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## EMPLOYER NEWSLETTER

### **SUPREME COURT STRIKES DOWN OSHA'S VAX-OR-TEST MANDATE**

January 14, 2022

On Thursday, January 13, 2022, the U.S. Supreme Court struck down the so-called “vax-or-test” mandate announced in November by the U.S. Occupational Safety & Health Administration (“OSHA”). ([Link to ruling.](#)) The mandate required private-sector employers with 100 employees or more to require their workers to become fully vaccinated for COVID-19 or, alternatively, to wear a mask and show a negative COVID test each week. However, the Court *upheld* a vaccine mandate for health care workers who work for employers covered by regulations issued by the Centers for Medicare & Medicaid Services (“CMS”). The OSHA mandate was the more closely watched case because it would have affected an estimated 84 million employees.

Although unlikely, it is possible that OSHA could impose another vaccine mandate through its normal, non-emergency rule-making powers. But, the likelihood of it doing so (and of any such regulations surviving judicial review) has been greatly diminished.

#### **Options to Consider:**

1. **Maintain current safety plans and protocols.** Employers are not required to encourage or discourage employees to become vaccinated. However, they continue to have a general duty to provide a safe work environment for employees and those who are invited into the workplace. Thus, it remains critical for employers of all sizes to adopt COVID-19 response and safety plans.

2. **Adopt a customized vaccine policy.** In Arizona, employers may adopt their own vaccine mandate as long as it provides reasonable accommodations for employees who object based on their own medical conditions or sincerely held religious beliefs or practices. As examples, an employer could impose a vax-or-test mandate without requiring unvaccinated employees to wear masks; similarly, it could provide paid time off benefits to vaccinated employees who test positive or become ill (or who must isolate/quarantine), but not for unvaccinated employees.

3. **Adopt safety rules for unvaccinated employees.** Employers may require unvaccinated employees to comply with additional safety restrictions. Such rules could include masking requirements, social distancing rules, restrictions on business-related travel, and other policies relevant to the employer’s particular work environment. If such safety rules are adopted,

they should be related to the legitimate safety concerns of the particular workplace and announced well ahead of their effective date.

**4. Adopt vaccine incentives.** Employers may offer incentives for employees to become vaccinated voluntarily. Based on EEOC guidelines issued last year, employers can provide modest incentives or “rewards” to employees who become, or who already are, vaccinated.

If you have questions about adopting your own vaccine policy or safety plans or reviewing, modifying, or rescinding your current policies, please contact Mr. Clark at 480-844-0039, etc@clarkfirm.com, or [legal@clarkfirm.com](mailto:legal@clarkfirm.com).

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