

# Employers, the Coronavirus, and the Reinstatement of the OSHA ETS: What Now?

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## ***Updated as of 1/27/22 due to OSHA's withdrawal of the Emergency Temporary Standard (ETS)***

The vax-or-test legal rollercoaster ride continues, leaving human resource managers' heads spinning, lawyers prognosticating, and employers simply wondering what comes next.

On January 13, 2022, the United States Supreme Court, [in a 6-3 majority decision](#), dealt a substantial blow to the future implementation of the Occupational Safety and Health Administration's (OSHA's) Emergency Temporary Standard (ETS) for large employers, putting the ETS on hold indefinitely pending further review by the United States Court of Appeal for the 6<sup>th</sup> Circuit ([which had reinstated the vaccinate-or-test mandate](#)). Among other things, the ETS mandated that all businesses with 100+ employees require their employees to either vaccinate (and provide proof thereof) or submit to weekly COVID-19 testing to attend work.

Acknowledging OSHA is tasked with ensuring workplace safety by enforcing reasonably necessary or appropriate occupational safety and health standards, the Supreme Court expressed concern that the ETS was "no everyday exercise of federal power." The majority wrote:

"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. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. 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."

The Supreme Court further expressed that the vaccinate-or-test mandate was "strikingly unlike the workplace regulations that OSHA has typically imposed," and that its universal application to any employer having 100 or more employees was not in line with the regulatory authority OSHA possessed to regulate occupation-specific dangers, whether related to COVID-19 or otherwise.

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Indeed, the Supreme Court recognized that targeted regulations are plainly permissible, and that OSHA could appropriately regulate businesses where the coronavirus poses a special danger because of the particular features of an employee's job, such as researchers who work with the COVID-19 virus, or particularly crowded or cramped workplace environments where a highly communicable virus would more rampantly spread. But, according to the Supreme Court, "OSHA's indiscriminate approach [with the ETS] fail[ed] to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an '*occupational* safety or health standard.'"

Keep in mind this is unfinished business. In an unsurprising move, on Wednesday, January 26, 2022, OSHA formally withdrew the ETS. However, in doing so, OSHA, on its [website](#), published: "Although OSHA is withdrawing the vaccination and testing ETS as an enforceable emergency temporary standard, the agency is not withdrawing the ETS as a proposed rule. The agency is prioritizing its resources to focus on finalizing a permanent COVID-19 Healthcare Standard." In other words, the ETS – which was always designed to be a temporary protective measure – is done, but OSHA is exploring the implementation of a new, permanent rule that ostensibly would be drafted to comply with the constitutional concerns raised by the Supreme Court.

## **What does this mean for employers with 100+ employees?**

So, where does that leave employers having 100+ employees?

For starters, employers that have already mandated vaccination (with appropriate accommodations in place) are unlikely to back-pedal. Reports are that many large employers that already had required vaccination, like Citigroup Inc., are going to keep their policies in place.

Other employers, who were prepared for compliance but had not committed to a vax-or-test policy and were awaiting the Supreme Court's ruling, may pump the brakes in implementing such policies, but may not abandon them outright, either. Indeed, employers that have not mandated vaccination but were prepared to mandate it may:

- Proceed according to plan, but now have more time to prepare and implement their own vaccination policies;
- Remain in a holding pattern, and wait and see what happens both politically, judicially, and within their own business and cultural environments before determining how to proceed; or
- Back-pedal and decide against mandating vaccination, almost as if the ETS never happened.

Starbucks, for example, was [recently reported to reverse course](#). While employers like Starbucks undoubtedly have the legal right to pull their vax-or-test plans now that the ETS has been stayed (again) by the Supreme Court, this is the least conservative approach and ignores certain legal, practical, medical and economic realities.

*First*, as indicated above, OSHA may issue narrower, targeted, industry-specific rules and regulations, which could be permanent (the ETS was going to be in effect for only six months anyway), in a renewed effort to mandate vaccination on some level within the parameters of the Supreme Court's ruling. In fact, [OSHA was quick to announce](#) it would consider all options available to it in light of the Court's rulings.

*Second*, on the same day the Supreme Court halted the vax-or-text mandate for large employers, [it issued a separate opinion](#) upholding and enforcing a separate but similar mandate issued by the Secretary of Health and Human Services requiring healthcare facilities that receive Medicare and Medicaid funding to ensure their staff are vaccinated against COVID-19 (unless exempt for legitimate medical or sincerely held religious reasons). The Supreme Court recognized that “vaccination requirements are a common feature of the provision of healthcare in America,” and there are long lists of detailed conditions healthcare facilities must maintain “to help prevent the development and transmission of communicable diseases and infections.” Thus, the Supreme Court essentially doubled-down on requiring vaccination within the healthcare environment for institutions like hospitals, long-term care facilities, ambulatory surgical centers, and facilities that provide outpatient physical therapy and speech-language pathology services.

*Third*, the Supreme Court’s ruling does not apply to, undermine, or affect the validity of state or local mandates already in place. Employers acting in compliance with state or local mandates are not affected by the Supreme Court’s ruling. For example, in New Jersey, healthcare workers, preschool and childcare centers, and schools Pre-K through 12<sup>th</sup> Grade must require employee vaccination or weekly testing. In Philadelphia, there is an indoor mask mandate and a vaccination mandate for certain industries, including establishments that sell and serve food for inside consumption, like restaurants, bars, movie theatres, and bowling alleys, to name a few. It remains to be seen whether more state and local governments will spring to action and implement local or industry-specific vaccination mandates as a consequence of the Supreme Court’s ruling

*Fourth*, nothing in the Supreme Court’s ruling prevents private employers from implementing their own mandatory vaccination policies to protect their employees, customers, vendors and communities.

Accordingly, while the ETS as previously drafted may not be resuscitated, there may be new life breathed into mandatory employee vaccination in any number of ways, either by OSHA with more targeted enforcement, by way of state or local enactment, or through measures implemented by private employers. And, clearly, COVID-19 isn’t going away. Employers can – and should – still take steps to protect their own, unique workforces. Employers can carefully collect employee data relating to vaccination, require vaccination with necessary exemptions or testing, impose a health insurance surcharge on non-vaccinated workers, require masking and social distancing in the workplace, and provide vaccination incentives, all in an effort to keep their businesses going. Thus, [as I cautioned in the video here](#), employers proceed at their peril if they decide to completely abandon employee vaccination as a potential avenue to combating the coronavirus.

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