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# Supreme Court Considers Arguments on Stay of OSHA Vaccine Mandate

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On January 7, 2022, the U.S. Supreme Court heard arguments on a slew of emergency applications for a stay of the Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS). OSHA's ETS requires employers with 100 or more employees to implement policies requiring employees to either receive a vaccine or test regularly and wear a mask. OSHA maintains that the ETS will prevent the transmission of COVID-19 in the workplace.

The Court will either order a stay, possibly a short stay of OSHA's ETS, or the Court will affirm the Sixth Circuit's decision to lift the stay on OSHA's ETS.

Both sides fielded pointed questions, although Justices Breyer, Kagan and Sotomayor were particularly strident. The challengers argued that OSHA lacked authority to promulgate a vaccine or test rule that's so broad in scope that it affects all workplaces of 100 or more employees without recognizing differences in the risk of transmission within certain industries or workplaces. Further, the challengers argued that, while the states clearly have the authority to issue rules requiring vaccination, the federal government lacks such authority.

The challengers did not agree with Justice Barrett who suggested that a more narrow rule, one that is limited to certain industries or individuals may be acceptable, and they characterized OSHA's vaccine or test rule as unlawful. Justice Breyer queried the challengers on how it could be in the public interest to stay the rule. The challengers responded by noting that it is always in the public's interest for the government to act within the confines of the law. While states have the authority to act and private businesses may also act, the federal government does not have such authority. Justices Kagan and Sotomayor both suggested that Congress expressly authorized that OSHA regulate the health and safety of the workplace when it passed the Occupational Safety and Health

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Act in 1971 and provided OSHA with the authority to issue emergency temporary standards.

The Solicitor General described the vaccine or mask and test rule as in the "heartland" of OSHA's regulatory authority. She noted that Congress appropriated money so that OSHA could address health and safety issues in the workplace caused by COVID-19, claiming that Congress essentially authorized the ETS.

In one question, Justice Alito suggested that the ETS is OSHA's effort at "squeezing an elephant into a mouse hole." He pointed out that a rule requiring vaccination is fundamentally different from every other regulation promulgated by OSHA in that vaccination affects an individual permanently and cannot be imposed only during working hours.

It is difficult to call or predict what the Court will do based on the oral argument today. It sounded as though there are at least three votes in favor of the rule and possibly more. The consensus of observers and practitioners alike seems to be that there are at least five votes in favor of a short administrative stay, but we remain uncertain. At this point, with the first compliance deadline set for January 10 and with tests in very short supply, employers should move ahead with their efforts to comply with the ETS.

**Contact us**

If you have questions about the best course of action for your workplace as a result of this update, contact Brian Hendrix, Courtney Steelman, Tracey O'Brien, Jennifer Ralph or your Husch Blackwell attorney.

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