

Supreme Court Ruling on OSHA's ETS: What Does it Mean and What's Next?

January 14, 2022
By Sarah M. Sawyer

On January 13, 2022, three days after the Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard (ETS) COVID-19 vaccination and testing mandates went into effect; the Supreme Court stayed the mandate pending further review in the Sixth Circuit. However, the stay is only temporary, and employers should remain vigilant. For now, the mandate that would have impacted an estimated 100 million Americans is on hold, and employers, who were at the ready to race towards compliance, are likely breathing a collective sigh of relief.

Supreme Court Ruling

In a 6-3 decision, the Supreme Court reinstated the temporary injunction stopping OSHA from enforcing the ETS, pending resolution in the Sixth Circuit Court of Appeals. The Court's decision focused on whether OSHA has the requisite authority to promulgate the ETS. In its ruling, the Court explained that, while OSHA has the power to "set workplace safety standards," it does not have the authority to set "broad public health measures." Ultimately, given that COVID-19 is a daily risk to individuals as they go about their daily lives, not just in the workplace, the Court found that "although COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most." Accordingly, the Court views COVID-19 as part of "the hazards of daily living," not a workplace hazard under OSHA's purview.

Justices Breyer, Kagan, and Sotomayor dissented, finding that OSHA acted within its scope of authority in issuing the ETS. The dissenting justices concluded that COVID-19 presents a "grave danger" to employees, and the ETS is necessary to address those dangers.

What's Next?

It is now up to the Sixth Circuit Court of Appeals to determine whether the ETS is valid. If it does, based on the Court's reasoning in staying the ETS, it is unlikely to survive should it go before the Court again. Another consideration for the future of this regulation is that the ETS is a temporary standard meant to be replaced by a permanent standard on or before May 5, 2022. As such, we could see some movement by OSHA to engage in the formal rulemaking process to publish a formal regulation in the coming months. Also, given that Court approval of a vaccine mandate is unlikely, we may see new targeted regulations from OSHA to implement additional safety measures in workplaces where in-person work is necessary and social distancing is difficult, which are less likely to face successful legal challenges.

Though employers are not currently required to comply with the numerous requirements of the ETS, including mandatory vaccination, it is within their discretion to mandate vaccination and implement other COVID-19 safety protocols. Even without OSHA's mandate, many employers are mandating vaccination or implementing safety protocols based on vaccination status. While businesses implementing voluntary directives do not need to jump through the regulatory hoops of the ETS, they must still take care to develop comprehensive and compliant policies to ensure compliance with Title VII and the Americans with

Disabilities Act (ADA). Additionally, it is imperative that companies still carefully consider what safety protocols are suitable for their workplace as the transmittal of COVID-19 in the workplace has both practical and legal consequences, especially where employers are subject to state and local COVID-19 safety orders.