

What's at Stake in the Supreme Court's OSHA Vaccine-or-Testing Case

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The U.S. Supreme Court will hear oral arguments Jan. 7 on whether the Occupational Safety and Health Administration (OSHA) overstepped its authority when it issued an emergency temporary standard (ETS) requiring employers with at least 100 employees to mandate vaccinations or masks and weekly testing for workers.

The high court also will hear arguments about whether the Centers for Medicare & Medicaid Services (CMS) overreached when it issued an emergency regulation requiring health care workers to be vaccinated.

Decisions in the cases are expected soon—perhaps Friday, over the weekend or Monday—following oral arguments. The first requirements of the OSHA ETS (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-review-ets-compliance-steps.aspx)—everything but the weekly testing requirements—are set to take effect Jan. 10, unless the court acts before then to block them. The testing requirements are supposed to take effect Feb. 9.

'Huge Impact'

The OSHA case "will have a huge impact on the future of American workplaces," said Robin Samuel, an attorney with Baker McKenzie in Los Angeles. "In the short term, the case will determine whether millions of additional American workers will get vaccinated in order to keep their jobs. In the longer term, if the ETS is struck down, federal OSHA's authority to regulate workplaces on a national scale will be significantly undermined, leaving states to regulate workplace safety issues in more of a patchwork fashion."

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Challenges to OSHA's Standard

The U.S. solicitor general maintained in a brief that statutory and constitutional challenges to OSHA's standard are unlikely to succeed. According to the solicitor, the Occupational Safety and Health Act provides that OSHA shall issue an ETS when the agency determines that one is necessary to protect employees from a grave danger resulting from exposure to physically harmful agents or new hazards.

OSHA properly determined that exposure to coronavirus in the workplace presents a grave danger to unvaccinated employees and that the standard is necessary to protect those employees from the dangers of contracting COVID-19 at work, the federal government said.

The federal government rejected challengers' arguments that:

- Risk of infection, hospitalization and death faced by unvaccinated workers do not qualify as a grave danger. Vaccination is the most effective and efficient workplace control available, the government said.

- The standard is not necessary because some subset of individuals might be safe from transmission due to natural immunity of those previously infected with COVID-19. OSHA could err on the side of overprotection, the federal government noted.
- OSHA lacks authority to issue occupational standards related to the coronavirus because risks from exposure exist outside the workplace.

The government criticized characterization of its standard as a vaccine mandate, saying it gave employers a choice between vaccination or requiring masks and tests. "Employers are best positioned to determine which approach will secure employee cooperation and protection," the government's brief said.

In its brief, the National Federation of Independent Business (NFIB) criticized OSHA for not using the notice-and-comment period before issuing a standard. The NFIB also emphasized that COVID-19 could be contracted anywhere. "COVID-19 is a societal health problem within the province of general public health agencies—perhaps other federal agencies within HHS [U.S. Departments of Health and Human Services], and certainly state and local authorities—but not of occupational agencies," it stated.

In addition, the NFIB said that even if the ETS results in a 1 percent to 3 percent attrition in the workforce, the ETS would cause significant injury to businesses.

Led by Ohio, states opposing the vaccine-or-testing standard said in a brief that there isn't a grave danger from COVID-19, asserting that "the risk to young, unvaccinated employees is roughly equivalent to the risk faced by older, vaccinated employees." The states added, "By the time OSHA acted, Americans had access to vaccines for nearly a year, better therapeutics than ever before and a great deal of experience with the virus. OSHA responds by noting that 'dangers can evolve.' True enough, but the changed circumstances OSHA cites lessened the danger."

Moreover, the power to regulate public health is "a matter traditionally reserved to the states," the states said.

Employers' Objections

According to Robin Shea, an attorney with Constangy, Brooks, Smith & Prophete in Winston-Salem, N.C., some employers object to OSHA's standard "because of the cost and administrative hassles, and also for fear that, during the current labor shortage, their unvaccinated employees will quit and go to work for employers who are not subject to the ETS. On the other hand, OSHA argues that the pandemic justifies these actions."

As for employer mandates, Kevin Troutman, an attorney with Fisher Phillips in Houston, said, "The law on this question is pretty clear. Subject to applicable medical and religious accommodations (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/if-workers-refuse-a-covid-19-vaccination.aspx) under federal law, employers may mandate COVID vaccinations."

That said, Marjory Robertson, assistant vice president and senior counsel with Sun Life in Wellesley Hills, Mass., noted that without the pre-emptive power of the ETS, employers would "need to grapple with conflicting state laws that place limits on or outright prohibit vaccine mandates."

CMS Emergency Regulation

The CMS emergency regulation "has a narrower impact than the litigation involving the OSHA ETS because the mandate applies only to certain workers at health care facilities that receive Medicaid or Medicare funding," Robertson said.

"There are a significant number of states and local governments that have adopted similar mandates requiring that health care workers receive COVID-19 vaccinations," she said. "Therefore, for some health care facilities, the outcome of the federal litigation about the CMS mandate may have no impact on their policies or practices."

Jim Paul, an attorney with Ogletree Deakins in St. Louis, said that with the CMS emergency regulation, "the government's broader ability to tie strings to the federal money that it gives to the states and to private organizations through the states is also part of the equation."

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