

## THOUGHT LEADERSHIP

LEGAL UPDATES

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## U.S. Supreme Court Stays OSHA Vaccine Mandate

On January 13, 2022, in *per curiam* opinion *National Federation of Independent Business et al., v. Department of Labor, Occupational Safety and Health Administration, et al.*, the Supreme Court stayed OSHA's COVID-19 Vaccination and Testing, Emergency Temporary Standard (vaccine mandate). Six members of the Court joined the *per curiam* opinion, three concurred and three members dissented. The stay will almost certainly not be brief. The Court's order staying OSHA's vaccine mandate will remain in place "pending disposition of the applicants' petitions for review" in the 6th Circuit *and* "disposition of the applicants' petitions for writs of certiorari, if such writs are timely sought." In other words, even if OSHA prevails before the 6th Circuit, OSHA must wait for the Supreme Court to dispose of any appeal (and to do so in OSHA's favor) before OSHA can enforce the vaccine mandate. Additionally, the vaccine mandate will expire in May, regardless of what happens in the 6th Circuit or before the Supreme Court.

### **OSHA lacks authority to impose vaccine mandate on 84 million Americans**

OSHA's vaccine mandate would require employers with 100 or more employees to require employees to either be fully vaccinated or to wear a mask and submit to weekly testing. The Supreme Court held that it was appropriate to stay the vaccine mandate because "the applicants are likely to succeed on the merits of their claim that OSHA lacked authority to impose the vaccine mandate." OSHA "ordered 84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense." The majority agreed that "[t]his is no 'everyday exercise of federal power.' . . . It is instead a significant encroachment into the lives—and health—of a vast number of employees." The Court expects "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." In this

case, the Occupational Safety and Health Act authorizes OSHA to set workplace safety standards, not broad public health measures.”

The majority recognized that Congress authorized OSHA to regulate occupational safety or health hazards. However, it did not authorize OSHA to regulate public health hazards. As the majority explained it, “[p]ermitting OSHA to regulate the hazards of daily life – simply because most Americans have jobs and face those same risks while on the clock – would significantly expand OSHA’s regulatory authority without clear congressional authorization.”

Justice Gorsuch concurred, authoring an opinion joined by Justice Thomas and Justice Alito, he wrote that “[t]he only question is whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people. Or whether, as 27 States before us submit, that work belongs to state and local governments across the country and the people’s elected representatives in Congress.” For Justice Gorsuch and the majority of the Court, it’s the latter of those options. As he explained it, the “agency claims the power to force 84 million Americans to receive a vaccine or undergo regular testing. By any measure, that is a claim of power to resolve a question of vast national significance. Yet Congress has nowhere clearly assigned so much power to OSHA.”

### **What this means to you**

The Court’s decision to stay OSHA’s vaccine mandate is quite firm. The stay prevents OSHA from enforcing the vaccine mandate for the foreseeable future. While the Court did not rule on the merits of the rule, we now know that OSHA is unlikely to prevail on the merits. Moreover, the vaccine mandate will expire in May.

While the vaccine mandate isn’t enforceable, OSHA has made it clear that it expects employers to comply with CDC and OSHA guidance on the prevention of COVID-19 in the workplace. In a statement released by Secretary Walsh following the Court’s decision, the Secretary urged “all employers to require workers to get vaccinated or tested weekly . . . Employers are responsible for the safety of their workers on the job . . . OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the COVID National Emphasis program and General Duty Clause.”

### **Contact us**

If you have questions about the Court’s decision, the stay or any other occupational safety and health or employment law matter, please do not hesitate to contact Brian Hendrix, Courtney Steelman, Jessica Brown, Tracey O’Brien or your Husch Blackwell attorney.

### **Your comprehensive COVID-19 legal resource**

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.