

Leonard Nelson, JD, on how vaccine mandate rulings impact physicians

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In today's COVID-19 Update, AMA Chief Experience Officer Todd Unger talks with Leonard Nelson, JD, the AMA's senior assistant general counsel, about the recent Supreme Court decisions on vaccine mandates and their long-term implications for physicians.

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Speaker

- Leonard Nelson, JD, senior assistant general counsel, AMA

Transcript

Unger: Hello, this is the American Medical Association's COVID-19 Update video and podcast. Today we're joined by Leonard Nelson, the AMA's senior assistant general counsel in Chicago, who'll discuss the recent Supreme Court decisions on vaccine mandates and the implications. I'm Todd Unger, AMA's chief experience officer in Chicago. Leonard, thanks so much for joining us. Big decisions that came down this week on both a large employer mandate and the one related to health care. Let's start first by getting some background. Why don't you start with a large employer mandate, kind of what was it and what was on the table?

Nelson: The large employer, thank you Todd, and the large employer mandate was a mandate, which is in the form of a rule or regulation imposed by the Occupational Safety and Health Administration, which is a division of the United States Department of Labor. And the mandate was that employers

that hired at least 100 employees were required to, they were required to require their employees to do one of two things, either be vaccinated and prove they were vaccinated or be tested weekly. Of course, the employer could pay for the testing but the employer didn't have to pay for the testing. And the employees would have to wear masks. So the employers had to insist that their employees follow one of those two courses to prevent transmission of the COVID virus.

Unger: And in terms of exceptions to that, any?

Nelson: Well, there were. There were exceptions, religious exceptions and exceptions that for those employees who didn't have close contact with other people at their jobs, like people who were working from home or were working completely exclusively outdoors, then those would be exceptions. They didn't have to get vaccination or the masks.

Unger: And when was that scheduled to take effect?

Nelson: It was sort of a rolling schedule. There were various things. In other words employer had to have a plan for making this come into place. And then the employer actually had to do it. And the plan was late last year. And then the actual requirements were early this year, I think January.

Unger: So the second mandate was smaller in scope but directly related to health care. Talk about the details of that particular mandate.

Nelson: Yes. Well, this applied to health care institutions such as of course, hospitals most prominently but could be other institutions as well, rehabilitation facilities. And those institutions were required again, along roughly the same time schedule, but it was a little more less lenient. That they had to have their employees, would have to be vaccinated, none of this masking stuff.

Unger: So let's talk about the decision itself. It's kind of a split decision so to speak between the two. Why don't we start first on the large employer mandate?

Nelson: Okay. So on the large employer mandate, the decision was six to three against the large employer mandate. As a technical matter, the court simply said, we're going to stay the mandate but for all intents and purposes, I mean, that's like, that's it. Because the mandate itself is a temporary requirement and it's going to expire within a few months. And I mean, maybe the federal government could come up with something else in light of the Supreme Court decision, maybe not. But at any rate with a larger employer mandate, the court went through the statute, which is the OHS or OSH Act and said, "We don't think that this came within the purview of the OSH Act."

And so I mean, on the one hand, the federal government through the Department of Labor said the OSH Act says that it's up to the federal government to make sure, or at least the federal government has a role in making sure that employees are safe on the job, that they're protected on the job. And

the other side said, well, yeah, that may be but traditionally nobody made a problem. Nobody raised a fuss if the Department of Labor through the OSHA administrative agency said you had to wear hard hat and goggles and steel toed boots but those are very closely related to what's going on in the job. Whereas a mandate for vaccination is broader. If you get vaccinated and if you find that that's an affront to your bodily integrity, you can't get unvaccinated after you leave your job.

Unger: So this is a pretty, in terms of implications, pretty widespread. I mean, we're talking about the application to almost 85 million workers out there. In terms of now the impact of this decision, can you talk a little bit about what is the impact?

Nelson: Well, the immediate impact, if the court had gone otherwise would be that many of the large employers in the United States would be, hopefully they've already been putting some pressure on their employees to get vaccinated but they could sort of pass the buck and they could say, "Hey, it isn't us. It's the federal government. We're required to do it. You got to get vaccinated." And I tend to think, and this is my own opinion somewhat, that would give an out to the anti-vaxxer employees that they'd say, "Okay, I didn't break the faith. I kept my traditions and I didn't give in but I had to do it. And so I'm going to get vaccinated. And I go about my business." And according to the AMA and the Centers for Disease Control, that would save many, many thousands of lives and reduce hospitalization significantly.

Unger: I think the specific estimate around that was that it would've cause 22 million people to get vaccinated and prevent about a quarter of a million hospitalizations. So that's quite a big impact. I want to turn now to talking about the health care employer mandate, a different decision there. Let's talk about that.

Nelson: Right. Well, there the court, both cases, I mean, I think it's worthwhile to look at both cases together because in both cases, the court was interpreting statutes that were passed decades ago. And it was long after the influenza pandemic of 2009 had run its course. And it was before medical science had reached the point where it could create vaccines sort of on demand. And so Congress didn't in either statute, either the Medicare statute or the Medicaid statute or the OSH Act, in none of them did Congress specifically identify this exact situation about pandemics and creating vaccines and forcing people to get vaccines but they spoke in broader language, which is not at all unusual.

I mean, it's power for the courts in statutes. And in the Medicare Medicaid act, they said the federal government's going to spend money for Medicare Medicaid services. And it's going to spend money on hospitals and other institutions. And the federal government has a right to see that its money is spent properly so that the money is going to be spent to cure people, to make people better, not to subsidize institutions, which will make people sicker by subjecting them to infectious diseases.

Unger: So, is that the basis, which a different decision came out here, which is in favor of the mandate ...

Nelson: Right.

Unger: ... in the health care side.

Nelson: Yes, that's right. But Todd, the problem is, depends how you read those statutes. In neither case, did Congress specifically say, okay, there's going to be a vaccine and it's going to be imposed on demand on the people that are covered by these statutes. There's broader language. The language that hospitals have to be places of safety and health. And so they didn't say, and places where people have to get vaccinated if they're going to work in those hospitals. See I think the other reason—

Unger: So is that kind of difference that you're drawing there, is that why one was upheld and not the other?

Nelson: Well, that's what the Supreme Court would say. That's not necessarily what I would say.

Unger: Is it consistent with other previous Supreme Court decisions? And if not, how is this different?

Nelson: Todd, there have been thousands and thousands of prior Supreme Court decisions. So one can find, and many decisions are many pages long and they say lot of things in different context. So one could grasp at a straw in one decision and say, "See, we're following that straw and that decision. And we're consistent with it." But in my judgment, no, I don't think that the, I think that, yeah look, you got to interpret, you've got to read statutes that were pass at a different time to cover slightly different circumstances. And if I look at the Department of Labor, the OSHA decision, no, I don't think it followed precedent. I think it grasped at a straw to say this statute wasn't 100% clear and because it wasn't 100% clear in the eyes of these beholders, then it didn't count. And the other, they went the other way.

Unger: Regardless of the Supreme Court decisions, the AMA has come out with a very specific stance regarding these mandates. And it stands on the decision. Can you talk about the AMA's position?

Nelson: Well, it's not surprising. The AMA is very pleased with the mandate that was upheld in the Medicare Medicaid context. That's very much what the AMA had pushed for. And we're very disappointed in the Department of Labor, large employer mandate being invalidated.

Unger: I mean, obviously the reasoning behind the stance on the health care mandate is pretty obvious in terms of saving lives and commitments to patients. How about the reasoning on the stance for the large employer mandate?

Nelson: We disagree with the reasoning. I'm not sure that we got to the granularity of saying this specific statement by this specific section doesn't meet muster but I think that's got to be the conclusion of the AMA.

Unger: There's obviously evidence that these mandates are working or do work. We with just got news, from United Airlines this week. Their CEO talked about what the impact has been. And they've gone from one employee dying a week to none with the mandate that they've put in place. You look at the impact of these two decisions, the combination of them too. How do you think they're going to impact health care going forward?

Nelson: Well, in terms of the CMS, the Medicare Medicaid mandate, that's going to save lives Todd, save lives, save health, lower hospitalizations, make it for a healthier society. The failure to uphold the large employer mandate is going to do the opposite. It's going to say, COVID, go ahead COVID. Do your worst. We're not going to stop you.

Unger: And that's a tough thing to face when we read about the situation in hospitals right now, overcrowding, under resourced would not actually describe the situation there with, especially with the Omicron variant and the impact of that. So that's a tough situation to face for our physician and health care teams out there. And we're thinking of you. Leonard, thanks so much for being here to give your perspective on these cases. And we'll look for more information as it comes. That wraps up today's episode.

Nelson: Okay.

Unger: And...

Nelson: Thank you, Todd.

Unger: We'll be back with more from COVID-19 Update, our video and podcast soon. In the meantime, visit [ama-assn.org/COVID-19](https://www.ama-assn.org/COVID-19) for more resources on COVID-19. Thanks for joining us. Please take care.

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