

Supreme Court Rescues Large Employers from the OSHA ETS Vaccine Mandate

By [Alicia J. Samolis](#) and [Michael A. Gamboli](#)

Employers with 100 or more employees can breathe a sigh of relief as the United States Supreme Court has come to the rescue and blocked the Emergency Temporary Standard (ETS) put in place by OSHA.

How Did We Get Here?

On November 5, 2021, OSHA published the ETS, requiring that all employers with 100 or more employees under OSHA jurisdiction either require employees to be vaccinated or, alternatively, to wear a mask and produce proof of a negative COVID-19 test on a weekly basis. The ETS was initially blocked from taking effect by a Fifth Circuit court decision. With over a dozen legal challenges in play, the federal Multidistrict Litigation Panel consolidated all of the challenges and the Sixth Circuit court was assigned the task of deciding the matter. On December 17, 2021, the Sixth Circuit effectively reversed the Fifth Circuit's prior decision, lifting the stay and putting the ETS back in effect. Most requirements of the ETS, such as having a written and disseminated policy and a roster setting forth the vaccination status of all employees, required compliance by January 10, 2022, while the requirement to show proof of vaccination or a weekly negative test was set to go into effect on February 9, 2022. The Sixth Circuit decision was appealed on an emergency basis and placed in the lap of the Supreme Court.

SCOTUS Lays Down the Law

The Supreme Court issued its decision on January 13, 2022, blocking the ETS once again. The basis of the Court's decision was essentially that the ETS exceeded OSHA's authority. The Court disagreed with OSHA's view that COVID-19 is an occupational hazard in most workplaces, and therefore subject to OSHA authority, instead likening COVID-19 to a "day-to-day danger" similar to "crime, air pollution, or any number of communicable diseases." According to the Court, because the ETS attempts to address a public health measure, and not set forth an occupational safety and health standard, OSHA exceeded its authority. Stated quite bluntly by the Court: *"This is no everyday exercise of federal power. [...] 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. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category."*

Where Does This Leave Us?

In effect, the Supreme Court has reinstated the preliminary injunction or stay that prohibits OSHA from enforcing the ETS. As the name implies, the injunction is a preliminary decision, and not a final decision on the merits as to whether the ETS is valid. The case now moves back to the Sixth Circuit, which technically could still move forward and issue a final decision on the merits that the ETS is valid. That course of action would appear to be unlikely as it would immediately be appealed back to the Supreme Court, which offered its opinion of the ETS in no uncertain terms, referring to the ETS as a *"blunt instrument [that] draws no distinctions based on industry or risk of exposure to COVID-19....[requiring] lifeguards and linemen face the same regulations as do medics and meatpackers"* and further describing the ETS as a *"significant encroachment into the lives—and health—of a vast number of employees."* While the Supreme Court's view seems clear today, it was a 6 to 3 decision, and should the composition of the Court change in the near future or the politics surrounding COVID change due to some new and severe strain of the virus or change in the understanding of the relevant science, a different outcome is not out of the question.

It is also of note that the ETS was always designed as a temporary measure and to be in place for six months

while comments were elicited, at which point it would be replaced by a permanent standard. That still could happen if for some reason OSHA wants to continue to fight the fight.

Healthcare Mandate Upheld

In a separate decision also issued on January 13, 2022, the Supreme Court upheld the requirement that healthcare workers be vaccinated to work at medical facilities receiving Medicare and Medicaid funding. The requirement does not have a daily or weekly testing option for unvaccinated workers, but does permit exemptions for individuals who cannot be vaccinated against COVID-19 for religious and disability-related reasons. The Court held that the Department of Health and Human Services (DHHS) has the authority to issue such a mandate because federal law allows DHHS to impose conditions on federal Medicaid and Medicare funds.

What Are Large Employers To Do Now?

This is a win for most large employers, many of which were facing the prospect of spending large amounts of money and time in order to comply with the ETS while also facing the prospect of losing employees unwilling to comply with the ETS and who are likely able to secure alternative employment with smaller employers given the unusually tight labor market.

Employers should continue to collect proof of vaccination from employees and maintain the roster of employee vaccination status that was part of the ETS (and which may be required by various state laws). Employers should revise or rescind their ETS compliant policy (assuming it was put in place earlier this week) as desired but continue to comply with existing state and local requirements. The ETS compliant policy should be retained internally just in case the ETS is somehow revived and the policy becomes necessary at some later date. Employers should also consider implementing testing and exclusion policies surrounding exposure and positive tests even if not required under state rules, as an outbreak in a short-staffed work place could have serious impacts on the ability of businesses to function.

While most large employers will applaud the decision, there are likely some employers that were hoping the ETS would remain in place to provide the ETS mandates without the employer having to take the "blame" for voluntarily requiring the mandates. Those employers can continue to explore incentives, surcharges or other ways of increasing vaccination rates after consulting with counsel to ensure the programs are legal.

Next Steps

The Supreme Court decision does not mean employers can forget about vaccination, testing and exclusion from work policies. For example, in office settings in Rhode Island, employers can only avoid a mandatory mask policy if the employer obtains proof of vaccination. In Boston, most employers open to the public have to require vaccination of their employees and customers. Further, federal and state agencies and lawmakers who were waiting to see what happened with the ETS may now decide to implement new vaccine, testing and exclusion mandates. We will provide updates and guidance as these issues continue to evolve.

The [Employment & Labor Practice Group](#) at Partridge Snow & Hahn is available to answer questions about COVID-19 in the workplace.

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