

# Client Alert

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## Supreme Court Stays OSHA Vaccine-or-Test Mandate for Large Businesses

On January 13, 2022, the Supreme Court issued its first rulings related to the Biden Administration's COVID-19 vaccine mandates. In the case of *NFIB v. OSHA*, by a vote of 6-3, the Court held that the COVID-19 vaccination and testing mandate issued by the Occupational Safety and Health Administration (OSHA) in the form of an Emergency Temporary Standard (ETS), as applied to employers with 100 or more employees, was likely beyond OSHA's statutory authority. The Court thus stayed OSHA's mandate pending appeal.

### The Stay of OSHA's Emergency Temporary Standard Governing Large Employers

The ETS requires private employers with 100 or more employees (across all worksites) to develop, implement, and enforce COVID-19 testing and vaccination policies. The ETS was published on November 5, 2021, and promptly stayed by the Fifth Circuit. On December 17, 2021, the Sixth Circuit concluded that the Fifth Circuit's stay was unjustified. The Supreme Court disagreed and granted a stay pending appeal. In a setback to the Biden administration, the Court held that those challenging the vax-or-test mandate are likely to succeed on the merits of their claim that the Secretary of Labor lacked authority to impose the mandate.

In an unsigned *per curiam* opinion, the Court wrote that the vaccination or mandatory testing requirement was "a significant encroachment into the lives—and health—of a vast number of employees," and that the Occupational Safety and Health Act did not empower the Secretary of Labor to enact such a mandate. The Court specifically noted that, although Congress has given "OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly," and that "requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category." The Court emphasized

that, although COVID-19 is a risk that occurs in many workplaces, it is not specifically an occupational hazard. Rather, it is a universal risk that is no different from “the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases.” In response to the Court’s decision, President Biden said that he was “disappointed” and described the vaccination or mandatory testing requirement as a “common-sense life-saving requirements for employees at large businesses that were grounded squarely in both science and the law.”

Justice Gorsuch wrote a concurring opinion that was joined by Justices Thomas and Alito. In that separate opinion, Justice Gorsuch reasoned that the legality of the vax-or-test mandate hinges on who has authority to create such a mandate: OSHA or Congress and state and local governments. The concurrence noted that the Supreme Court has established a firm rule: “We expect Congress to speak clearly” if it wishes to assign to an executive agency the authority to make decisions “of vast economic and political significance.” While the concurrence reasoned that there is no question that state and local authorities possess considerable power to regulate public health, it also concluded that “Congress has nowhere clearly assigned so much power to OSHA.” The concurrence was equally unpersuaded that OSHA could act based on delegated employee safety emergency powers. The concurrence noted that OSHA’s ETS is beyond the authorities delegated to the Agency as the vax-or-test rule not only seeks to regulate what occurs in the workplace, but also acts as an inducement for individuals to undertake a medical procedure that affects their lives outside of the workplace. The concurrence concluded by emphasizing that it was not “impugn[ing] the intentions behind the agency’s mandate,” but recognizing that it is the Court’s “duty to enforce the law’s demands when it comes to the question who may govern the lives of 84 million Americans.”

Justices Breyer, Sotomayor, and Kagan authored a joint dissent. They would have held that the mandate fell within OSHA’s statutory authority. In their view, the Court should have deferred to “the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions.”

### **Practical Next Steps**

The Supreme Court’s order staying the vax-or-test ETS means that employers no longer have to adopt the vax-or-test requirement at this time. The stay will remain in effect until the Sixth Circuit hears the challenges to the ETS on their merits, following which the case will likely return to the Supreme Court. OSHA has not issued a statement as of the drafting of this article, and it is unclear how OSHA will respond. It is possible that OSHA may proceed with alternate requirements based on the General Duty Clause that requires employers to maintain a workplace “free from recognized hazards.”

Despite the foregoing, many employers may still have to comply with some form of vax-or-test requirement, as many local jurisdictions have implemented vax-or-test ordinances and some companies have opted to adopt such restrictions. In addition, certain state OSHA agencies have implemented various COVID requirements for employers in those states. President Biden has encouraged states and businesses to take up the requirements: “As a result of the Court’s decision, it is now up to States and individual employers to determine whether to make their workplaces as safe as possible for employees, and whether their businesses will be safe for consumers during this pandemic by requiring employees to take the simple and effective step of getting vaccinated.”



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