

**ALERT**

# Supreme Court Blocks OSHA Vax-or-Test ETS

January 14, 2022

**What:** On January 13, 2022, the U.S. Supreme Court blocked the Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS), which required businesses with at least 100 employees to ensure their workers were vaccinated against COVID-19 or undergo weekly COVID-19 testing.

The Court's decision criticized the ETS as a "blunt instrument" that "draws no distinctions based on industry or risk of exposure to COVID-19" and further described the ETS as a "significant encroachment into the lives—and health—of a vast number of employees." The 6-3 majority concluded that the ETS exceeded OSHA's authority to regulate occupational dangers under the Occupational Health and Safety Act (OSH Act) because "[r]equiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees" constituted an effort to regulate public health outside of the workplace. Accordingly, the Court determined that it was appropriate to stay the ETS pending the outcome of the ETS litigation in the Sixth Circuit Court of Appeals.

Justices Breyer, Kagan, and Sotomayor co-signed a dissenting opinion that chastised the majority, arguing that COVID-19 is a grave danger, that vaccination policies are necessary to address it, and that the majority's focus on whether OSHA had the power to address a disease outside the workplace placed a limit on OSHA's authority that could not be found in the OSH Act.

The Court's decision allowed a separate rule requiring vaccinations for workers in nursing homes, hospitals, and other facilities that receive Medicare and Medicaid payments from the federal government to remain in effect.

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**Impact on Industry:** The Court's ruling on the OSHA ETS limits the Biden Administration's options for increasing the country's vaccination rate as COVID-19 cases continue to spike, especially given the nationwide stay already in effect blocking enforcement of Executive Order 14042's federal contractor vaccine mandate pending the outcomes of litigation.

Employers that would have been covered by the ETS may now discontinue their efforts to comply without fear of penalties from OSHA pending the Sixth Circuit Court of Appeals' ruling on the enforceability of the ETS. It is important to note, though, that OSHA has stated in the past that it would "vigorously enforce" the General Duty Clause of the OSH Act concerning COVID-19 even in the absence of promulgated standards like the ETS. The General Duty Clause requires employers to maintain a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm to their employees.

Notably, the Supreme Court's decision does not limit employers' ability to institute or continue their own vaccination or testing policies or to implement other health and safety policies so long as those policies do not violate state law or other legal requirements. Accordingly, employers should continue to evaluate how they can best address the spread of COVID-19 in their workplaces.

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