

EMPLOYMENT ALERT

Post OSHA ETS Issues January 18, 2022

The OSHA ETS was stayed by the Supreme Court last Thursday. While the OSHA ETS may not yet be declared dead, it is certainly on life support. We'll explain what lies ahead in the ETS litigation and more importantly how OSHA may respond, and what employers should consider having in place as Omicron surges through the Nation.

The ETS litigation

The ETS has been stayed. This means it is on hold while the lawsuits challenging the ETS play out now in the lower federal courts. Theoretically, the Sixth Circuit could, after a full blown trial, resurrect the ETS. This seems unlikely, and any decision of this nature will be appealed back to the Supreme Court. If the 5 of the 6 justices who ruled for the stay last week remain on the bench, it is inconceivable that they will reverse their decision. The majority decision wraps up with this conclusion:

“Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 11 employees, certainly falls into the latter category.”

This sweeping conclusion is noteworthy for two reasons. It does not even leave the door ajar for OSHA to claim that it has the authority to enact the OSHA ETS. Second, the statement is inaccurate. The OSHA ETS requires either vaccination or testing of the unvaccinated. The majority in the Supreme Court did what many others have done, and glossed over the fact that testing was an option for employers for their unvaccinated workers. This means that there is realistically no chance that the current ETS ever takes effect.

How will OSHA respond?

Right now without the ETS standards to enforce, OSHA must fall back on the General Duty Clause. Secretary Walsh said as much in his statement following the Supreme Court's decision. In a statement echoed by the President, he urged private sector employers to adopt their own vaccine and/or testing mandates. He also stated that OSHA will do everything in its authority to

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hold businesses accountable for protecting workers. Secretary Daley cited the General Duty Clause and the COVID-19 National Emphasis Program. For those of you who are not familiar with this program, OSHA's NEP focuses on inspections in high risk industries like health care, manufacturing, meat processing, restaurants and supermarkets.

OSHA's inspection resources are limited but it seems that they will want to send a message to employers that COVID remains a grave threat and it will use the General Duty Clause and enforcement actions to incentivize safety practices. The best way to send a message is to make an example of some employers. These employers are more likely to be in high risk industries (health care, for example) or ones that experience outbreaks or COVID related deaths.

What should employers consider doing now?

Many of you will have been well prepared for the ETS. Some of you may have put into place some of the ETS requirements which were in effect for 4 days last week. I believe that it makes sense to cherry pick the elements of the ETS which are practical, cost effective and promote safety. One example is time off for vaccinations. Tracking vaccination status (which many may have already been doing) makes good sense. Also requiring masking of unvaccinated employees except in non-public offices should be considered. For those employers with relatively few unvaccinated employees, some regular testing may be practical and not cost prohibitive. The provisions of the ETS on employee notification of a positive test and "removal" from the workplace are also prudent measures to implement. By taking these steps you may also be well prepared if OSHA proposes a permanent standard for airborne diseases, including COVID-19.

None of us need reminding about the risks that remain at this stage of the pandemic. The minority of the Supreme Court justices had no hesitation in describing the current state of the pandemic as a "grave danger" to employees in the workplace. In fact, they went so far as to accuse their colleagues in the majority as "causing grave danger to the Nation's workforce" by the decision to stay the ETS.