

U.S. Supreme Court Puts OSHA COVID-19 Vaccine-Or-Test ETS Back on Ice

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In a 6-3 ruling, the U.S. Supreme Court has granted a temporary stay of the Occupational Safety and Health Administration's (OSHA) [Emergency Temporary Standard](#) (ETS).

The Court described the standard as a “blunt instrument” demanding most employers to require two-thirds of the American workforce to receive COVID-19 vaccinations or otherwise undergo weekly testing. The justices tipped their hands in the [January 13 decision](#) on how they might ultimately rule on the merits, stating that petitioners challenging the standard are likely to succeed in their arguments that OSHA exceeded its authority in promulgating the standard.

Noting that the Occupational Safety and Health Act empowers the Secretary of Labor to set workplace standards, the Court distinguished the ETS as a measure that instead attempts to address a broader public health concern. “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.” Significantly, the Court observed that this ETS was the first of its kind, “a broad public health regulation ... addressing a threat that is untethered, in any casual sense, from the workplace.”

The Court did not preclude all regulation to stop the spread of COVID-19 in workplaces, however. It explained that the agency could take targeted measures “[w]here the virus poses a special danger because of the particular features of an employee’s job or workplace,” such as “researchers who work with the COVID-19 virus” or “risks associated with working in particularly crowded or cramped environments.” OSHA may decide to utilize the General Duty clause to address COVID-19 hazards,

especially in the types of workplaces enumerated by the Court.

The decision stays the ETS, pending review of the merits by the U.S. Court of Appeals for the Sixth Circuit. The stay will remain in place until the Supreme Court denies a request for review or, if granted, until the Court issues a judgment on the merits.

At this point, all eyes are back on the Sixth Circuit, which has yet to hear, let alone to decide, the case on the merits, including arguments over whether the ETS overrides state or local laws based on federal preemption. Meanwhile, Alabama, Arizona, Arkansas, Florida, Iowa, Kansas, Montana, North Dakota, Tennessee, Texas, Utah, and West Virginia have enacted measures that would restrict or impact vaccination requirements.

Employers not covered by another federal, state, or local mandate may choose to implement whatever policies and practices best-suited to the unique needs of their workplace, keeping in mind that in State Plan states, further change may still be on the horizon. In all cases, employers should communicate clearly with their employees about any change in their policies and practices and assure employees that they will continue to monitor all circumstances and make additional changes as necessary. Additionally, employers who choose to maintain workplace vaccination policies must still follow other applicable laws, such as Title VII and the Americans with Disabilities Act, and be cognizant of the requirements in the various states mentioned above.

Kristina Brooks also contributed to this update.

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