

# Supreme Court Stays OSHA Vaccinate-or-Test Mandate

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Following up on our update of earlier this week, today the U.S. Supreme Court stayed implementation and enforcement of OSHA's vaccination or testing ETS, while it allowed CMS's mandate, which requires COVID-19 vaccination for certain healthcare workers, to go forward. Litigation over the ETS now moves back to the U.S. Court of Appeals for the Sixth Circuit for consideration of the merits of the ETS. As a practical matter, employers subject to OSHA's ETS because they have 100 or more employees no longer need to comply with its requirements, at least for now.

The 6-3 Court majority wrote that the ETS "operates as a blunt instrument" and "draws no distinctions based on industry or risk of exposure to COVID-19. Thus, most lifeguards and linemen face the same regulations as do medics and meatpackers." According to the Court, "Although COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most (emphasis in original)." Rather, the Court found, it is a "universal risk...no different from day-to-day dangers that" everyone faces—whether at the workplace or in everyday life. The majority concluded that "Permitting OSHA to regulate the hazards of daily life...would significantly expand OSHA's regulatory authority without clear congressional authorization."

While employers covered by the ETS do not have to comply with its requirements in the short term, the underlying merits of the ETS are still being litigated. Employers outside of the healthcare industry will now be subject to a patchwork of state laws and regulations on vaccinations and other safety measures. Some states have imposed their own mandates regarding COVID-19 vaccinations for employees of private employers. Other states have issued restrictions on the imposition of mandatory vaccine policies. So it is important for employers to understand which policies are required or permitted in states where they have workers.

Employers should keep in mind that they remain subject to the General Duty Clause of the OSH Act, which requires providing a workplace free of known, dangerous hazards that can be feasibly mitigated. Pre-ETS OSHA

guidance, based on guidance from the CDC, can help employers identify workplace risks of exposure and/or infection related to COVID-19 and determine appropriate control measures.

You may contact the Nexsen Pruet Employment and Labor Law group for additional information on workplace safety and health requirements and best practices.