

Supreme Court Stays OSHA's ETS Mandatory COVID-19 Vaccination/Testing Requirement

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Practice Area: Labor and Employment

On January 13, 2022, the Supreme Court of the United States ("Supreme Court") issued a Stay on the implementation of the Occupational Safety and Health Administration's ("OSHA") Emergency Temporary Standard ("ETS") which required private sector employers with 100 or more employees to implement a COVID-19 policy under which employees were to either become vaccinated, or undergo weekly COVID-19 testing (demonstrating a negative test result) and wear a face covering.

The Supreme Court's Decision

The Supreme Court stayed the OSHA ETS, which now halts the enforcement of the temporary standard against employers for the foreseeable future. In reaching its decision, the Supreme Court explained that OSHA does not have the authority to issue a mandate that has such broad impact and significance. It expressed concern that OSHA had ordered 84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense, which is not an everyday exercise of its federal power. The Supreme Court identified that the OSHA ETS was a significant encroachment into the lives—and health—of a vast number of employees and that Congress had not spoken clearly to authorize OSHA to exercise such vast powers of economic and political significance. The Supreme Court also noted that the Occupational Safety and Health ("OSH") Act only gave OSHA the authority to implement workplace safety standards and did not grant OSHA the authority to implement broad public health measures, such as the vaccination and testing requirements reflected in the ETS.

The Court's decision merely imposes a "time out" for the implementation of the ETS, while the litigation challenging the ETS proceeds. OSHA may voluntarily choose not to implement the ETS and let it expire. Even absent the ETS, OSHA has sweeping authority under the General Duty Clause of the OSH Act to regulate workplace safety obligations. In fact, after the issuance of the decision, the Department of Labor, in a statement issued by Secretary Marty Walsh, made clear that OSHA will hold employers accountable for workplace safety, including COVID-19 exposure mitigation. Secretary Walsh stated that "...OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the COVID-19 National Emphasis Program and the General Duty Clause."

What the Supreme Court Decision Means for Employers

Though employers are, for the time being, not required to implement the OSHA ETS, employers must still take steps to safeguard their employees from the COVID-19 virus. Under the General Duty Clause, Section 5(a)(1) of the OSH Act, employers must provide a workplace that is "free from recognized hazards that are causing or likely to cause death or serious physical harm." While the Centers for Disease Control and Prevention ("CDC") and OSHA guidance is not mandatory, employers are advised to evaluate their existing COVID-19 workplace policies to determine the extent to which they meet the "guidance" and evaluate if it may be prudent to implement testing and vaccination requirements. Minimally employers are well advised to reinforce the CDC/OSHA directives on masking, quarantine/isolation, social distancing and workplace sanitation to provide support for its General Duty Clause compliance efforts. Additionally, employers should evaluate any state and local vaccination and testing requirements imposed on employers. It is important to closely monitor state and local developments.

Best Practices

In light of the Supreme Court's decision and remaining employer obligations to provide workplace safeguards including for COVID-19, employers are encouraged to:

1. Update COVID-19 policies pertaining to vaccination and testing requirements. The processing of exemptions should also be addressed.
2. Communicate to employees any changes that are being made to COVID-19 policies.
3. Follow OSHA guidelines to ensure compliance with the updated requirements for keeping a "safe workplace." These include:
 - Implementing social distancing in all areas that are communal.
 - Instructing employees who test positive to stay home or otherwise meet the CDC directives.
 - Providing workers with face coverings and encourage/require use, as may be suggested by the CDC. Remember that N-95 mask requirements may subject the employer to additional responsibilities.
 - Ensuring the workplace is ventilated.
 - Recording and reporting COVID infections consistent with the mandates of OSHA.
4. Follow CDC guidelines to ensure compliance with the updated requirements for keeping a safe workplace, such as quarantining for the appropriate amount of time after a positive test or a close contact.
5. Monitor for interpretations and compliance responsibilities in the future.

It is important to note that there may be rules and obligations different from or in addition to the above for public sector employers.

Finally, employers face challenges any time the government issues new regulations and guidance. Thus, employers may find it useful to confer with experienced labor and employment counsel in order to maximize compliance and reduce the potential for legal exposure. Please contact your von Briesen Attorney for additional information.

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