

3 Key takeaways from the SCOTUS ruling on Biden's ETS vaccine and testing mandate

The Supreme Court's majority ruling on January 13, 2022 blocked the Biden Administration's CV-19 vaccine- and testing rules for large private employers. Despite the ruling, many businesses are still facing challenging decisions on vaccine and testing enforcement, in part due to state or local regulations that remain in effect, and the promise of new and narrower rules coming from OSHA. Regardless of regulatory mandates, businesses are carefully balancing the desire to ensure a safe and healthy workplace for all employees while respecting individual choice.

Here are 3 key takeaways from the ruling.

- **State and local vaccine and testing mandates remain in effect**

As of late December, 25 states had vaccine mandates in place, with 13 states incorporating vaccine mandate bans. State and local laws may require employers to mandate vaccines or regular testing. New York City, for example, has a more stringent rule than the federal government's. The Supreme Court has repeatedly upheld state vaccine mandates and has not limited the ability of employers to create their vaccine and testing requirements, subject to reasonable accommodation requirements under the Americans with Disabilities Act and state law.

- **Expect new and narrower federal vaccine and testing rules to come from OSHA**

The high court's ruling provides leeway for a narrower approach. "Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible," the court said.

As noted by David Michaels, who led OSHA during the Obama administration, the agency could rewrite the rule to narrow its focus to workplaces with the greatest risk of transmission. Such a requirement could apply to sites where employees are together all day, particularly in structures with poor ventilation. In addition to factories with assembly lines, a more narrowly targeted requirement could also apply to workplaces where there is contact with customers – such as retail establishments – and to businesses where remote work is not possible. Even where remote work is possible, if employees are required to occasionally come and work in person, that would be a high-risk workplace as well.

Labor secretary Marty Walsh signals a continued activist stance from OSHA, stating that OSHA "will do everything in its existing authority to hold businesses accountable for protecting workers."

- **Regardless of mandates, businesses are carefully balancing the desire to ensure a safe and healthy workplace for all employees while respecting personal choice**

Many businesses will move ahead in states that allow it. More than half (57%) of businesses responding to a Willis Towers Watson survey in November either already required or planned to require COVID-19 vaccinations. At the time, 25% indicated they would do so even if the OSHA rule did not take effect.

For employers, unvaccinated employees do represent a business risk. Unvaccinated workers are more likely to bring COVID into the workplace, more likely to get sick from it, and more likely to be hospitalized – incurring large medical bills for the business’ health insurer to pay.

Many unions demand that workplaces take active vaccine and testing action. President Biden has called on business leaders to “immediately join those who have already stepped up and instituted vaccination requirements”. Many large employers with a strong culture of safety, such as Starbucks and United, have instituted vaccine and testing mandates.

Businesses will continue to be whiplashed by conflicting requirements and demands.

Employers that take action require effective and flexible solutions to help HR and company managers ensure compliance while keeping employees safe.

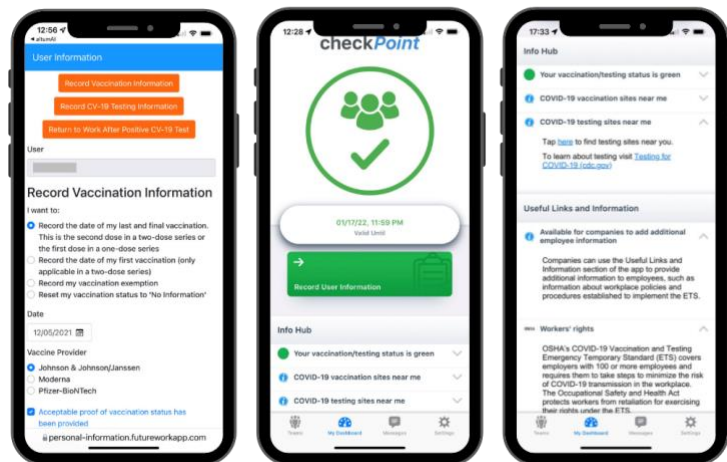
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