

Understanding the Supreme Court Opinion on the OSHA Private Employer Emergency Temporary Standard

On January 13th, in a 6-3 decision, the United States Supreme Court reinstated the stay of OSHA's COVID-19 Emergency Temporary Standard (ETS). Under the ETS, as of January 10th, all private employers with a total of 100 or more employees were required to create COVID-19 policies and procedures for their workforce (among other requirements), and as of February 9th, require employees entering the workplace to either provide proof of vaccination for COVID-19, or provide weekly negative COVID-19 test results. The Supreme Court's decision puts these requirements "on hold" for now.

- 1. What exactly did the Supreme Court ruling mean?** The Supreme Court issued a "stay" of the ETS. A stay means that OSHA cannot (for now) enforce the ETS - this applies to all parts of the ETS - vaccine mandates, testing requirements, data collection, and paid time off (among other components of the ETS). The stay will remain in place unless the case makes it way back to the the Supreme Court and it denies a request for review or grants a review and issues a judgment on the merits.
- 2. How did we get here and why do I care about how we got here?** There were significant legal challenges to the ETS on a variety of grounds (such as whether OSHA acted within its authority, whether the ETS was constitutional, and/or whether there was a "grave danger" to the United States workforce - among other arguments). Those legal challenges have not actually been addressed. Once all of the lawsuits were filed, the plaintiffs who filed the cases asked the court to "stay" the ETS (issue injunctive relief to halt enforcement) while the courts, parties, and attorneys hashed out the underlying legal issues. Plaintiffs asked for the stay of the ETS so that employers would not be faced with the burden of compliance while the case was litigated (among other reasons). **On January 13th the Supreme Court only ruled on whether the ETS should be "stayed" and it said yes - it should be stayed.**
- 3. What does it mean to private employers (not healthcare) with 100 or more employees?** For now, private employers do not have to comply with the requirements of the ETS - they do not have to track vaccine status, implement testing, or provide time off for vaccines or vaccine side effects (unless they want to on their own accord).

- 4. What about all the state and local laws?** Now that the ETS has once again been stayed, the state and local laws regarding vaccines are applicable. For example, in FL if an employer has (or plans to implement) a mandatory vaccine program it must follow the state law and include the additional exceptions required by the state law. Similarly, in TN, employers are prohibited from implementing a mandatory vaccine program. This means that while covered employers may breathe a federal sigh of relief, they must still pay attention to and comply with any state or local laws.
- 5. Why do I keep saying “for now” – what happens next?** When the Supreme Court issued its “stay” it also sent the case back to the Sixth Circuit to review the case on its merits (like the issues I listed in #2 above). The questions regarding the legitimacy and legality of the ETS must still be addressed and answered by the Sixth Circuit. However, the Supreme Court has made its position clear and, to be frank, basically set forth a road map for the Sixth Circuit to follow, stating for example:

The question, then, is whether the Act plainly authorizes the Secretary’s mandate. It does not. The Act empowers the Secretary to set workplace safety standards, not broad public health measures.

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Although COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most. COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA’s regulatory authority without clear congressional authorization.

Just because the ETS is stayed for now, employers should remain vigilant and pay attention to local and state regulatory activity which is not subject to the Supreme Court’s decision. Additionally, this decision does not prevent employers from adopting reasonable COVID-19 mitigation measures in order to keep their workplace safe. Employers should review their current policies and practices to ensure their safety practices are sufficient to address the current COVID-19 exposures in their workplace.

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