

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

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Supreme Court Blocks Enforcement of OSHA's Vax-or-Test Rule; What Now?

The wait is over. On Jan. 13, 2022, the United States Supreme Court issued a decision to stay the Occupational Health and Safety Administration's (OSHA) vaccination or test emergency temporary standard (ETS), effectively blocking the enforcement of the ETS for the foreseeable future.

The Supreme Court's Decision

On Friday, January 7, the Supreme Court heard oral arguments regarding the ETS at a special session of the Court. In its Jan. 13 *per curiam* decision, the Court majority reasoned that the ETS is "strikingly unlike the workplace regulations that OSHA has typically imposed," and that "imposing such a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not 'part of what the agency was built for.'" Essentially, the Court applied the Major Questions doctrine to conclude that although Congress has indisputably given OSHA the power to regulate occupational dangers, it "has not given that agency the power to regulate public health more broadly." In Justice Gorsuch's concurring opinion, joined by Justices Thomas and Alito, he clarified that such power "rests with Congress and the States, not OSHA."

What Does This Mean?

The ETS' first compliance deadline was Jan. 10, 2022, and required employers to prepare and implement a COVID-19 vaccination or weekly testing policy; determine vaccination status of all of its employees by obtaining acceptable proof of vaccination; maintain a roster of each employee's vaccination status; ensure that unvaccinated employees wear face coverings; provide paid time off for vaccination and for vaccination side effects; require employees to provide prompt notice of a positive COVID-19 test or COVID-19 diagnosis and remove these employees from the workplace until they can return to work. The Court's decision freezes the requirement for employers to implement the ETS in their workplace, pending further review by the U.S. Court of Appeals for the Sixth Circuit. It also halts OSHA's enforcement of the ETS.

Though the ETS was only temporarily stayed, pending review in the lower courts, the Supreme Court's decision has dealt a serious blow to the ETS' ultimate fate. The Sixth Circuit will now substantively consider the validity of OSHA's ETS. Notably, the ETS is a temporary standard which is set to expire in May 2022. The Supreme Court's decision indicates that even if the Sixth Circuit decides to allow the ETS' implementation prior to May 2022, the Court will likely not uphold the ETS, as written, if it ever makes its way back up to the Supreme Court for a final review. Practically, this means that employers will not be subject to the ETS' requirements any time soon.

What Now?

In a news release on the U.S. Department of Labor's website, Secretary of Labor Marty Walsh, reminded employers that they are responsible for the safety of their workers on the job, and pointed employers to [OSHA's COVID-19 Guidance](#) to assist with upholding these obligations. Secretary Walsh stated that OSHA will do "everything within its existing authority to hold businesses accountable for protecting workers." OSHA is also working on a permanent rule that addresses the workplace and COVID-19, and in the future it may publish a regulation that imposes limited or different requirements to the ETS.

Employers must also keep in mind that state and local governments may have their own vaccination, testing, paid COVID-19 leave, and quarantine and/or isolation requirements. These requirements are not impacted by the Supreme Court's decision and employers must still ensure compliance with safety practices and other requirements stipulated by these laws, as applicable.

Regardless of the Court's decision, employers must ensure that they clearly communicate their company's policies and procedures with their employees.

If you have any questions or need Bond's help, please contact [Michael D. Billok](#), [Nihla F. Sikkander](#), any attorney in Bond's [Labor and Employment practice](#) or the Bond attorney with whom you are regularly in contact.

