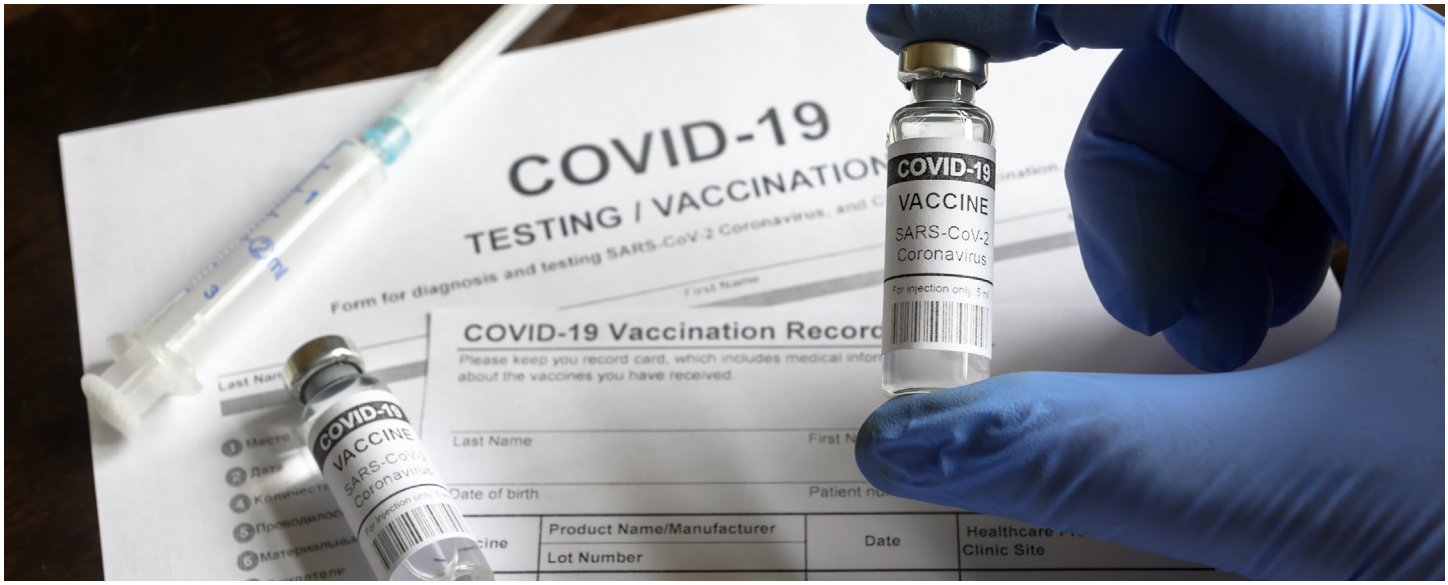
Supreme Court Effectively Ends OSHA Vaccination Emergency Temporary Standard



In a 6-3 decision issued on January 13, 2022, the Supreme Court reimposed a legal stay that prevents OSHA from enforcing its vaccination Emergency Temporary Standard (ETS). And while the matter is being sent back to the 6th Circuit Court of Appeals for further review, the conclusions drawn by the Court almost certainly means the end of the ETS.

How did we get here?

The ETS was formally published on November 5, 2021, with initial compliance dates of December 5, 2021, and January 4, 2022. Shortly thereafter, the 5th Circuit Court of Appeals issued a legal stay that put the ETS on pause and temporarily prevented OSHA from enforcing it.

There were numerous legal challenges to the ETS, which were quickly consolidated and given to the 6th Circuit Court of Appeals for adjudication. The 6th Circuit lifted the legal stay and allowed OSHA to move forward with enforcement. In response, OSHA issued new compliance dates of January 10, 2022, and February 9, 2022, while the case was appealed to the Supreme Court.

What did the Supreme Court say?

The primary question before the Supreme Court was whether the scope of the vaccine ETS exceeded the statutory authority given to OSHA to issue emergency temporary standards.

The Court started its analysis by acknowledging that OSHA has the power to regulate occupational risks and dangers. It then asked the question whether the ETS targeted occupational hazards, or whether it was actually regulating public health more broadly, which would exceed OSHA's authority.

While the court recognized that OSHA has the power to regulate COVID-19 risks in environments that may be uniquely susceptible to

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transmission (such as COVID-19 research labs, cramped workspaces, etc.), it concluded that the breadth of the ETS went beyond clearly identifiable occupational hazards, and thus was tantamount to an impermissible public health measure:

> *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 [we] 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.*

As a result, the Court decided that the parties opposing the ETS "are likely to succeed on the merits of their claim that [OSHA] lacked authority to impose the mandate", so it reimposed the stay and sent the matter back down to the 6th Circuit for further review of the merits of the case. However, the Supreme Court's reasoning and analysis all but ensures that the 6th Circuit will come to the same conclusion.

What does this mean for employers?

Employers will no longer have to comply with the ETS, which means that they will now have greater latitude to decide what COVID-related practices are best for their workplaces.

Employers that have already started complying with the provisions of the ETS can continue to do so, if they choose, or they can discontinue some or all of the measures they've adopted at this point. Employers that were holding off on compliance while waiting for the Supreme Court's decision will now have to decide whether they want to modify any of their existing safety practices.

As employers make these decisions, a few things should factor into the consideration process:

- The Supreme Court's focus was on whether OSHA exceeded its statutory authority, which has nothing to do with what workplace practices individual employers can choose to adopt. As a result, the decision does not impact the vaccination, testing, and masking practices options that employers can choose from.
- OSHA still has authority under its General Duty Clause to inspect and penalize what it considers to be unsafe COVID-related practices, although its scope and power under the General Duty clause is much narrower than under the ETS. Indeed, in response to the Supreme Court's decision, OSHA has put employers on notice of its continuing commitment to address COVID-19 safety in the workplace:

  > *Regardless of the ultimate outcome of these proceedings, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the COVID-19 National Emphasis Program and General Duty Clause.*

- States that have approved state OSHA programs could independently choose to pursue implementation of their own versions of the ETS, and even states without their own OSHA programs may have Departments of Health or other agencies that have made specific recommendations for COVID-related workplace safety practices.
- Employers covered by the vaccination mandates imposed on federal contractors (the federal contractor mandate) and certain recipients of Medicare and/or Medicaid funds (the CMS mandate) may still have to comply with those requirements, since in a separate opinion the Supreme Court upheld the CMS mandate and is expected to eventually weigh-in on the federal contractor mandate.

In other words, the ETS was not the only variable that might influence employer practices, which means that employers should be mindful as they decide what COVID-related practices to adopt going forward. In doing so, it will be important to work with trusted advisors and vendors to help make the best decisions for each workplace.