

Supreme Court Nixes OSHA Vax, Upholds Health Worker Mandate

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On January 13, 2022, the United States Supreme Court blocked the OSHA ETS rule, which mandated private employers with at least 100 employees require their employees to be fully vaccinated or submit to a weekly COVID test and wear face masks. Six of the Court's nine justices held that the ETS constituted an attempt by OSHA to regulate general matters of public health, as opposed to occupational hazards, and therefore overstepped its authority. As such, OSHA is precluded from further implementing or enforcing the ETS while legal challenges continue in lower federal courts.

Given the Supreme Court's decision, employers are no longer required to track vaccination status, require masks and social distancing, or test employees. Employers may voluntarily comply with the OSHA ETS, but certainly are no longer required and will not face any penalties for noncompliance. Employers may reassess its workforce in light of this ruling and determine if any self-imposed vaccination or testing rules are necessary. For those wanting to implement or maintain a self-imposed vaccination and/or testing policy, we included a few refreshers below.

Implementing or Maintaining a Vaccination Policy Despite this Ruling? Below are a few helpful reminders:

- The EEOC has indirectly confirmed that a mandatory vaccination policy (subject to disability and religious exemptions) is lawful.
- If an employee cannot get vaccinated for COVID-19 because of a disability or a sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace.
- Can employers make COVID-19 vaccination a condition of employment (pre-hire/post-offer)? Generally, yes—if subject to same reasonable accommodation obligations under ADA and Title VII.
- Pre-screening vaccination questions (asked of everyone) may implicate ADA's provisions regarding disability-related inquiries.

- The EEOC says certain exemptions must be provided:
 - Accommodations for employees with disabilities that prohibit them from getting vaccinated.
 - Sincerely-held religious beliefs must be accommodated.
 - No exceptions for secular or medical beliefs about vaccines.
- What if employee requests exemption due to disability?
 - Request documentation from the employee's medical provider to confirm nature of specific disability and need for accommodation.
 - Engage in Interactive Process: Work with employee to find reasonable accommodation absent undue hardship.
 - Accommodations may include telework, change of work location, transfer to a different position (even at different pay rate).
- Per the EEOC, exemption must be granted to employees who have sincerely held religious practice, belief, or observance.
- Because the vaccine can have side effects, employers should consider staggering their staff's vaccinations if they are concerned about staffing issues. Wisconsin's Department of Health Services has an excellent website (www.dhs.wisconsin.gov/covid-19) where employers and employees can go for information.
- Could employers be liable if they mandate or encourage their employees to get the vaccine and someone has an allergic or other adverse reaction? In that event, the employer's liability would most likely be limited to a workers' compensation claim. The biggest myth is the concern that an employer can get sued if they mandate the vaccine and something goes wrong. It is pretty well established that workers compensation would be the exclusive remedy for employees.

The U.S. Supreme Court allowed a separate rule to take effect requiring vaccination shots for workers in nursing homes, hospitals and other facilities that receive Medicare and Medicaid payments from the federal government. Click [here](#) to read our update on this matter.

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