

## Employment & Labor Law Alert

January 2022

# Supreme Court Stays OSHA COVID-19 Vaccine Mandate; State and Local Rules May Still Apply

### Executive Summary

**Updated Jan. 26:** The Occupational Safety and Health Administration formally withdrew the vaccination and testing emergency temporary standard, effective Jan. 26. In a statement issued Jan. 25, the agency noted that it is not withdrawing the ETS as a proposed rule, which remains subject to the formal rulemaking process, and “is prioritizing its resources to focus on finalizing a permanent COVID-19 Healthcare Standard.”

The U.S. Supreme Court’s recent ruling staying (once again) the Biden administration’s vaccine mandate for larger private-sector employers most likely means the Occupational Safety and Health Administration (OSHA) [COVID-19 Vaccination and Testing emergency temporary standard \(ETS\)](#) will likely never take effect—or at least not in its current form.

The OSHA ETS imposed significant vaccine and testing responsibilities on employers with 100 or more employees—roughly two-thirds of all private-sector employers. (Read our alert on the mandate [here](#).)

In the Jan. 13 per curiam opinion, six of the nine justices agreed that the petitioners opposing the OSHA ETS—states, business groups and religious organizations—are likely to succeed on the merits of their claim that OSHA exceeded its authority when it issued the ETS. The majority agreed with an earlier Fifth Circuit ruling staying enforcement of the ETS and rejected an alternative view taken by the Sixth Circuit that subsequently lifted the stay and found that OSHA was justified in issuing the ETS in light of the pandemic emergency.



In a companion decision issued on the same day, however, a 5-4 majority of the Court allowed the U.S. Centers for Medicare & Medicaid Services (CMS) COVID-19 vaccine mandate to take effect, agreeing with CMS that a COVID-19 vaccine mandate is necessary to protect patients because the virus is a highly contagious deadly disease, particularly for Medicare and Medicaid patients.

With the renewed stay of the private-sector mandate, covered employers are not obligated to comply with any of the ETS requirements, and OSHA cannot enforce the mandate in any way, at least so long as the stay remains in effect. Because the Supreme Court ruled only on the stay and did not fully address the merits, the consolidated cases now go back to the Sixth Circuit, where that court will determine whether to permanently enjoin the ETS from taking effect. But the thumb is already on the scales: The Supreme Court made it clear that it does not think the OSHA ETS was lawful.

The decision largely leaves the choice as to which policy on vaccinations, testing, both or neither to impose up to companies, subject to compliance with the patchwork of

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state and local regulations that may apply to them—some of which require specific protective measures against COVID-19 and some of which prohibit employers from imposing vaccine or mask mandates.

### Supreme Court: ‘Significant Encroachment’

In the per curiam opinion, the 6-3 majority found that the opponents of the ETS are likely to succeed on the merits of their claim that the U.S. Secretary of Labor, acting through OSHA, lacked authority to impose the employer mandates. The OSHA Act empowers the Labor Secretary to set workplace safety standards, not broad public health measures. The majority called the ETS vaccine and testing mandates “a significant encroachment into the lives—and health—of a vast number of employees.”

Allowing OSHA to regulate “the hazards of daily life” simply because most Americans have jobs and face the same risks while working would impermissibly expand OSHA’s regulatory authority, according to the majority. Further, a vaccine mandate is unlike any workplace regulations that OSHA typically imposes because a vaccination “cannot be undone at the end of the workday.”

Targeted OSHA regulations would be appropriate, however, when COVID-19 poses a special risk to employees, such as researchers who work with the COVID-19 virus and employees working in particularly crowded environments, the majority noted.

Three justices—Justices Stephen G. Breyer, Sonia Sotomayor and Elena Kagan—dissented, arguing that the ETS falls within OSHA’s mission to protect employees from “new hazards” and “exposure to harmful agents.” The OSHA Act authorizes regulations to protect employees from workplace hazards and “[i]t does not matter whether those hazards also exist beyond the workplace walls.”

### Legal Challenges Going Forward

The ETS, which required covered employers to develop, implement and enforce a mandatory COVID-19 vaccination and testing policy, was intended in part to preempt state and local laws that ban or limit employers from requiring vaccination, wearing face coverings or testing for COVID-19.

Legal challenges were immediate: More than half the states, along with various business and religious groups,

filed suits to stop the ETS. On Nov. 6—one day after the ETS took effect—the Fifth Circuit (one of the most conservative courts in the country) put the brakes on the ETS implementation nationwide and subsequently issued a ruling identifying multiple reasons why the ETS should be permanently enjoined as unlawful.

To deal with the multiple lawsuits filed across jurisdictions, the U.S. Judicial Panel on Multidistrict Litigation used a lottery to determine that the Sixth Circuit would preside over all lawsuits related to the mandate. The Sixth Circuit panel reinstated the nationwide mandate in a 2-1 decision published Dec. 17, concluding that OSHA’s determination that the pandemic was an emergency justified issuing the ETS. The Sixth Circuit also pushed the ETS effective date back.

The Supreme Court’s decision returns the consolidated cases to the Sixth Circuit for review and expressly considers that the circuit court’s decision may end up back before the high court at some point.

### State and Local Mandates

Now that the ETS is again stayed, employers are not obligated to comply with any of its requirements. The Supreme Court’s decision does not, however, bar OSHA from issuing more targeted COVID-19 mandates against where, according to the majority’s decision, “the virus poses a special danger because of the particular features of an employee’s job or workplace.”

The Biden administration also urged employers to impose their own COVID-19 vaccination rules. “The Court has ruled that my administration cannot use the authority granted to it by Congress to require this measure, but that does not stop me from using my voice as President to advocate for employers to do the right thing to protect Americans’ health and economy,” President Joe Biden said in a statement. “I call on business leaders to immediately join those who have already stepped up — including one-third of Fortune 100 companies — and institute vaccination requirements to protect their workers, customers, and communities.”

Whether and to what extent employers can and will implement their own COVID-19 plans in the absence of a federal mandate is not clear cut, however. Employers must still comply with state and local COVID-19 laws and regulations, which are anything but uniform.

For example, New York City has implemented several regulations aimed at employers in response to the pandemic.

The city required all private-sector employees working in person to be fully vaccinated against COVID-19 by Dec. 27, the first measure of its kind in the nation. In August, the city implemented the Key to NYC program, which mandates COVID-19 vaccinations for employees and customers at indoor dining, fitness, entertainment and performance facilities.

The state of New York enacted the [New York Health and Essential Rights Act](#), known as the NY HERO Act, which took effect in June. The NY HERO Act directs private-sector employers to adopt model airborne infectious disease prevention standards or develop their own comprehensive airborne infectious disease exposure prevention plan.

Upon the New York State Department of Health's (NYSDOH) designation of COVID-19 as an airborne infectious disease under the NY HERO Act, [new legal responsibilities for employers were triggered](#). NYSDOH recently [extended the designation until Feb. 15](#).

In California, the California Division of Occupational Safety and Health (Cal/OSHA) Standards Board adopted the Cal/OSHA COVID-19 Prevention ETS. An updated ETS adopted by the board Dec. 16 [includes rules for fully vaccinated employees](#). The ETS applies to most California workers who are not already covered by the Aerosol Transmissible Diseases standard and is set to expire April 14, 2022.

On the flip side, however, are the state directives that prohibit businesses from requiring vaccines or verification of vaccination status. In the absence of federal regulations preempting these regulations, employers may be prevented from enacting their own COVID-19 mandates.

## Employer Outlook

While employers that were covered by the OSHA ETS are no longer required to implement its vaccine and testing mandates, certain employers must still comply with [OSHA's National Emphasis Program \(NEP\) to protect employees in high-hazard industries or work tasks from the risks of COVID-19](#). The NEP took effect July 7.

In accordance with the Supreme Court's ruling upholding the CMS COVID-19 vaccine mandate, 76,000 medical facilities must implement vaccination policies covering 10.4 million health care workers, according to a [statement by the CMS](#). Health care providers in the 24 states covered by the Court's decision now must establish procedures to ensure staff are vaccinated.

In addition, 22 states have OSHA-approved workplace safety and health programs that cover both private-sector and state and local government workers. Another six states have plans covering only state and local government workers (see the breakdown [here](#)). State OSHA programs may still issue their own vaccine and testing mandates, so it's important to stay up to date on what the programs require.

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