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U.S. Supreme Court Stays OSHA Vaccine/Testing Mandate for Employers with 100 or More Employees

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On January 13, 2022, the U.S. Supreme Court, in a *per curiam* opinion, stayed OSHA's Emergency Temporary Standard ("ETS") mandating that employers with 100 or more employees require all employees to be fully vaccinated against COVID-19 or to wear face coverings and undergo weekly testing. Our summary of the ETS's requirements is available here.

As we previously reported here, the ETS was initially stayed by the U.S. Court of Appeals for the Fifth Circuit. Challenges to the ETS were then consolidated before the U.S. Court of Appeals for the Sixth Circuit, and on December 17, 2021, a three-judge panel of the Sixth Circuit issued an order dissolving the Fifth Circuit's stay. Multiple petitioners quickly filed emergency applications with the Supreme Court asking for the stay to be reinstated.

The Supreme Court held oral arguments on January 7, 2022. Six days later, the Court stayed the ETS. Justice Gorsuch issued a concurring opinion, joined by Justices Thomas and Alito. Justices Breyer, Sotomayor, and Kagan issued a joint dissenting opinion.

The *per curiam* opinion held that the stay was appropriate because petitioners were likely to succeed on the merits of their claim that the Secretary of Labor lacked authority to impose the mandate. In support of this holding, the majority addressed several arguments that had been raised in support of the ETS by the Federal Government, including:

- Holding that OSHA did not have the authority to issue the ETS because Congress did not plainly authorize the agency to implement a national vaccine-or-test mandate when it enacted the OSH Act. The Court emphasized that the OSH Act only provides OSHA the authority to enact occupational safety standards as opposed to general public-health measures such as a national vaccine-or-test mandate.

- Holding that the risk of contracting COVID-19 at the workplace is not a "work-related danger" for most workplaces. The Court clarified that a "work-related danger" cannot be a universal risk that employees face in their ordinary day-to-day activities outside of work.
- Rejecting the dissent's assertion that the ETS is comparable to a fire or sanitation regulation. The Court emphasized that unlike such regulations, vaccination "cannot be undone at the end of the workday."
- Holding that OSHA may have the authority to regulate workplaces where COVID-19 poses a special danger due to the "particular features of an employee's job or workplace." The Court provided examples such as researchers who work with the COVID-19 virus or more generally workspaces that have crowed or cramped environments.
- Rejecting the Government's argument that the equities favor delaying the stay. The Court explained that it does not have the responsibility to decide whether the harms of staying the ETS outweighs the potential harm caused by the continued spread of COVID-19. The Court explained that the governmental bodies chosen by the people must decide those tradeoffs.

Justice Gorsuch wrote a concurrence, joined by Justices Thomas and Alito, in which he argued that the central question the Court faced is which entity should decide effective public-health policy for the country. He noted that the states and local authorities have historically held broad general powers to address issues of public health. By contrast, the Federal Government must invoke specific constitutional authority before regulating public-health matters. To that end, the concurrence argued that a federal agency making a decision of "vast economic and political significance" on issues of public health such as the ETS must have a clear delegation of authority from Congress, which OSHA did not.

Justices Breyer, Sotomayor, and Kagan issued a joint dissenting opinion, arguing that OSHA acted properly when it issued the ETS in response to the "grave danger" COVID-19 posed to workers around the country. The dissenting Justices argued that the ETS fits the statutory language of the OSH Act perfectly because the ETS addresses a "new hazard" as well as a "physically harmful agent" that poses a "grave danger" to employees. The Justices cited the millions of Americans affected by COVID-19, including the current surge in cases around the country, as evidence of the "grave danger" posed by the virus.

In a separate *per curiam* opinion, the Supreme Court denied several states' applications to stay a vaccine mandate for health-care workers issued by the Centers for Medicare and Medicaid Services ("CMS"). The CMS vaccine mandate requires Medicare and Medicaid providers to establish policies for the vaccination of all eligible staff. Therefore, employers who are Medicare- and Medicaid-certified providers and suppliers must comply with the vaccination requirements for their particular business under the CMS vaccine mandate in order to continue participating in the Medicare and Medicaid programs.

We will continue to monitor and report on further developments regarding the ETS and the litigation regarding its implementation.

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