

Split Decision: SCOTUS Stays OSHA ETS, While Upholding CMS Vaccine Mandate

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On January 13, 2022, in a 6-3 *per curiam* opinion in *NFIB v. OSHA*, the United States Supreme Court ordered the OSHA ETS be stayed pending disposition of the matter at the Sixth Circuit Court of Appeals.

Large Employer Mandate

In its majority opinion, the Court referred to the ETS, which requires employers with 100 or more employees to require their employees be fully vaccinated or undergo weekly testing and wear a mask, as a "blunt instrument" and "a significant encroachment" into the lives and health of employees. The Court went on to conclude that the Secretary of Labor lacked authority to issue this vaccine-or-test mandate.

In particular, the Court noted that COVID-19 is not an "occupational hazard," but rather it is a "kind of universal risk [that] is no different from the day-to-day dangers that all face" As it became clear during oral arguments in this case, which occurred less than a week ago on Friday, January 7, 2022, the Court took issue with OSHA's broad-strokes approach to issuing the vaccine-or-test mandate for all employers with 100 or more employees without regard to industry or a particularized risk associated with transmitting COVID-19.

The Court went on to state that "OSHA's indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an '*occupational* safety or health standard.'" In determining that the Applicants were likely to succeed on the merits that OSHA lacked authority to impose the ETS, the Court determined that a stay was appropriate, preventing OSHA from enforcing the ETS, at least during the pendency of the matter at the 6th Circuit.

Healthcare Facilities

Also, on January 13, 2022, the Supreme Court issued a *per curiam* opinion in *Biden v. Missouri*, granting the applications to stay the two injunctions barring the Secretary of Health and Human Services' regulation requiring facilities that participate in Medicare and Medicaid to ensure that their covered employees are vaccinated against COVID-19.

In other words, unlike the Biden Administration's nationwide vaccine-or-testing mandate for employers with 100 or more employees, the Supreme Court is allowing the Secretary of Health and Human Services to mandate vaccinations for covered employees of facilities that receive Medicare and Medicaid funding, at least until the U.S. Court of Appeals for the Fifth and Eighth Circuits fully hear and render decisions on this issue.

Stay tuned for a deeper dive into these cases, their dissents, and other developments.

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