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U.S. Supreme Court Halts Enforcement of the OSHA Vaccine or Test Mandate

The United States Supreme Court today stayed enforcement of the OSHA emergency temporary standard (ETS) requiring employers with 100 or more employees to require employees either be “fully vaccinated” against COVID-19 or submit to weekly testing. The ruling immediately stops enforcement of the rule which had gone into effect on January 10, 2022.

Today’s order raises significant doubt as to whether the ETS requirement will ever take effect in its current form. A 6 to 3 majority of the Supreme Court justices issued the profound statement that the parties opposed to the rule “are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate.” The Court went on to state that the OSH Act does not authorize the agency to “set . . . broad public health measures,” such as the found in the current emergency standard.

The Supreme Court was not yet ruling on the underlying OSHA mandate. The Court was instead acting at a phase in the proceedings during which it is essentially limited to taking action designed to avoid irreparable harm while the matter continues to be litigated. Accordingly, the Court technically has enjoined enforcement of the rule pending further action by the Sixth Circuit Court of Appeals, where the dozens of challenges to the emergency standard have been consolidated. However, the Sixth Circuit will have to rule on those challenges in light of the guidance offered by today’s Supreme Court’s Order.

While three justices suggested that the Court was imposing a limit on OSHA’s authority that is not found in the OSH Act, the remaining six justices disagreed. The majority of the justices found “that OSHA is charged with regulating “occupational” hazards and the safety and health of employees,” not the kind of “universal risk” posed by COVID-19 to the American public at large. The majority added more generally that public health “falls outside of OSHA’s sphere of expertise.”

The Court did suggest that there are circumstances under which OSHA may possess the authority to regulate “occupation-specific risks related to COVID-19,” such as “[w]here the virus poses a special danger because of the particular features of an employee’s job or workplace.” As an example, the Court pointed to researchers who work with the COVID-19 virus. The Court also noted, “So too could OSHA regulate risks associated with working in particularly crowded or cramped environments.”

The Court left the rule issued by the Centers for Medicare & Medicaid Services (CMS) which affects mainly nursing homes to remain in place. The Court’s ruling on the ETS also has no impact on the enforcement of state or local mandates or safety rules, such as the New York City COVID-19 vaccination mandate for private employers.

Employers should exercise caution when considering COVID-19 safety and vaccine or testing requirements and are recommended to consult with qualified counsel knowledgeable in this arena.

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