

SUPREME COURT STAYS OSHA EMERGENCY VACCINATION RULE, LIKELY FOR GOOD

In a 6-3 decision the Supreme Court stayed the Emergency Temporary Standard (“ETS”) issued by the Occupational Safety and Health Administration in November 2021 that would have imposed mandatory Covid-19 vaccination-or-testing requirements on employers with 100 or more employees, along with onerous data-collection and recordkeeping requirements. (For a complete summary of OSHA’s ETS, see our November 2021 Legal Alert [here](#).)

The Supreme Court decision to stay the rule—coming just four days after many provisions of the ETS took effect—likely ends any uncertainty over the rule’s legality, as the Court found that the rule’s challengers, a coalition of businesses and States, had demonstrated that they were likely to succeed on the merits of their challenge to the rule.

The Court’s decision ([which can be found here](#)) focused, as did many of the challengers’ arguments, on the breathtaking scope of the ETS when compared to the mandate and authority Congress gave to OSHA. Specifically, the Court noted that the agency was empowered to regulate occupational safety—that is, *workplace* hazards—not “public health more generally.” But Covid-19, the Court found, was a “universal risk,” not just a workplace one: “Covid-19 can and does spread at home, in schools, during sporting events, and

everywhere else that people gather....Permitting 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. Particularly because the ETS was “blunt instrument,” drawing no distinctions between different industries, and mandating measures that extended far beyond the workplace (i.e., vaccination of individuals), the Court held that the ETS operated more as a “general public health measure” than a workplace safety measure, and therefore went beyond OSHA’s authority.

The Court stopped short of stating that OSHA had no authority to regulate occupation-specific Covid-19 risks. The majority of the Court suggested, for example, that the agency would be within its authority to regulate researchers working with the Covid-19 virus, or “particularly crowded or cramped environments.” Underscoring this point, [in a separate decision issued today](#), the Court upheld by a 5-4 majority a different mandatory-vaccination rule, issued last year by the Secretary of Health and Human Services to health care facilities. That rule requires the vaccination of employees of health care



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facilities, as a condition of receiving Medicaid and Medicare funding.

It remains to be seen whether OSHA will attempt to revise and promulgate a narrower rule in keeping with the Court's decision. Employers should continue to monitor both federal and state regulatory action in this area, as some states—which possess wider authority than OSHA, including public-health powers—may now attempt to impose their own authority in place of OSHA's.