

January 20, 2022

COVID-19 Update: Supreme Court Stays OSHA Emergency Temporary Standard Requiring Large Employers to Mandate COVID-19 Vaccination or Weekly Testing and Allows CMS Vaccine Mandate to Proceed

Last week, the Supreme Court of the United States, in a 6-3 decision, granted emergency relief to stay the implementation of the Occupational Health and Safety Administration (OSHA)'s Emergency Temporary Standard (the "Employer ETS") requiring that all employers with 100 or more employees ensure that their workforce is fully vaccinated or require any workers who remain unvaccinated to undergo weekly COVID-19 testing and wear a face covering at the workplace (the "the OSHA ETS Decision").¹ The Employer ETS had been in effect as a result of a decision by a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit, which held that the Employer ETS was likely consistent with OSHA's statutory and constitutional authority.² The Supreme Court stayed the Employer ETS pending further review by the Sixth Circuit, however, concluding that the challengers were likely to succeed in their claim that the Employer ETS was inconsistent with OSHA's statutory and constitutional authority. The Court stated that the Employer ETS was "a blunt instrument" and "a significant encroachment into the lives—and health—of a vast number of employees," and concluded that a stay was appropriate pending further review by the Sixth Circuit. U.S. Secretary of Labor Marty Walsh expressed disappointment in the OSHA ETS Decision, affirming OSHA's commitment to protect the health and safety of workers regardless of the ultimate outcome of the legal challenges against the Employer ETS and urging employers to nevertheless require workers to get vaccinated or tested weekly. For the duration of the stay ordered by the OSHA ETS Decision, the requirements of the Employer ETS, including compliance with its testing requirement by February 9, 2022, and its preemption of contrary state laws are paused. The Employer ETS was initially scheduled to remain in effect for six months, until May 5, 2022, at which point OSHA would determine whether to adopt it as a final standard.

¹ *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, No. 21A244, 2022 WL 120952 (U.S. Jan. 13, 2022).

² *In re MCP No. 165*, 2021 WL 5989357, ___ F. 4th ___ (CA6 2021).

In a separate ruling on the same day, the Supreme Court, in a 5-4 decision, lifted the stays issued against the vaccine mandate for healthcare workers at facilities participating in Medicare and Medicaid (the “CMS Mandate”). The CMS Mandate remains in effect nationwide as a result of this decision (the “CMS Mandate Decision”).³

Key Takeaways

- The OSHA ETS Decision stays the implementation and enforcement of the requirements of the Employer ETS pending further review by the Sixth Circuit.
- The CMS Mandate Decision allows the implementation and enforcement of the CMS Mandate, which requires healthcare workers at facilities participating in the Medicare and Medicaid programs to get vaccinated against COVID-19 subject to religious or medical exemptions.
- OSHA stated that it “will do everything in its existing authority to hold businesses accountable for protecting workers,” regardless of the ultimate outcome of the proceedings challenging the Employer ETS.⁴ OSHA will be evaluating “all options” to ensure workers are protected from the risks of COVID-19.⁵

Background

In September 2021, President Joseph Biden announced a forthcoming emergency rule requiring all employers with 100 or more employees to ensure that their workforce is fully vaccinated or that any unvaccinated workers submit a negative COVID-19 test result on a weekly basis.⁶ The purpose of the rule was to increase vaccination rates at “businesses all across America.”⁷ The Biden administration intended to impose vaccine requirements on about “100 million Americans—two thirds of all workers” in tandem with other planned regulations regarding COVID-19 vaccination.⁸ Two months later, in November 2021, consistent with President Biden’s announcement, OSHA issued the Employer ETS, which it estimated would apply to 84.2 million employees and prevent over 6,500 deaths and over 250,000 hospitalizations.⁹ The Employer ETS required covered employees to get vaccinated against COVID-19 or take a weekly test and wear a mask at work and was intended to preempt inconsistent state and local occupational safety and health workplace laws relating to COVID-19, in particular those that ban or limit an employer from requiring vaccinations, face coverings or testing. The Employer ETS was issued alongside the CMS Mandate and followed OSHA’s issuance of vaccination requirements for employees of federal contractors and subcontractors (the “Federal Contractor Vaccine Mandate”) and federal employees in September 2021.

Following its issuance, the Employer ETS was met with multiple legal challenges brought by states, businesses, trade groups and nonprofit organizations.¹⁰ Parties challenging the Employer ETS filed petitions for review, with at least one petition arriving in

³ *Biden v. Missouri*, No. 21A240, 2022 WL 120950 (U.S. Jan. 13, 2022).

⁴ DOL, Statement from Secretary of Labor Marty Walsh on Supreme Court Ruling on OSHA Emergency Temporary Standard of Vaccination, Testing (Jan. 13, 2022), <https://www.dol.gov/newsroom/releases/osec/osec20220113>.

⁵ *Id.*

⁶ For additional details about President Biden’s announcement on the federal vaccine mandate and other initiatives and measures to reduce the number of unvaccinated individuals, please refer to our [September 15, 2021 memorandum](#).

⁷ The White House, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

⁸ *Id.*

⁹ COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402, 61,408, 61,467 (Nov. 5, 2021) (to be codified at 29 C.F.R. parts 1910, 1915, 1917, 1918, 1926 and 1928), <https://www.govinfo.gov/content/pkg/FR-2021-11-05/pdf/2021-23643.pdf>.

¹⁰ The Federal Contractor Vaccine Mandate and the CMS Mandate were also met with legal challenges. In December 2021, the U.S. District Court for the Southern District of Georgia issued a nationwide injunction pausing the implementation of the Federal Contractor Vaccine Mandate. The U.S. Court of Appeals for the Eleventh Circuit subsequently denied the federal government’s request for a stay of the District Court’s injunction. *State of Georgia, et al v. President of the United States, et al*, No. 21-14269 (11th Cir. Dec. 17, 2021). As a result, the District Court’s injunction remains

each regional U.S. Court of Appeals. These cases were consolidated in the U.S. Court of Appeals for the Sixth Circuit, which was selected at random pursuant to a statutory provision governing multi-circuit petitions. Prior to consolidation, however, the U.S. Court of Appeals for the Fifth Circuit had stayed the Employer ETS pending further judicial review, holding that it likely exceeded OSHA's statutory authority, raised concerns regarding separation of powers in the absence of a clear delegation from Congress and was not properly tailored to the risks facing different types of workers and workplaces.¹¹ A three-judge panel of the Sixth Circuit subsequently dissolved the Fifth Circuit's stay, holding that the Employer ETS was likely consistent with OSHA's statutory and constitutional authority and allowing the Employer ETS to take effect.¹² In particular, the Sixth Circuit stated that the Employer ETS was "not a novel expansion of OSHA's power" and was instead "an existing application of authority to a novel and dangerous worldwide pandemic."¹³ Various parties filed applications in the Supreme Court requesting that the Court stay the Employer ETS, two of which were thereafter consolidated and scheduled for an expedited oral argument before the Court on January 7, 2022.

After over two hours of arguments, the 6-3 OSHA ETS Decision was issued on January 13, 2022. Justice Gorsuch, joined by Justices Alito and Thomas, authored a concurring opinion. Justices Breyer, Sotomayor and Kagan dissented in a joint opinion..

The OSHA ETS Decision

Majority Opinion

The OSHA ETS Decision held that OSHA likely lacks the statutory authority to impose the Employer ETS under the Occupational Safety and Health Act (the "OSH Act"), and the equities did not justify delaying the stay. After concluding that the Employer ETS, which requires 84 million Americans "to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense," implicated OSHA's authority to exercise powers "of vast economic and political significance," the OSHA ETS Decision held that the OSH Act did not authorize OSHA to set "broad public health measures," such as the Employer ETS, as opposed to *workplace* safety measures, which fall within OSHA's sphere of expertise.¹⁴ Notably, the OSHA ETS Decision concluded that the risk of contracting COVID-19 at the workplace was not the type of "work-related danger[]" that OSHA is authorized to regulate.¹⁵ Although the OSHA ETS Decision acknowledged that COVID-19 is a risk that occurs in many workplaces, it characterized the risks of contracting COVID-19 as among "the hazards of daily life," over which OSHA has no regulatory authority, and distinguished it from occupational hazards that fall within OSHA's purview.¹⁶ The OSHA ETS Decision expressly recognized that OSHA has the authority to issue "targeted regulations" aimed at addressing occupation-specific risks related to COVID-19 where the virus poses "a special danger because of the particular features of an employee's job or workplace."¹⁷ The OSHA ETS Decision emphasized that OSHA historically "has never before adopted a broad public health regulation of this kind," which the majority said was a "telling indication" that the Employer ETS extended beyond the agency's legislative reach, in the absence of clear congressional authorization.¹⁸

in effect nationwide and the Federal Contractor Vaccine Mandate is paused. On the other hand, the CMS Mandate was initially stayed in the 10 states that challenged the mandate in the U.S. District Court for the Eastern District of Missouri, *Missouri v. Biden*, No. 4:21-CV-01329, 2021 WL 5564501, at *1 (E.D. Mo. Nov. 29, 2021), and also in the 14 states that challenged the mandate in the U.S. District Court for the Western District of Louisiana, *Louisiana v. Becerra*, No. 21-30734, 2021 WL 5913302 (5th Cir. Dec. 15, 2021).

¹¹ *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.*, 17 F.4th 604, 604 (5th Cir. 2021).

¹² *In re MCP NO. 165*, 21 F.4th 357, 2021 WL 5989357 (6th Cir. 2021), *application granted sub nom. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, No. 21A244, 2022 WL 120952 (U.S. Jan. 13, 2022).

¹³ *Id.* at *7.

¹⁴ *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, No. 21A244, 2022 WL 120952, at *3 (U.S. Jan. 13, 2022).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at *4.

¹⁸ *Id.* (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)).

The Court stayed the Employer ETS without resolving the dispute as to whether the balance of equities weighed in favor of a stay on the ground that only Congress could properly weigh such tradeoffs.¹⁹ As to the equities, the parties challenging the Employer ETS had argued that covered employers would incur unrecoverable compliance costs and that hundreds of thousands of employees would leave their jobs.²⁰ On the other hand, the federal government had argued that the Employer ETS would save over 6,500 lives and prevent hundreds of thousands of hospitalizations.²¹

Concurring Opinion

The concurring opinion authored by Justice Gorsuch noted that the majority “rightly applie[d]” the “major questions doctrine”—the principle that Congress “‘speak[s] clearly’ if it wishes to assign to an executive agency decisions ‘of vast economic and political significance’”—and concluded that the Employer ETS failed the doctrine’s test.²² Justice Gorsuch stated that while the OSH Act grants OSHA the authority to impose emergency temporary standards necessary to protect “employees” from “grave danger” in the workplace, the Act did not grant the agency “the power to issue a nationwide mandate on a major question” that is untethered to any clear congressional mandate and “induce[s] individuals to undertake a medical procedure that affects their lives outside the workplace.”²³ Even if the OSH Act were interpreted to provide OSHA with such authority, Justice Gorsuch argued, the “law would likely constitute an unconstitutional delegation of legislative authority.”²⁴ Justice Gorsuch argued that state and local authorities—which historically possess considerable power to regulate public health—and Congress, rather than OSHA, held the power to decide how to respond to the pandemic, including whether to mandate the vaccination or regular testing of 84 million people.²⁵

Dissenting Opinion

The dissenting opinion by Justices Breyer, Sotomayor and Kagan posited that the majority misapplied the applicable legal standards, and in so doing, stymied the federal government’s ability to counter the unprecedented threat that COVID-19 poses to employees. First, the dissenters argued that, contrary to the OSHA ETS Decision, the Employer ETS “perfectly fits” the language of the OSH Act which “commands” OSHA to issue an emergency temporary standard whenever it determines that employees are exposed to “grave danger” arising from “new hazards” or exposure to “harmful agents” and that “such [an] emergency standard is necessary to protect employees from such danger.”²⁶ The dissenting opinion further argued that the Employer ETS should be afforded judicial deference given the extensive evidence in the record supporting the agency’s determinations about the risks of COVID-19 and the efficacy of masking, testing and vaccination.²⁷ Second, the dissenters criticized the majority for imposing a “judicially created exception” by concluding that the OSH Act does not provide OSHA with the power to address a disease that exists “both inside and outside the workplace.”²⁸ The dissenters argued that the language of the OSH Act does not limit OSHA’s ability to regulate a workplace hazard that is also found elsewhere, such as COVID-19, and that OSHA has long regulated risks that arise both inside and outside of the workplace.²⁹ The dissenters maintained that the Employer ETS, which responds to a workplace health emergency that is unparalleled in the agency’s history and American

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at *6 (Gorsuch, J., concurring).

²³ *Id.* at *6–7.

²⁴ *Id.* at *7.

²⁵ *Id.* at *5.

²⁶ *Id.* at *8 (Breyer, J., dissenting).

²⁷ *Id.* at *10.

²⁸ *Id.*

²⁹ *Id.* at *10–11.

working life, “lies at the core of OSHA’s authority.”³⁰ Third, the dissenters argued that the balance of harms and the public interest weighed against a stay. Citing the extent of harm caused by COVID-19, including the recent surge in cases and the emergence of new variants, the dissenting Justices argued that the public interest in protecting workers from diseases and death “overwhelms the employers’ alleged costs,” including any disruption to businesses.³¹

Stay of the Employer ETS

As a result of the OSHA ETS Decision, the implementation and enforcement of the requirements under the Employer ETS is stayed pending further review by the Sixth Circuit or a potential subsequent review by the Supreme Court.³² With the Employer ETS stayed, its preemption of “inconsistent state and local requirements . . . including requirements that ban or limit employers’ authority to require vaccination, face covering, or testing, regardless of the number of employees” is no longer in effect.³³ As of January 2022, it was reported that 13 states prohibit requirements relating to COVID-19 vaccination.³⁴ Additionally, to the extent that businesses are subject to a state or local vaccine mandate that implicates the Employer ETS, the OSHA ETS Decision may affect them. For example, New York City’s private employer COVID-19 vaccine mandate requires businesses that are subject to federal vaccination requirements that are not currently in effect due to a court order to require workers who perform in-person work or interact with the public to show proof that they have received at least one dose of a COVID-19 vaccine.

Secretary of Labor Walsh expressed disappointment in the OSHA ETS Decision, stating that the Employer ETS was promulgated under “clear authority established by Congress to protect workers facing grave danger in the workplace,” such as COVID-19, and that the stay “is a major setback to the health and safety of workers across the country.”³⁵ Secretary Walsh also stated that OSHA “will be evaluating all options to ensure workers are protected from” COVID-19 and “will hold businesses accountable for protecting workers,” including under the General Duty Clause of the OSH Act, “[r]egardless of the ultimate outcome of these proceedings.”³⁶ Under the General Duty Clause, employers have a general duty to provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”³⁷

The CMS Mandate Decision

In a separate opinion issued on January 13, 2022, the Supreme Court granted the federal government’s request to stay the injunctions against the CMS Mandate entered by the U.S. District Courts for the Western District of Louisiana and the Eastern District of Missouri.³⁸ The CMS Mandate provides that, in order to receive Medicare and Medicaid funding, participating facilities must ensure that their staff—unless exempt for medical or religious reasons—are vaccinated against COVID-19.³⁹

In contrast to the conclusion reached in the OSHA ETS Decision that the Employer ETS likely exceeded OSHA’s statutory authority, the Supreme Court, in a 5-4 decision, concluded that the CMS Mandate “falls within the authorities that Congress has

³⁰ *Id.* at *11.

³¹ *Id.* at *11.

³² For a more detailed discussion of the requirements under the Employer ETS, please refer to our [November 8, 2021 memorandum](#).

³³ 86 Fed. Reg. at 61,551.

³⁴ Kaiser Family Foundation, State COVID-19 Data and Policy Actions (Jan. 12, 2022), <https://www.kff.org/report-section/state-covid-19-data-and-policy-actions-policy-actions/>.

³⁵ DOL, Statement from Secretary of Labor Marty Walsh on Supreme Court Ruling on OSHA Emergency Temporary Standard of Vaccination, Testing (Jan. 13, 2022), <https://www.dol.gov/newsroom/releases/osec/osec20220113>.

³⁶ *Id.*

³⁷ 29 U.S.C. § 654(a).

³⁸ *Biden v. Missouri*, No. 21A240, 2022 WL 120950, at *2 (U.S. Jan. 13, 2022).

³⁹ *Id.* at *1.

conferred upon [the Secretary of Health and Human Services].”⁴⁰ The Court explained that the Secretary has general statutory authority to promulgate, as a condition of a facility’s participation in the Medicare and Medicaid programs, such “requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution.”⁴¹ While acknowledging that “the vaccine mandate goes further than what the Secretary has done in the past to implement infection control,” the Court nevertheless held that the Secretary is authorized to implement the CMS Mandate.⁴² Notably, the majority in the CMS Mandate Decision placed more weight on the risks of COVID-19 than the majority in the OSHA ETS Decision, stating that the “unprecedented circumstances [of the COVID-19 pandemic] provide no ground for limiting the exercise of authorities the agency has long been recognized to have.”⁴³ The CMS Mandate Decision also concluded that, given the rulemaking record, the CMS Mandate was not arbitrary and capricious, and that other statutory objections to the CMS Mandate were insufficient to invalidate the mandate.⁴⁴ The CMS Mandate Decision allows the implementation and enforcement of the CMS Mandate in the 24 states where the mandate had been stayed, and thus the CMS Mandate remains in effect nationwide.

Justice Thomas, joined by Justices Alito, Gorsuch and Barrett, dissented. Justice Thomas took a narrower view of the statutory provisions CMS cited and concluded that they do not authorize the CMS Mandate. He viewed the “health and safety” statutory authority as limited to administrative requirements or sanitation of facilities.⁴⁵

Justice Alito, joined by Justices Thomas, Gorsuch and Barrett, wrote a separate dissenting opinion. Justice Alito believed that even if CMS had statutory authority to issue the mandate, it failed to show that there was “good cause” to skip the notice-and-comment rulemaking process.⁴⁶

Implications for Employers

- The Employer ETS was initially scheduled to expire on May 5, 2022, at which point OSHA would determine whether to adopt it as a final standard. In light of the conclusion reached by the OSHA ETS Decision that OSHA likely lacks the authority to impose the Employer ETS, it is doubtful that the implementation or enforcement of the Employer ETS will be resumed before May 2022.
- OSHA, in response to the OSHA ETS Decision, stated that it intended to hold employers accountable for protecting workers from the risks of COVID-19 under its existing authority, including the General Duty Clause of the OSH Act. In addition, given that the OSHA ETS Decision expressly affirmed OSHA’s authority to issue “targeted regulations” addressing occupational hazards arising from COVID-19, it is possible that OSHA could issue more limited or different COVID-19-related requirements in the future.
- Employers are advised to monitor further developments from OSHA and other federal, state and local authorities, including any laws or regulations enacted by state and local authorities in the absence of the Employer ETS, as well as further litigation updates relating to COVID-19 vaccination.
- In the wake of the CMS Mandate Decision, the CMS Mandate is now in effect nationwide. The Federal Contractor Vaccine Mandate is not affected by the CMS Mandate Decision or the Employer ETS Decision and remains paused nationwide.

⁴⁰ *Id.* at *2

⁴¹ *Id.* at *1.

⁴² *Id.* at *3–4.

⁴³ *Id.* at *5.

⁴⁴ *Id.* at *4.

⁴⁵ *Id.* at *6–7 (Thomas, J., dissenting).

⁴⁶ *Id.* at *9–10 (Alito, J., dissenting).

- Employers are advised to review relevant federal, state and local COVID-19 requirements to assess the impact of the OSHA ETS Decision staying the implementation of the Employer ETS and its preemption of contrary state law, if any.
- Additionally, employers may want to monitor COVID-19 guidance from relevant federal, state and local authorities as the public health situation is rapidly developing.
 - The OSHA ETS Decision can be found [here](#).
 - The CMS Mandate Decision can be found [here](#).

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Jeh Charles Johnson
+1-212-373-3093
jjohnson@paulweiss.com

Brad S. Karp
+1-212-373-3316
bkarp@paulweiss.com

Loretta E. Lynch
+1-212-373-3000

Jean McLoughlin
+1-212-373-3135
jmcloughlin@paulweiss.com

Kannon K. Shanmugam
+1-202-223-7325
kshanmugam@paulweiss.com

Liza M. Velazquez
1-212-373-3096
lvelazquez@paulweiss.com

Lawrence I. Witdorchic
+1-212-373-3237
lwitdorchic@paulweiss.com

Maria Helen Keane
1-212-373-3202
mkeane@paulweiss.com

Associate Leah J. Park contributed to this Client Memorandum.