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OSHA Alert

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“Test-or-vax” gets the axe

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The US Supreme Court ruled Fed/OSHA exceeded its authority in issuing its Emergency Temporary Standard requiring employers to implement COVID-19 vaccination and/or testing policies.



What's the Impact?

- / Fed/OSHA is prohibited from enforcing the ETS
- / Employers remain free to implement their own COVID-19 policies, consistent with applicable state and local requirements
- / Decision does not impact existing state and local COVID-19 related mandates and guidance

In a highly-anticipated decision, a divided United States Supreme Court halted the controversial “vaccine-or-test” Emergency Temporary Standard (ETS) for employers with 100 or more employees issued¹ last fall by the federal Occupational Safety and Health Administration (Fed/OSHA). In a *per curiam* opinion², with which Justices Gorsuch, Thomas, and Alito concurred, Chief Justice Robert and Justices Barrett and Kavanaugh held that the Occupational Safety and

¹ [Labor & Employment Blog Post – November 16, 2021.](#)

² https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf.

Health Act empowered the agency “to set *workplace safety* standards, not broad public health measures.”³ Relying on the fact that COVID-19 is a “universal risk . . . no different from day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases,” the high court determined that Fed/OSHA had exceeded its authority and granted an emergency stay. The stay will remain in effect until the United States Court of Appeals for the Sixth Circuit issues its final opinion on whether the ETS exceeded Fed/OSHA’s authority and any appeals of that decision to the United States Supreme Court are finally resolved. Justices Breyer, Sotomayor, and Kagan dissented.

Employers with 100 or more employees who have undoubtedly been anxiously awaiting this decision can pause their efforts to comply with the ETS. However, while Fed/OSHA is prohibited from enforcing *this* rule, keep in mind that employers remain free to implement their own COVID-19 prevention and mitigation policies and strategies, including employee vaccination, testing, and/or face-covering requirements, to the extent consistent with applicable state or local law. Additionally, remember that the Supreme Court decision on the Fed/OSHA ETS does not impact state and local laws or ordinances that impose COVID-19 requirements on companies, such as healthcare vaccine mandates and state or local mask requirements.

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³ [The Supreme Court permitted the Centers for Medicare & Medical Services \(CMS\) vaccine mandate for the 21 categories of Medicaid and Medicare providers and suppliers to remain in effect.](#)