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Supreme Court Stays OSHA Vaccine-Or-Testing Mandate

Client Alert | January 13, 2022

Click for PDF Decided January 13, 2022 ***National Federation of Independent Business v. Occupational Safety and Health Administration*, No. 21A244; and *Ohio v. Occupational Safety and Health Administration*, No. 21A247 On Thursday, January 13, 2022, by a 6–3 vote, the Supreme Court prevented the implementation of an OSHA rule that would have imposed a vaccine-or-testing regime on employers with 100 or more employees. Background:** On November 5, 2021, the Occupational Safety and Health Administration ("OSHA") issued an emergency temporary standard ("ETS") governing employers with 100 or more employees. The ETS mandated covered employers to "develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers" that require unvaccinated employees to undergo weekly COVID-19 testing and to wear a mask during the workday. Business groups and States filed petitions for review of the ETS in each regional Court of Appeals, contending that OSHA exceeded its statutory authority under the Occupational Safety and Health Act. The Fifth Circuit stayed the ETS and later held that the OSHA mandate was overly broad, not justified by a "grave" danger from COVID-19, and constitutionally dubious. After all petitions for review were consolidated in the Sixth Circuit, that court dissolved the Fifth Circuit's stay. The panel majority held that COVID-19 was an emergency warranting an ETS and that OSHA had likely acted within its statutory authority. **Issue:** Whether to stay implementation of the vaccine-or-testing mandate pending the outcome of litigation challenging OSHA's statutory authority to require employers with 100 or more employees to develop, adopt, and enforce a vaccine-and-testing regime for their employees. **Court's Holding:** The vaccine-or-testing mandate should be stayed because OSHA likely lacks the statutory authority to adopt the vaccine-or-test mandate in the absence of an unmistakable delegation from Congress.

> *"It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace."*

Per Curiam Opinion of the Court **What It Means:**

- The Court's decision prevents the implementation of the OSHA mandate, which applies to 84 million Americans. Echoing its recent decision in *Alabama Ass'n of Realtors v. Dep't of Health & Human Services*, the Court emphasized that agency action with such "vast economic and political significance" requires a clear delegation from Congress. It is doubtful that the stay will be lifted to allow OSHA to enforce the mandate before the ETS expires in May, meaning that it is unlikely employers will ever actually be subject to the ETS's vaccine-or-testing mandate.
- The challengers had argued that covered employers would incur unrecoverable compliance costs and that employees would quit rather than comply. The federal government, for its part, had argued that the OSHA mandate would save over 6,500 lives and prevent hundreds of thousands of hospitalizations. The Court stayed the mandate without resolving this dispute on the ground that only Congress could properly weigh such tradeoffs.
- The Court's decision to hear oral argument on the stay applications may signal the beginning of a trend, as this is the second time this Term that the Court moved an

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application to vacate a stay from the emergency docket to the argument calendar.

- Other Mandates: The Court stayed lower court injunctions against the vaccine mandate issued by the Centers for Medicare & Medicaid Services ("CMS"). *See Biden v. Missouri*, 21A240; *Becerra v. Louisiana*, 21A241. By a 5–4 vote, the Court ruled that the Secretary of Health and Human Services likely has the statutory authority to require vaccination for healthcare workers at facilities that participate in Medicare and Medicaid. Today's decisions do not address the federal contractor vaccine mandate that is presently enjoined on a nationwide basis by a federal district court in Georgia. Four other federal district courts also have enjoined the government from enforcing that mandate. So far, the Sixth and Eleventh Circuits have refused to stay the injunctions against the federal contractor mandate pending appeal.

The Court's opinions are available here and here. Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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