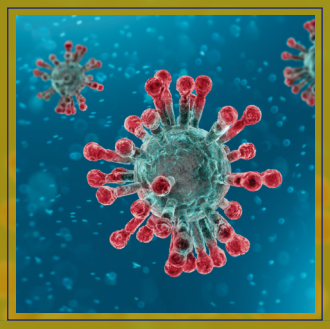

NECA Legal Alert

Supreme Court Reinstitutes a Stay of OSHA's Vaccinate-or-Test ETS

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

The United States Supreme Court issued a *per curiam* decision reinstituting a stay of OSHA's ETS. Here is a link to the opinion of the Court.

A per curiam decisions is a court opinion issued in the name of the Court rather than specific judges, but it is certainly not an indication that the decision was unanimous or non-controversial, and in this instance, we know it was not that. There was also a concurrence by Justice Gorsuch (joined by Justices Thomas and Alito), and a joint dissent by Justices Breyer, Sotomayor, and Kagan.

At first blush, it appears that the majority of the Court is saying that without a more explicit delegation of authority from Congress, OSHA can only regulate hazards that are fairly unique to the workplace, which could have broader implications for OSHA's regulatory reach than just this COVID-19 ETS (see Heat Illness):

> *"Although COVID–19 is a risk that occurs in many workplaces, it is not an occupational hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. 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."*

Under this theory, the majority opinion indicates that there are some issues that are of such "exceptional political and economic" consequence that the courts will presume Congress did not intend to delegate the issue to agencies unless the delegating statute is clear. More specifically, for those rare, really significant regulations that have really significant impacts on the country, Congress needs to be somewhat precise in its intention to delegate its legislative duty to an executive agency. In this context, the OSH Act's now-fifty year old and rather generic delegation of rulemaking authority does not grant a clear enough mandate for OSHA in this context. That is, the OSH Act may be a clear enough delegation of authority for those not-quite-so-major-issues about which OSHA typically develops and enforces regulations, but not for something so fundamental as *"ordering 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no 'everyday exercise of federal power.'"* And while the vaccinate-or-test rule may be an appropriate subject for a rule that OSHA could issue and enforce, if that is to be a nationwide rule of that importance, that is, in order for OSHA to lawfully issue and enforce that rule, it would need to be the result of a pretty express and somewhat recent delegation of authority from Congress.

So, it should be the States, or at least the US Congress, which is closer to the pulse of the American people, not OSHA on its own, that should decide whether there should be a vaccination requirement of any kind for major segments of the population. In other words, this kind of policy is something important enough that it deserves legislation, not a sub-cabinet agency regulation. And really, it has been two years into the pandemic, and a full year into the rollout of a safe and efficacious vaccination program with ample supplies, and not only has Congress not passed a law that requires vaccination or large-scale testing programs in workplaces, or for healthcare workers, or for federal contractors, etc., it has not even seriously debated it publicly.

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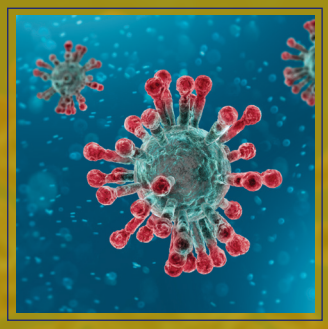

And the majority does clarify that OSHA is not blocked from any regulation regarding COVID-19, just a broad, one-size-fits-all approach like the vaccinate-or-test ETS:

> *"That is not to say OSHA lacks authority to 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. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face."*

Indeed, simultaneously with this opinion about the OSHA ETS, the Supreme Court issued a companion decision upholding CMS's authority to issue its regulation setting a hard vaccine-mandate for certain healthcare workplaces.

Here is the specific relief granted in the OSHA ETS decision:

> "The applications for stays presented to JUSTICE KAVANAUGH and by him referred to the Court are granted. ***OSHA's COVID–19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the Sixth Circuit and disposition of the applicants' petitions for writs of certiorari, if such writs are timely sought.*** Should the petitions for writs of certiorari be denied, this order shall terminate automatically. In the event the petitions for writs of certiorari are granted, the order shall terminate upon the sending down of the judgment of this Court."

While the decision technically is only a temporary stay of the ETS pending a full review of the legal challenges to the rule by the Sixth Circuit, the Court's conservative justices sent an unmistakable signal that the High Court conservative majority believes OSHA exceeded its statutory authority in issuing a workplace standard to address an issue of broad public health.

The three progressive justices, issued a scathing dissent essentially charging that a stay would result in the loss of tens of thousands of lives to COVID-19.

We will provide a more in-depth analysis of the Court's decision soon, not only about what it means for the ETS, but the sea change it may signal for OSHA's regulatory authority generally. For now, we simply wanted to immediately let you know that enforcement of the ETS has been stayed – i.e., there are no regulatory obligations to meet pursuant to the ETS – and seems to have been effectively put to rest by the Supreme Court. There does still remain the OSH Act's General Duty Clause, so a return to evaluating a reasonable response to the pandemic against the multitude of various CDC and OSHA guidance for COVID-19 workplace protocols.

Also one quick word about what this means for the State OSH Plans. The Supreme Court's decision today to reinstitute a stay of the federal OSHA vaccinate-or-test ETS technically affects only the federal rule. Since the basis on which the Court struck down the federal ETS was the Major Questions Doctrine, the decision relates only to federal OSHA's authority regulate without a more clear delegation from the US Congress. That principle is only appliable to fed OSHA, the federal OSH Act, and the US Congress. It would not be applicable to any State OSH Plan that would have its regulatory authority arising out of a state statute.

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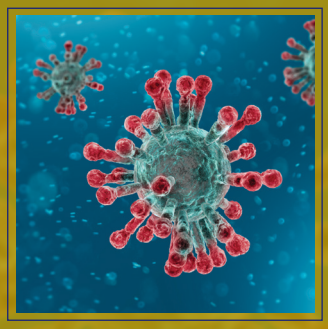

To be clear, without a fed OSHA ETS on the books, the State Plans will not be compelled to issue their own versions of a vaccination ETS, but this ruling by the Supreme Court does not block them from doing so on their own accord. From a practical standpoint, however, we just watched 100% of the State OSH Plans sit on the sidelines while the Fifth Circuit's Stay of the fed ETS was in effect. Every one of those state plans could have moved ahead with their own versions of a vaccination ETS, but they all pumped the brakes, including those that we might have anticipated to be most aggressive (i.e., Cal/OSHA, WISHA, and OR OSHA). Even during the period that the Stay was lifted between December 17th and today, only MN OSHA moved ahead to adopt the vaccinate-or-test ETS. We would not be terribly surprised to see most (or maybe even all) of the State Plans stand down again.

We wanted to very quickly let you know that the ETS seems to have been put to rest by the Supreme Court, and there are no regulatory obligations to meet pursuant to the ETS. There does still remain the OSH Act's General Duty Clause, so employers are now faced with a return to evaluating whether they are making reasonable efforts to protect their employees from pandemic hazards when measured against the multitude of various CDC and OSHA guidance for COVID-19 workplace protocols.

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