers surveyed in November by the consulting firm Willis Towers Watson said they require or plan to require employees to be vaccinated. A third said they would do so only if required by OSHA. Only 7% said they plan to mandate vaccinations even if OSHA does not. After the Supreme Court’s OSHA decision, Starbucks told its 200 000 US employees it would rescind its 2-week-old policy requiring workers to get vaccinated or undergo weekly tests for the virus.

### Enforcement challenges

Following the Supreme Court’s separate decision upholding the vaccine requirement for health-care workers, the Centers for Medicare & Medicaid Services (CMS) will begin enforcing the rule for hospitals, nursing homes, ambulatory surgical centres, and other providers that treat patients whose care is funded by the government’s Medicare or Medicaid insurance programmes.

Employees of these facilities must have at least one vaccination by Feb 22, and for the two-dose regime, a second by March 21. In 24 states unaffected by the Supreme Court ruling because a lower federal court approved the vaccine requirement earlier, the deadlines are Feb 14 for a first dose and March 15, for a second dose. The mandate applies to all employees—including those who do not have direct contact with patients. Exemptions for medical or religious reasons can be requested. Non-compliance could eventually result in the loss of Medicare or Medicaid funding and expulsion from the government programmes.

However, enforcing the requirement and other CMS rules for Medicare and Medicaid providers depends on state agencies that inspect health-care facilities on behalf of

CMS, which oversees health-care facilities that participate in Medicare and Medicaid. But not all states are eager to cooperate. The consequences are most evident in Florida, whose governor opposes vaccine mandates, and where state inspectors will not check for compliance with the new rule.

“The state of Florida is not going to serve as the Biden Administration’s biomedical police”, a spokeswoman for Republican Governor Ron DeSantis told the USA TODAY Network-Florida newspaper group. “Firing unvaccinated healthcare workers, many of whom have infection-conferred immunity, is unethical and unscientific on its face”.

However, more than 90% of about 13 000 employees of the Jackson Health System, which has 2237 beds at its seven hospitals in or near Miami have already been vaccinated or received medical or religious exemptions, said Lida Amoretti-Morgado, a spokeswoman. “We are confident we will reach full compliance in the coming months.”

Members of the Florida Health Care Association, representing most of the state’s approximately 706 nursing homes, “are working toward following the federal CMS mandate”, said spokeswoman Kristen Knapp. So far, 76% of staff and 82% of residents have received vaccinations, she said, and 19% of staff and 46% of residents have received booster shots.

“Given the majority of our residents rely on Medicaid or Medicare, the risk of losing their Medicare or Medicaid certification is too great for providers not to comply”, she said. But members are concerned that some workers will quit their jobs rather than get vaccinated. The anticipated resignations will exacerbate existing staffing shortages that “are at crisis levels and forcing our care centers to limit admissions, which threatens access to care for our state’s seniors”.

Susan Jaffe