COVID-19 Alert: OSHA's Vaccine ETS Ruling

U.S. Supreme Court Rules on OSHA COVID-19 Vaccine ETS

By:Amanda E. Thibodeau and Matthew L. Mitchell
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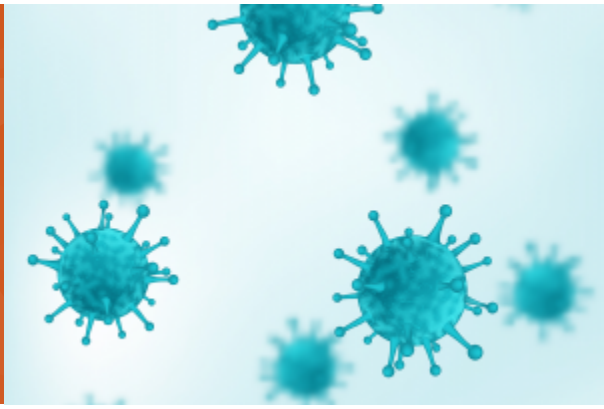

On January 13, 2022, the U.S. Supreme Court issued a stay of the Occupational Safety and Health Administration's ("OSHA") Emergency Temporary Standard ("ETS"), effectively halting OSHA's enforcement of the ETS days after it was scheduled to come into force.

As previously reported, OSHA issued an ETS that would require all private employers, with 100 or more employees, to implement a mandatory employee vaccination program, or require unvaccinated employees to receive weekly COVID-19 testing. OSHA had established compliance deadlines of January 10, 2022, for employers to have a compliant ETS policy in place, and February 9, 2022, for employers to have compliant COVID-19 testing protocols in place. Now, with the Supreme Court's decision to stay the ETS, employers will not be expected to comply with the ETS or its compliance deadlines – at least yet.

The Decision

The OSHA ETS

In a 6-3 decision, the Supreme Court lifted the stay and held that OSHA lacked the authority to issue and enforce the ETS. The Court, while recognizing the broader public health concern, held that OSHA lacked the power to "regulate the hazards of daily life" without congressional authority. COVID-19, the Court commented, is "untethered, in any casual sense, from the workplace." The Court commented, however, that OSHA could take more targeted measures in instances where COVID-19 poses a special danger due to the features of an employee's job or worksite. For example, OSHA could utilize its General Duty clause to require additional protections for employees who work in particularly crowded or cramped environments, or for researchers who work directly with the COVID-19 virus.

The Supreme Court's decision now sends the case back to the U.S. Court of Appeals for the Sixth Circuit, which will rule on the merits of the ETS. While it is likely that further appeals to the Supreme Court will follow, the Supreme Court's decision at this stage forecasts a likely end to OSHA's efforts to implement the ETS, at least in its current form.

The Centers for Medicare & Medicaid Services Vaccine Mandate

In the same decision, the Supreme Court *lifted* the injunctions on the Centers for Medicare & Medicaid Services ("CMS")vaccine mandate for most Medicare- and Medicaid-certified healthcare providers. This means enforcement of the *CMS vaccine mandate* may begin. Employers who fall into this category must now be prepared to comply with the mandate as soon as January 27, 2022, for Phase 1 and February 28, 2022 for Phase 2.

The Federal Contractor Mandate

The Supreme Court did not address the federal contractor vaccine mandate in its January 13 opinion. Currently, this mandate is still subject to an injunction and will not be enforced by the government at this time.

What Next?

While most private employers are no longer subject to the ETS, employers may still implement their own vaccine mandate or standards, subject to any state or local laws, and applicable federal laws, such as Title VII and the Americans with Disabilities Act. Employers who developed policies compliant with the ETS may still wish to move forward but should now re-assess and revise as desired or necessary to their unique circumstances.

Morse is focused on assisting our clients through these unprecedented times. Please contact Matthew Mitchell or Amanda Thibodeau should you have questions concerning this subject, or any other COVID-19 response matters.

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