

Client Alert: Supreme Court Stays OSHA's Vaccine-or-Test Rule

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On January 13, 2022, a divided Supreme Court stayed OSHA's vaccine-or-test emergency temporary standard (ETS). *Nat'l Federation of Independent Business v. Dep't of Labor, OSHA*, 595 U.S. ____ (2022). The matter came before the Court on a request for emergency relief after the Sixth Circuit granted an emergency motion by OSHA to dissolve a stay of the ETS previously issued by the Fifth Circuit.

Focusing on the statutory authority provided under the Occupational Safety and Health Act (the Act), the majority held that the Act does not authorize a rule as broad as the OSHA ETS. The per curiam (unsigned) majority opinion found that, particularly given the "significant encroachment into the lives—and health—of a vast number of employees," Congress had to clearly authorize OSHA's "exercise [of] powers of vast economic and political significance." Opinion at 5-6. The majority held that the Act does not authorize the ETS because it goes beyond OSHA's authority to issue only "occupational safety and health standards." Opinion at 6 (emphasis supplied). The Court found that although COVID-19 risk occurs in many workplaces, it is a "universal risk...no different from the day-to-day dangers that all face." *Id.* at 6-7. "Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs...—would significantly expand OSHA's regulatory authority without clear congressional authorization." *Id.* at 7. The Court determined that OSHA exceeded this authority by imposing an indiscriminate and overly broad regulation of public health, an area that "falls outside of OSHA's sphere of expertise." *Id.* The Court also focused on the unique nature of vaccination: "A vaccination, after all, 'cannot be undone at the end of the workday.'" *Id.* at 7.

Importantly, the majority described the ETS as a "blunt instrument" that "draws no distinctions based on industry or risk of exposure to COVID-19," *id.* at 3, and it clarified that its ruling does not mean OSHA lacks authority to regulate *occupation-specific* risks related to COVID-19: "Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible." The majority expressed "[no] doubt, for example, that OSHA could regulate researchers who work with the COVID-19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments." *Id.* at 7.

Concurring in the judgment, Justice Gorsuch (joined by Justices Thomas and Alito) emphasized that compared to the states, the federal government has limited powers and that under the “major questions doctrine” Congress must provide clear authorization before OSHA can issue sweeping regulations impacting hundreds of millions of Americans. Concurrence at 3. Moreover, under the “nondelegation doctrine,” Congress cannot “hand off all its legislative powers to unelected agency officials.” *Id.* at 5. The concurrence found that if the statutory language on which OSHA relied “really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority.” *Id.* at 6. According to the concurrence, the power to respond to the pandemic “rests with the States and Congress, not OSHA.” *Id.* at 7

Writing together, Justices Breyer, Sotomayor, and Kagan dissented. They argued that nothing in the Act supported the majority’s limitation on OSHA’s regulatory authority and that the Act does not require that employees are exposed to regulated dangers “only while on the workplace clock.” Dissent at 7.

As noted above, this decision was issued on an emergency basis, seeking relief from a Court of Appeals decision that itself was issued on an emergency basis. Thus, this ruling is technically a temporary stay pending the final disposition of the consolidated case before the Sixth Circuit (and any subsequent petition to the Supreme Court). But the writing is on the wall for the OSHA ETS: even if OSHA prevails on the merits at the Sixth Circuit, challengers will petition Supreme Court review. Indeed, the emergency stay expressly applies until the Supreme Court has the opportunity to weigh in on any contrary final Sixth Circuit decision. Opinion at 9.

The OSHA ETS ruling also provides important indications for how the Court might rule on the federal contractor COVID-19 mandate which has been stayed by various district courts. Specifically, challengers to that mandate will be emboldened by the Court’s requirement that COVID-19 vaccine mandates be authorized by specific statutory language. The challengers to the contractor mandate have argued that the authorizing statute—the Federal Property and Administrative Services Act—does not provide the necessary authority. Similarly, the Supreme Court’s focus on the nature of vaccination as a medical procedure that “cannot be undone” may find even greater purchase in the context of the contractor COVID-19 mandate, which does not provide a testing option such as that available under the OSHA ETS.

On the other hand, the federal government may be encouraged by the Supreme Court’s decision—on the same day it struck down the OSHA ETS—to uphold the vaccine mandate issued by Centers for Medicare & Medicaid Services (CMS). *Biden v. Missouri*, 595 U.S. __ (2022). The CMS mandate generally provides that employees of all facilities receiving Medicare or Medicaid funding must be fully vaccinated. The Court held that the CMS vaccination mandate “fits neatly within the language of the statute” authorizing the Secretary of Health and Human Services “to impose conditions on the receipt of Medicaid and Medicare funds that ‘the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.’” CMS Opinion at 5.

So where does this leave government contractors? First, the OSHA ruling resolves the question of whether the OSHA ETS could apply to contractors while the contractor mandate is preliminarily enjoined or if it is permanently struck down. The answer is no. Second, these rulings shift attention back to the lower courts in which the contractor COVID-19 mandate is being litigated. The nationwide preliminary injunction issued by a district court in the Southern District of Georgia remains in effect and is currently on appeal in the Eleventh Circuit. Most recently, the Eleventh Circuit denied the government's motion for emergency stay of the injunction. The more limited injunctions issued by district courts in Kentucky, Florida, and Missouri are in various stages of litigation or appeal. (Following the Supreme Court decisions, the Biden Administration has appealed the Eastern District of Missouri injunction.) Given the signals from the Supreme Court on similar issues regarding the OSHA ETS, discussed above, the government may reevaluate its litigation strategy or even adjust its regulatory direction. When appealed, the federal government will strenuously argue that the federal contractor mandate is clearly authorized under existing federal law and regulations, as was the CMS vaccine mandate.

The bottom line is that both the OSHA ETS and contractor mandates are currently stayed. While attention shifts back to the lower courts, the Supreme Court's decisions indicate that those mandates face difficult odds of ever coming into force.

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