



Alerts

SCOTUS Reimposes National Stay on Enforcement of OSHA's COVID-19 ETS

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Insights for Employers

On January 13, 2021, the U.S. Supreme Court (the court), *in a per curiam decision*, stayed enforcement of the COVID-19 Vaccination and Testing Emergency Temporary Standard (the ETS) by the Occupational Safety and Health Administration (OSHA). The Sixth Circuit Court of Appeals now will determine the merits of the challenges to the ETS. The ETS, which would affect roughly 84 million workers, *generally mandated* that employers with at least 100 employees require their employees to be fully vaccinated or submit to weekly testing and masking in the workplace.

Foundationally, emergency temporary standards are exceptions to the ordinary notice-and-comment procedures required for OSHA to promulgate an occupational safety and health standard. The court noted that emergency temporary standards are permissible only in the narrowest of circumstances, with the Secretary of Labor (the Secretary) required to show: (1) "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and (2) that the "emergency standard is necessary to protect employees from such danger."

OSHA is an agency created by statute and thus only possesses the authority provided by Congress, which is expected "to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." The court noted it would be difficult to dispute the broad economic and societal impact of the ETS. The court found the Occupational Safety and Health Act (the Act) did not authorize the Secretary's promulgation of the ETS and reasoned that the Act empowers the Secretary only to set *workplace* safety standards, not broad public health measures. The court held that although COVID-19 is a universal risk occurring in many workplaces, similar to crime or other communicable diseases, it is not an occupational hazard in most workplaces. The court reasoned that permitting OSHA to regulate the hazards of daily life—merely because most Americans have jobs and face the same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.

The court left the door open for OSHA to regulate occupation-specific risks where COVID-19 poses a special danger because of the particular features of an employee's job or workplace. OSHA's current approach, the court reasoned, failed to account for the crucial distinction between occupational risk and risk more generally.

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In light of the above, the court ruled that the challenges to the ETS are likely to succeed on the merits of their argument that the Secretary, acting through OSHA, lacked the authority to impose the ETS. The court thus reinstated the stay. As a result of the decision, OSHA cannot enforce the ETS unless and until there is a final ruling that OSHA indeed possessed the requisite authority to impose the ETS. Despite the stay on the ETS, private employers still may implement vaccine mandates and/or testing requirements, should they determine it is appropriate in their situation.

The decision raises interesting questions regarding the enforceability of state and local laws and ordinances which may have been contrary to the requirements of the ETS. The ETS itself has not been struck down; rather, only enforcement has been stayed. Employers should consult with their Hinshaw attorneys in assessing the impact of the decision on the state and local regulation.