



# SCOTUS Red Lights Vaccine-or-Test Rule and Green Lights Vaccine in Medicare/Medicaid Facilities Rule

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In [National Federation of Independent Businesses v. Department of Labor](#) the U.S. Supreme Court disallowed the Occupational Safety and Health Administration's (OSHA) emergency rule from going into effect temporarily, which required those who work for employers with 100 or more employees to be vaccinated. Such employers instead could require unvaccinated employees to be tested weekly for COVID-19 and wear a mask.

In [Biden v. Missouri](#) the Court allowed to go into effect temporarily, while litigation in the lower courts continues, an interim final rule requiring health care facilities that receive Medicare and Medicaid funding to ensure their staff are vaccinated against COVID-19.

In *NFIB v. DOL* the Court concluded that those challenging the vaccine mandate are likely to succeed in their claim that Congress failed to clearly authorize the Secretary of Labor to impose such a mandate. The Act that created OSHA allows for temporary emergency standards when it is "necessary" to protect employees exposed to "grave danger" from "exposure to substances or agents determined to be toxic or physically harmful or from new hazards."

According to the Court, the Act allows the Secretary of Labor to "set *workplace* safety standards, not broad public health measures," and the vaccine mandate is a broad public health measure. "Although COVID- 19 is a risk that occurs in



many workplaces, it is not an *occupational* hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather.” “Permitting OSHA to regulate the hazards of daily life— simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA’s regulatory authority without clear congressional authorization.”

Justices Breyer, Sotomayor, and Kagan dissented in *NFIB v. DOL*.

In *Biden v. Missouri* the Court concluded that the Secretary of Health and Human Services didn’t exceed his statutory authority in requiring facilities that receive Medicare and Medicaid funding to ensure their employees are vaccinated.

Congress authorized the Secretary to promulgate “requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution,” as a condition of allowing health care facilities to participate in Medicare and Medicaid.

The Court reasoned: “The rule . . . fits neatly within the language of the statute. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm. It would be the ‘very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID–19.’”

Justices Thomas, Alito, Gorsuch, and Barrett dissented in *Biden v. Missouri*.



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The opinions in both cases are unauthored. The Court’s opinions in these cases aren’t final determinations of the legal merits of the issues presented. Instead, the opinions disallow the vaccine-or-test rule and allow the health care facility rule to go into effect temporarily while litigation continues over these issues in the lower courts.

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