



# Supreme Court Stays OSHA Vaccination and Testing Standard

January 21, 2022

On January 13, 2022, the U.S. Supreme Court stayed the enforcement of the Occupational Safety and Health Administration’s (OSHA’s) Coronavirus Disease 2019 (COVID-19) vaccination and testing emergency temporary standard (ETS) for employers with 100 or more employees. The ETS generally requires such employers to establish and enforce mandatory COVID-19 vaccination or testing policies. In a per curiam [opinion](#), the Court concluded that staying the implementation of the rule was justified because the applicants, the National Federation of Independent Business and a coalition of States, were likely to succeed on the merits of their claim that OSHA lacks the statutory authority to issue such a standard. The Court maintained that the Occupational Safety and Health Act (OSH Act) authorizes the agency to establish only workplace safety standards and not “broad public health measures,” which, according to OSHA, would impact approximately 84.2 million employees. The Court indicated that, although COVID-19 is a risk that occurs in many workplaces, if OSHA were allowed to regulate COVID-19 when it is transmissible “at home, in schools, during sporting events, and everywhere else that people gather,” it is not an occupational hazard in most workplaces and OSHA’s authority would be expanded significantly without clear congressional authorization. This Sidebar provides an overview of the ETS and the Court’s decision, and concludes with a few considerations for Congress following the Court’s stay.

## The OSH Act and Emergency Temporary Standards

Congress enacted the OSH Act in 1970 to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . .” The law seeks to reduce the frequency and severity of work-related injuries and illnesses by promoting a “comprehensive, nationwide approach” to workplace safety, and authorizes the Secretary of Labor to promulgate occupational safety and health standards to protect workers. The Secretary has delegated this authority to the Assistant Secretary of Labor for Occupational Safety and Health, who acts as OSHA’s administrator.

While OSHA’s safety and health standards generally do not become effective until the agency publishes a proposed standard in the *Federal Register* and offers interested parties an opportunity to comment, the OSH Act authorizes OSHA to promulgate ETSs that have immediate effect when specified conditions exist. Section 6(c)(1) of the OSH Act, codified at [29 U.S.C. § 655\(c\)\(1\)](#), authorizes OSHA to issue an ETS that takes effect upon publication in the *Federal Register* if the agency determines that employees

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are exposed to “grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and . . . that such emergency standard is necessary to protect employees from such danger.”

In its November 5, 2021 *Federal Register* [notice](#), OSHA explained that a COVID-19 vaccination and testing ETS is appropriate because unvaccinated workers face a grave danger from exposure to COVID-19 in the workplace. The agency contended that its grave danger finding was based on “the severe health consequences associated with exposure to the virus along with evidence demonstrating the transmissibility of the virus in the workplace and the prevalence of infections in employee populations[.]” OSHA further indicated that vaccination provides the most effective and efficient control available to unvaccinated workers, with regular testing, the use of face coverings, and the removal of infected employees from the workplace also protecting workers who remain unvaccinated.

The COVID-19 vaccination and testing ETS generally requires employers with 100 or more employees to establish, implement, and enforce a written mandatory vaccination [policy](#). This policy requires employees to be fully vaccinated, except those employees for whom a vaccine is medically contraindicated, those for whom medical necessity requires a delay in vaccination, and those who are legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs that conflict with the vaccination requirement. An employer may be exempt from maintaining this type of policy if it establishes, implements, and enforces a written policy that allows an employee to either be fully vaccinated against COVID-19 or provide proof of regular testing for COVID-19 and wear a [face covering](#) when indoors or occupying a vehicle with another person for work purposes.

Under the ETS, [testing](#) for employees who are not fully vaccinated must occur at least once every seven days for individuals who report at least once every seven days to a workplace where others, such as coworkers or customers, are present. Employees who do not report to such a workplace during a period of seven or more days must be tested within seven days prior to returning to the workplace. Employers are required to maintain a record of each test result, but do not have to pay for any costs associated with COVID-19 testing.

The ETS also requires covered employers to determine the vaccination [status](#) of their employees. Employees are required to provide proof of vaccination status to their employers, and the employers must preserve this proof and maintain a roster of each employee’s vaccination status. Employers are required to support COVID-19 vaccination by providing up to four hours of paid [time](#) to each employee for each primary vaccination dose, and must provide paid sick leave to employees who experience side effects following any primary vaccination dose.

### ***National Federation of Independent Business v. OSHA***

Shortly after its publication in the *Federal Register*, the COVID-19 vaccination and testing ETS was challenged in federal appellate courts across the country. On November 6, 2021, the U.S. Court of Appeals for the Fifth Circuit temporarily stayed the ETS, pending further action by the court. The Fifth Circuit reaffirmed its initial stay less than one week later in *BST Holdings, L.L.C. et al. v. OSHA*, stating: “OSHA runs afoul of the statute from which it draws its power and, likely, violates the constitutional structure that safeguards our collective liberty.”

In light of the other pending court challenges to the ETS, and consistent with [28 U.S.C. § 2112](#), which sets forth the governing procedures when an agency order is challenged in more than one federal appellate court, the ETS cases were consolidated for further consideration by the U.S. Court of Appeals for the Sixth Circuit. On December 17, 2021, the Sixth Circuit [dissolved](#) the Fifth Circuit’s stay, recognizing OSHA’s statutory authority to regulate viruses that are not unique to the workplace and refuting the constitutional concerns raised by the ETS’s challengers.

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In *National Federation of Independent Business v. OSHA*, the Supreme Court considered two emergency applications to stay the ETS following the Sixth Circuit’s decision. Unlike the Sixth Circuit, the Court concluded that the OSH Act does not authorize the kind of COVID-19 regulations articulated in the ETS. Discussing the transmissibility of COVID-19 everywhere people gather, the Court observed: “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.” The Court maintained that the OSH Act empowers the agency to establish only workplace safety standards and not broad public health measures.

While the Court criticized the ETS’s breadth, it also indicated that OSHA could regulate 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, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID-19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments.

According to the Court, this type of regulation would more appropriately address occupational risk rather than a general risk of contracting the virus. The Court stayed the enforcement of the ETS pending disposition of the appeal currently before the Sixth Circuit.

In a concurring [opinion](#), Justice Neil Gorsuch, joined by Justices Clarence Thomas and Samuel Alito, emphasized OSHA’s lack of authority to issue such a broad ETS. The concurring opinion explicitly characterized the ETS as defying the “[major questions](#)” doctrine. The Court has previously explained that, under this doctrine, Congress must speak clearly when authorizing an agency to regulate matters of significant economic and political significance. Justice Gorsuch contended that OSHA sought to resolve a “question of vast national significance” when it issued the ETS and that Congress “nowhere clearly assigned so much power to OSHA.”

In a dissenting [opinion](#), Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan maintained that the ETS “perfectly fits” section 6(c)(1) of the OSH Act and that the standard is necessary to address COVID-19’s dangers in the workplace. The dissenting Justices determined that, pursuant to section 6(c)(1), the COVID-19 virus is both a “new hazard” and a “physically harmful” agent, and that the virus poses a “grave danger” to millions of employees—a position that, according to the dissenters, was not disputed by the Court. The dissenting Justices criticized the Court’s opinion for limiting OSHA’s regulatory authority when the OSH Act permits regulating hazards that may exist both in and out of the workplace: “The statute does not require that employees are exposed to those dangers only while on the workplace clock. And that should settle the matter.”

## Considerations for Congress

The [comment period](#) for the ETS, which also acts a notice of proposed rulemaking for a permanent standard, remained open through January 19, 2022. As part of this notice-and-comment rulemaking process, OSHA may consider the comments, as well as the Court’s decision, and issue a more narrowly tailored permanent rule. Given the Court’s seeming approval of more targeted COVID-19 regulation, it seems possible that OSHA could explore new requirements that focus on specific industries or risks in particularly crowded workplaces. The agency may also opt to withdraw the ETS altogether. In response to the Court’s decision in *National Federation of Independent Business*, Secretary of Labor Marty Walsh, in a [statement](#), expressed disappointment with the decision and stated that “[r]egardless of the ultimate outcome of these proceedings, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers . . . .”

In *National Federation of Independent Business*, the Supreme Court concluded that the OSH Act does not authorize OSHA to impose broadly a mandatory vaccination and testing policy for employers with 100 or

more employees. Congress could clarify the scope of the relevant OSH Act provisions if it determines that the Court's interpretation does not appropriately reflect congressional intent and new federal action is necessary to address the evolving pandemic. States may also consider new standards to protect employees from workplace exposure to the virus. California, for example, adopted new [standards](#) that require employers to, among other things, develop and implement a process for screening and responding to employees with COVID-19 symptoms. The absence of federal COVID-19 workplace safety standards could prompt more States to adopt similar requirements.

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