

**Alert | Health Emergency Preparedness Task Force:
Business Continuity Amid COVID-19**



January 2022

**Supreme Court Stays Enforcement of OSHA Emergency
Temporary Standard on Workplace COVID-19
Vaccination, Testing**

This GT Alert covers the following:

- The Supreme Court reached two decisions on emergency COVID-19 rulemaking.
- CMS may enforce its vaccine mandate applicable to certain health care entities in all 50 states.
- The OSHA ETS requiring vaccination or testing by large employers is stayed pending further litigation.

Supreme Court Releases Two Decisions on Emergency COVID-19 Rulemaking

On Jan. 13, 2022, the U.S. Supreme Court issued two significant decisions on emergency rulemaking pertaining to COVID-19 vaccination and testing. In one decision, *Biden v. Missouri*, the Court voted in a **5-to-4 decision** to uphold the Secretary of Health and Human Services' emergency rule mandating that certain health care providers receiving Medicare and Medicaid funding ensure their employees are vaccinated against COVID-19 infection. The decision allows the Centers for Medicare and Medicaid (CMS) to move forward with enforcement of the mandate in all 50 states, which, according to the latest **FAQs** from CMS, will begin Jan. 27, 2022.

The Court reached a different result with respect to the Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard known as "vax-or-test" which governs large employers (ETS). In a [6-to-3 decision](#), the Court stayed the requirement that employees of large employers (100+ employees) either receive a COVID-19 vaccination or submit to weekly COVID-19 testing and wear face coverings in the workplace. See *Nat'l Federation of Independent Business v. OSHA*. The majority held in per curiam opinion that the petitioners, a coalition of 26 different trade organizations, are likely to succeed on the merits of their claim that the Secretary of Labor exceeded its authority by imposing the ETS vaccine-or-test requirement.

The different outcomes in the decisions were based on the unique emergency rulemaking authority conferred by Congress on each federal agency. Between the nine Justices, most voted consistently between the two cases to either uphold the emergency rule or not. Two Justices, however – Justice Kavanaugh and Justice Roberts – voted to uphold the CMS mandate but stay enforcement of the OSHA ETS. See the [GT Alert on the CMS mandate](#), which includes an analysis of the legal authority of the Secretary of Health and Human Services. A summary of the Court's opinion on the OSHA ETS is below. The Court focused on whether COVID-19 constitutes a workplace hazard subject to broad, sweeping regulation by OSHA.

Supreme Court Stays Enforcement of the OSHA ETS

The Court based its opinion on the scope of OSHA's regulatory authority under the OSH Act. The Act allows the Secretary to impose emergency temporary standards to protect employees from grave danger in the workplace. The Court emphasized "[t]he Act empowers the Secretary to set **workplace** safety standards, not broad public health measures[,]” and there is no provision in the Act addressing public health on a general level. Per the Court, COVID-19 is not a workplace or occupational hazard in most cases, and “[p]ermitting 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.”

The Court equated the spread of COVID-19 to a “universal risk” present at home, in schools, at sporting events, and other places where people gather. The Court noted that although the OSH Act may permit OSHA to regulate workplaces where COVID-19 poses a heightened danger, such as in labs where COVID-19 is being studied or particularly crowded or cramped workplaces, Congress did not authorize OSHA to regulate in such a broad and sweeping fashion. Crucial to the Court's decision is that the ETS draws no distinction between workplace hazards and general public health hazards and applies broadly to all employers with 100 or more employees. Further, the Court found no legislative support for the ETS because OSHA has never issued an emergency standard addressing a hazard on such a broad level when there was no documented causal connection to the workplace.

As a final point, the Court discussed whether equity weighs for or against relief for the petitioners. The Court stated that enforcement of the ETS would result in billions of dollars in compliance costs for employers and the loss of hundreds of thousands of jobs. Alternatively, OSHA claimed its ETS would save over 6,500 lives and prevent hundreds of thousands of hospitalizations. The Court declined to compare these points, holding Congress has not delegated the authority to OSHA to require 84 million Americans to get vaccinated simply because their employer has more than 100 employees.

What's Next?

The Supreme Court's stay is an interim form of relief, in effect while the parties litigate the actual legality of the ETS before the Sixth Circuit Court of Appeals. In other words, there will be complete briefing and oral arguments from the interested parties on all aspects of the legal merits of the OSHA ETS before the Sixth Circuit, whose final order can then again be appealed to the U.S. Supreme Court for a final decision on the lawfulness of the ETS.

An unknown aspect of the ETS's fate is whether OSHA will continue to litigate this matter, throw in the towel, or go back to the drawing board. OSHA issued a [statement](#) following the Court's decision expressing disappointment and stating: "Regardless of the ultimate outcome of these proceedings, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers..."

Key Takeaways

Employers covered by the OSHA ETS may halt compliance efforts. This includes requiring employees to provide vaccination status and/or requiring weekly COVID-19 testing and mandatory use of face coverings. Employer relief is temporary, however, and contingent on future rulings of the Sixth Circuit and, potentially, the U.S. Supreme Court.

For more information and updates on the developing situation, visit [GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#) and [Business Continuity Amid COVID-19](#) page.

Authors

This GT Alert was prepared by:

- [Michael T. Taylor](#) ‡ | +1 703.749.1387 | taylormt@gtlaw.com
- [Amelia A. Esber](#) | +1 602.445.8408 | esbera@gtlaw.com
- [Adam Roseman](#) | +1 215.988.7826 | rosemana@gtlaw.com

‡ Admitted in the District of Columbia. Not admitted in Virginia. Practice in Virginia limited to federal OSHA and proceedings before federal agencies.

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