



COVID-19 Update

January 2022

U.S. Supreme Court Stays OSHA ETS; Health Care Worker Mandate Moves Forward

In two opinions announced on January 13 the U.S. Supreme Court decided to stay the Occupational Health and Safety Administration's [COVID-19 Vaccination and Testing Emergency Temporary Standard](#) ("OSHA ETS") but denied applications to stay a separate vaccination requirement issued by the Centers for Medicare & Medicaid Services ("CMS ETS").

Likely End of OSHA ETS

The OSHA ETS has had a tumultuous history since President Biden first announced on September 9, 2021 that he planned to require employers with 100 or more employees to mandate vaccinations or weekly testing of all employees. Two months later, the Secretary of Labor issued the OSHA ETS, which, consistent with President Biden's pronouncement, applied to all employers with 100 or more employees and required vaccination against COVID-19 or weekly testing of unvaccinated employees, with limited exceptions.

Almost immediately, state attorneys general and private businesses and interest groups challenged the OSHA ETS, with at least one suit challenging the rule being filed in each U.S. Circuit Court of Appeals. Those cases were consolidated before the 6th Circuit Court of Appeals in accordance with federal law governing multidistrict litigation and the review of agency regulations. Before consolidation, however, the 5th Circuit stayed the rule pending further judicial review, holding that the OSHA ETS likely exceeded OSHA's statutory authority, raised separation-of-powers concerns, and was not properly tailored to the risks facing different types of workers and workplaces. Following consolidation and a request by

OSHA, the [6th Circuit dissolved the stay](#). The petitioners then filed an application with the U.S. Supreme Court requesting that the stay be reimposed, and the Court consolidated two of those petitions – one from the National Federation of Independent Businesses and another from a coalition of several states – and held oral arguments on January 7.

Less than a week later, in a 6-3 *per curiam* opinion issued by the Court's conservative majority and Chief Justice John Roberts, the Court granted the petitioners' request for a stay, largely agreeing with the 5th Circuit in doing so. Specifically, the Supreme Court reasoned that OSHA was responsible for regulating "*occupational hazards*" (emphasis in original) and that COVID-19, which can be transmitted anywhere, was not a hazard unique to an office or job site. The Court analogized COVID-19 in this vein to "crime, air pollution, or any number of communicable diseases," and stated that 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." If OSHA wants to exercise its authority to protect against COVID-19 spread in the workplace, the Court stated, it needs to do so through targeted regulations focused on the particular features of specific jobs or workplaces, not a nationwide vaccine-or-testing requirement that would apply to approximately 84 million American workers. The Supreme Court found that OSHA's mandate was of the character of a public health measure and therefore exceeded its statutory authority.

The Court concluded its opinion by ordering that the stay remain in place until the later of (a) the expiration of the

deadline to file petitions for writs of certiorari following final disposition by the 6th Circuit; (b) the denial of such petitions for cert; or (c) final disposition by the Supreme Court if a petition for cert is granted. In other words, the OSHA ETS is stayed until the Supreme Court issues a final ruling on the matter. Given the reasoning provided by the Court's majority in this opinion, however, it likely spells the end of the OSHA ETS.

OSHA's Response

On January 13 Secretary of Labor Marty Walsh responded to the decision by stating that OSHA stands by its ETS and urges all employers to voluntarily comply and require workers to get vaccinated or tested weekly for COVID-19, reminding employers that they are responsible for their workers' safety on the job. Walsh reminded employers that OSHA has comprehensive COVID-19 guidance to help them uphold their legal obligations, and that regardless of the ultimate outcome of the legal proceedings involving its ETS, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers from COVID-19, including enforcing its regulations existing prior to the OSHA ETS originally going into effect in November 2021. This includes the OSHA standards that relate to personal protective equipment (29 CFR Part 1910, Subpart I (e.g., 1910.132 and 133)), respiratory protection (29 CFR 1910.134), sanitation (29 CFR 1910.141), protection from bloodborne pathogens (29 CFR 1910.1030), requirements for employee access to medical and exposure records (29 CFR 1910.1020), and OSHA's General Duty Clause (29 USC 654). Employers should continue to have COVID-19 policies in place intended to ensure employees' safety and health, which should consider whether employees are vaccinated or not as part of appropriate safety protocols.

CMS ETS Takes Effect

In its second opinion, the Supreme Court reached a different conclusion regarding the CMS ETS and allowed the vaccination mandate (with no testing option) to go into effect for certain health care facilities that participate in the Medicare and Medicaid programs. The CMS ETS had previously been enjoined by separate orders from the U.S. District Courts for the Western District of Louisiana and the

Eastern District of Missouri. Those injunctions had also been upheld by both the 5th and 8th Circuit Courts of Appeals.

The Supreme Court, however, disagreed with the lower courts and lifted the injunctions in a 5-4 *per curiam* opinion, with the Court's three liberal justices being joined by Chief Justice Roberts and Justice Kavanaugh. The Court agreed with the government's argument that the CMS ETS falls squarely within CMS's statutory authority granted by Congress to impose conditions on the receipt of Medicare and Medicaid funds that are "necessary in the interest of the health and safety of individuals who are furnished services" by health care facilities. The majority reasoned that imposing requirements to ensure that health care providers take steps to avoid transmitting a dangerous virus like COVID-19 "is consistent with the fundamental principle of the medical profession: first, do no harm." The Court also observed that CMS has always required health care facilities to "satisfy a host of conditions that address the safe and effective provision of healthcare" and has routinely imposed specific requirements on health care workers in the interest of protecting patient health and safety. Also, the Secretary of Health and Human Services has historically established long lists of detailed conditions with which facilities must comply to be eligible to receive Medicare and Medicaid funds.

The Court further noted that vaccination requirements like the CMS ETS are, in fact, a "common feature" of providing health care in the United States, where state laws routinely require health care workers to be vaccinated for diseases like hepatitis B, influenza, and measles, mumps and rubella. The Court accepted CMS's explanation that these preexisting state requirements "are a major reason the agency has not previously adopted vaccine mandates as a condition of participation." For all of these reasons, the Court concluded that the CMS ETS falls within CMS's statutory authority and health care facilities must therefore ensure that employees be fully vaccinated against COVID-19 in order to receive Medicare and Medicaid funds.

The Court concluded its opinion by rejecting the remaining arguments that the CMS ETS is "arbitrary and capricious," that CMS lacked good cause to delay the normal "notice and comment" period for proposed rules, and that CMS failed to properly consult with relevant state agencies

before issuing the CMS ETS. Similar to its OSHA ETS opinion, the Court ordered that the lower court injunctions of the CMS ETS be stayed until the later of (a) the expiration of the deadline to file petitions for writs of certiorari following final dispositions by the 5th and 8th Circuits; (b) the denial of such petitions; or (c) final disposition by the Supreme Court if a petition is granted. Based on this ruling, the CMS ETS remains in effect until the Supreme Court issues a final ruling on any legal challenges to the ETS.

Considerations for the Unionized Workplace

If an employer with a union who was covered by the OSHA ETS chooses to implement a vaccination mandate or a vaccinate-or-test mandate and has not yet bargained over the issue, the employer will likely be obligated to bargain over the decision to implement that mandate. By contrast, employers covered by the CMS ETS will likely be required to bargain only over the effects of the mandate.

Current Landscape for Government Contractors

As a reminder for government contractors, on December 7, 2021, [a federal judge issued a nationwide preliminary injunction](#) halting enforcement of the federal contractor and subcontractor vaccination mandate requirement issued by the Safer Federal Workforce Task Force in response to President Biden's Executive Order 14042, "Ensuring Adequate COVID Safety Protocols for Federal Contractors," which required covered contractor employees to be fully vaccinated by January 18. This ruling was upheld by the 11th Circuit Court of Appeals. As a result, at this time, covered contractors in any U.S. state or territory are no longer mandated to require their covered workers to be vaccinated. Other OSHA standards still apply.

State Law Complications

Employers who have already implemented vaccination or masking requirements in states that have passed laws or issued regulations or executive orders that limit an employer's discretion in these areas should review the current state requirements now that those employers cannot rely on OSHA's ETS as a governing and preemptive requirement that would trump a conflicting state law provision.

FOR MORE INFORMATION

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Additional Resources

We have assembled a firmwide multidisciplinary task force to address clients' business and legal concerns and needs related to the COVID-19 pandemic. Please see our [COVID-19 Task Force](#) page for additional information and resources.

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