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Updated: The Supreme Court Has Spoken: OSHA ETS Stayed

UPDATE (01/26/2022): OSHA has withdrawn its ETS on mandatory COVID-19 vaccination or testing effective January 26, 2022. OSHA's withdrawal comes on the heels of the U.S. Supreme Court's decision, discussed below, to stay the ETS. Employers now have clarity that the OSHA ETS will not be enforced. However, OSHA notes that it is "not withdrawing the ETS as a proposed rule" and continues to "strongly encourage the vaccination of workers against the continuing dangers posed by COVID-19 in the workplace."

On January 13, the U.S. Supreme Court issued a decision staying enforcement of Occupational Safety and Health Administration's (OSHA) emergency temporary standard (ETS) regarding COVID-19 vaccination and testing for private employers with 100 or more employees.

Background

As we previously reported here, on November 5, 2021, OSHA first issued the ETS requiring all employers with 100 or more employees to adopt either a mandatory COVID-19 vaccination policy or a policy requiring regular COVID-19 testing and face coverings for unvaccinated employees. The ETS was met by several legal challenges. Only a day after the ETS' official publication, the Fifth Circuit Court of Appeals stayed enforcement, and a three-judge panel of the Fifth Circuit affirmed the initial stay on November 12.

After the Fifth Circuit issued the initial stay, the nationwide legal challenges were consolidated before the Sixth Circuit Court of Appeals. As we discussed here, on December 17, 2021, the Sixth Circuit lifted the stay of enforcement. Several parties sought emergency relief from the U.S. Supreme Court, arguing that the ETS exceeded OSHA's statutory authority and was otherwise unlawful.

Supreme Court Decision

In a 6-3 vote, the Court found that the applicants were likely to succeed on the merits of their claim that the Secretary of Labor (acting through OSHA) lacked authority to impose the ETS's mandates, and it granted the stay. The Court held, in a per curiam opinion, that the Occupational Safety and Health Act (OSH Act), which created OSHA, "empowers the Secretary [of Labor] to set *workplace* safety standards, not broad public measures." The Court noted that "[p]ermitting 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." The Court distinguished other workplace regulations that OSHA has imposed by noting that a vaccination "cannot be undone at the end of the workday."

Justice Gorsuch authored a concurrence, joined by Justices Thomas and Alito. Justice Gorsuch framed the issue as "not how to respond to the pandemic, but who holds the power to do so," and stated that such power rests with the states and Congress, not OSHA.

Justices Breyer, Sotomayor and Kagan dissented, finding that the OSH Act enables OSHA to issue the ETS because the virus poses a "grave danger" to millions of employees, and the ETS is "necessary" to address that danger. The dissent criticized the majority's decision for being "not wise" to tell the agency charged with protecting worker safety not to do so in the face of a "still-raging pandemic."

What's Next?

The Supreme Court's stay prevents the ETS from taking effect, and it may be the effective end of the road for the ETS. It is possible that states and localities will attempt to fill the void created by the U.S. Supreme Court's stay of the ETS by enacting vaccination and testing requirements. Likewise, unless otherwise prohibited by state or local laws, employers may also voluntarily adopt their own vaccination and testing requirements. Employers should review applicable laws in the states in which they operate to determine what options may be available to them and ensure that their current policies on vaccines and testing comply with state law.

The Secretary of Labor issued the following cautionary statement to employers regarding the Supreme Court's ruling:

> We urge all employers to require workers to get vaccinated or tested weekly to most effectively fight this deadly virus in the workplace. Employers are responsible for the safety of their workers on the job, and OSHA has comprehensive COVID-19 guidance to help them uphold their obligation.
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> Regardless of the ultimate outcome of these proceedings, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the COVID-19 National Emphasis Program and General Duty Clause.

Employers would be wise to heed the Secretary's warning, which seems to indicate increased enforcement efforts on the horizon.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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