Supreme Court Weighs Biden's Workplace COVID Vaccine Requirements

The Supreme Court has overturned the OSHA rule that says large companies must require either vaccination or masks and regular testing.

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UPDATE: On Jauary 13, the Supreme Court blocked the Biden administration from enforcing its policy that large employers must require COVID vaccination or regular testing. However, the court upheld vaccine mandates for health care facilities that receive federal funding.

The Supreme Court on Friday [December 7] took up one of the most contentious issues of the COVID-19 pandemic, hearing a series of cases challenging the Biden administration's authority to require workers to get a COVID vaccine or be tested for the virus regularly.

The issue in the cases, which challenge rules set in November by the Occupational Safety and Health Administration and Centers for Medicare & Medicaid Services, is not directly whether the rules are legal but whether they can take effect while the cases are heard in detail by courts of appeals. The arguments lasted more than three and a half hours. A decision by the justices is expected within days.

The OSHA rule says that businesses with more than 100 employees must require their workers to either be vaccinated or wear masks and undergo weekly testing. The CMS rule requires that health care workers in facilities that receive federal Medicare or Medicaid funding be vaccinated, recognizing that they work with vulnerable patients.

Lower courts have split on whether the federal government has the authority to issue such rules and whether they can take effect while the cases are argued. Although the Supreme Court has generally upheld state-level vaccine requirements, whether it will allow the federal government to impose such rules isn't clear.

"It's not our role to decide public health questions," Justice Neil Gorsuch said. "But it is our role to decide who should decide."

Notably, Friday's arguments were held in a Supreme Court chamber with even stricter anti-covid

rules than those at issue. The court is closed to most members of the public, masks are required for everyone other than the justices, and lawyers and journalists must maintain physical distance and have negative tests. As the omicron variant surges in Washington, D.C., Justice Sonia Sotomayor, who has diabetes, opted to participate remotely from her chambers at the court. Also participating remotely were two of the six lawyers, including Ohio Solicitor General Benjamin Flowers, who tested positive for COVID after having a mild case over the holidays.

Conservative members of the court pressed lawyers about whether the administration overstepped its authority in issuing the rules, while some of the liberal justices grilled the rules' opponents on why the government should not move quickly and forcefully when faced with a massive public health issue. But how the justices might rule wasn't clear from the questions they asked.

Justice Brett Kavanaugh wondered why few hospitals or nursing homes are protesting the CMS rule for health care workers. "Where are the regulated parties complaining about this regulation?" he asked the state officials who have sued to block the rule.

Lawyers for the Biden administration argued that the federal government has ample power to protect worker safety in issuing its rule, which is technically an emergency standard. "This lies in the heartland of OSHA's regulatory authority," Solicitor General Elizabeth Prelogar told the justices.

Similarly, in the CMS case, Principal Deputy Solicitor General Brian Fletcher told the court that "requiring medical staff vaccination during a pandemic falls squarely within the [Health and Human Services] secretary's authority to protect the health and safety of Medicare and Medicaid patients."

Those challenging the rules, however, argued that although states and individual employers may impose such rules, the federal government cannot. If the OSHA rule takes effect, said Scott Keller, representing the National Federation of Independent Business, "workers will quit."

That is even more likely in the case of the CMS rule, which does not have a testing option, said Jesus Osete, deputy attorney general of Missouri. "Rural America will face an immense crisis," he said. "This mandate will close the doors of many of these rural facilities and will effectively deprive our citizens of health care."

The rules are strongly supported by public health organizations and many medical groups. Opponents are "wrong on the science, they're wrong on the medicine, and they're wrong on the law," Dr. Georges Benjamin, executive director of the American Public Health Association, told reporters in a conference call earlier in the week.

But business groups argue that employers cannot keep their doors open with such sweeping mandates in place. "If employers require vaccination, they will suffer the wrath of their workforce that refuses, for whatever reasons, to get vaccinated," said the NFIB's brief. On the other hand, should employers opt for the testing requirement, the brief said, "in a historically tight labor

market, they will be unlikely to pass those costs on to employees without losing them (and in some states and situations they will be prohibited from doing so by law).”

The cases on the OSHA rule are National Federation of Independent Business v. Department of Labor and Ohio v. Department of Labor. The cases involving the CMS rule are Biden v. Missouri and Becerra v. Louisiana.

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