

Supreme Court Rejects Federal Effort to Require Vaccines in Private Workplaces By Dennis Chong, Esq.

On January 13, 2022, the United States Supreme Court decided in *National Federation of Independent Business v. Department of Labor*, Nos. 21A244 and 21A247 (link: https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf) that the Occupational Safety and Health Administration (OSHA) likely exceeded its statutory authority when it sought to impose an emergency temporary standard to address the possible spread of COVID-19 in the workplace. (In a separate decision, the Court allowed a regulation that required that health care workers at Medicare- and Medicaid-certified providers and suppliers be vaccinated to go into effect. Link: https://www.supremecourt.gov/opinions/21pdf/21a240_d18e.pdf).

In November 2021, the Department of Labor, through OSHA, issued an “emergency rule” which would require that all employers with at least 100 employees, with some limited exceptions, develop and implement a policy mandating that its employees receive COVID vaccinations on threat of removal from the workplace. Alternatively, employers could require that employees subject themselves to weekly COVID testing.

Lawsuits were filed across the country challenging this rule, and they were eventually consolidated before the Sixth Circuit, which declined to enter preliminary injunction staying the OSHA mandate. On review of the Sixth Circuit’s decision, the Supreme Court held that OSHA likely lacked the authority to issue the emergency rule, and granted applications to stay its enforcement. Although the Supreme Court’s ruling related to the issuance of a preliminary injunction and did not technically resolve the case completely, its opinion forcefully signals that the OSHA rule will not survive as the case continues forward.

Private employers with over 100 employees therefore will not be *required as a matter of federal regulation* to develop a policy to require that its employees get vaccinated or undergo periodic testing. However, nothing in this ruling prevents private employers from choosing to implement vaccination-or-testing protocols. Likewise, this ruling does not relieve private employers from any obligations arising from state, local, or industry requirements.

Private employers considering implementing COVID vaccination protocols or who want to review their existing protocols to ensure compliance with local laws should contact an attorney knowledgeable with his rapidly-developing area of law.