

Supreme Court Reinstates Stay on OSHA's COVID-19 Vaccination and Testing ETS, Permits CMS' COVID-19 Health Care Vaccination Rule

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KEY TAKEAWAYS

- The Supreme Court stayed OSHA's Vaccination or Testing ETS, but state/local requirements may apply, employers may still have policies requiring COVID-19 vaccination or testing, and employers still have a general duty to provide a safe workplace.
- The Supreme Court permitted CMS's Interim Rule on COVID-19 Health Care Staff Vaccination to take effect.

On January 13, 2022, the United States Supreme Court, **by 6-3 majority**, reinstated the **Fifth Circuit's stay** of OSHA's ETS, which was previously **dissolved by the Sixth Circuit**.

The majority held that ETS challengers will likely succeed on the merits of their claim that OSHA lacked the authority to impose the vaccine or testing mandate. Specifically, the majority ruled:

- The ETS, being OSHA's exercise of "powers of vast economic and political significance," requires clear congressional authorization.
- The Occupational Safety and Health Act does not plainly authorize OSHA's vaccine or testing mandate. The Act only empowers OSHA to set workplace safety standards, not broad public health measures.
- COVID-19 is not an occupational hazard, but an everyday risk.
- Allowing OSHA to regulate daily-life dangers would significantly expand its regulatory authority without clear congressional authorization.
- The indiscriminatory approach by OSHA in the ETS fails to address occupation-specific risks related to COVID-19, and thus is a general public health measure rather than an "*occupational safety or health standard*."
- There is no legislative support for the vaccine mandate.
- The unprecedented measure now taken and the broad authority now claimed by OSHA are parts of a "telling indication" that OSHA exceeds its authority.

The majority stated it is the role of the legislature, not the judiciary, to weigh the tradeoffs between the benefits and harms of the ETS.

The Supreme Court's decision does not nullify the ETS but prevents it from taking effect pending the Sixth Circuit's decision on the merits and any subsequent appeal.

On the same day, the Supreme Court, in a 5-4 **decision**, lifted the preliminary injunction imposed by two district courts on the Centers for Medicare & Medicaid Services's (CMS) COVID-19 health care vaccination **interim rule**. This rule conditions receipt of Medicare and Medicaid funding on covered staff of participating health care facilities being vaccinated against COVID-19. Unlike OSHA's ETS, a majority of the Court found that CMS has the requisite congressional authority to issue the interim rule. The majority also found that the rule is not arbitrary and capricious and

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the challengers' statutory objections to it are unpersuasive.

What does this mean for employers?

- The Supreme Court's ETS decision does not affect any state or local requirements of vaccination and/or testing.
- The Supreme Court's ETS decision does not prevent employers from imposing their own requirement on vaccination and/or testing.
- Employers still have a general duty to provide a work environment free from recognized hazards that are causing or are likely to cause death or serious physical harm.
- The Supreme Court's ETS decision does not prevent OSHA from promulgating more targeted COVID-19 regulations.
- As a reminder, any workplace COVID-19 policy must comply with the requirements of federal and state employment laws, including the anti-discrimination prohibition and obligation to provide reasonable accommodations based on disability and sincerely held religious belief.

Miller Canfield will continue to monitor new developments concerning the ETS and CMS' interim rule. If you have any questions about these developments or how they may impact your workplace, please contact the authors of this alert or your Miller Canfield attorney.

This information is based on the facts and guidance available at the time of publication and may change as the agency receives comments and/or updates its guidance.