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SUPREME COURT BLOCKS ENFORCEMENT OF OSHA'S VACCINE MANDATE FOR LARGE EMPLOYERS

In a highly anticipated 6-3 decision, the Supreme Court stayed enforcement of OSHA's Emergency Temporary Standard ("ETS") requiring large employers to implement vaccine or testing policies. This means employers can put pencils down on complying with the ETS, at least for the time being.

HISTORY

As most employers are well aware by now, on November 6, 2021, OSHA issued its long-awaited ETS mandating that employers with 100 or more employees adopt a policy requiring employees to be vaccinated or submit to weekly testing and wear face coverings in the workplace. Challenges ensued throughout the country, and the Fifth Circuit Court of Appeals issued an order staying the enforcement and implementation of OSHA's ETS pending further judicial review. The consolidated challenges to the ETS made their way to the Sixth Circuit Court of Appeals, where the court lifted the Fifth Circuit's stay.

Following the Sixth Circuit's ruling, OSHA extended its enforcement deadlines, announcing that no citations would be issued for noncompliance with the ETS

before January 10, nor would citations be issued for noncompliance with the standard's testing requirements before February 9. In the meantime, the case was appealed to the Supreme Court.

THE DECISION

Just days after the January 10 deadline for compliance (and after many employers had already taken significant steps toward rolling out their policies), the Supreme Court put a halt to the ETS's enforcement. The Court concluded the challengers are likely to succeed on the merits of their attacks on OSHA's authority and therefore stayed the implementation of the ETS. The Court cast significant doubt on the scope of OSHA's authority to issue COVID-19-related safety measures, noting that OSHA's role is to regulate specific occupational hazards, not public health hazards like the risk of contracting the COVID-19 virus generally.

WHAT'S NEXT?

To be clear, the Supreme Court's ruling is not the end of the road for the ETS. It will return to the Sixth Circuit for a review on

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the merits. Given the Supreme Court's skepticism of OSHA's authority to issue such a mandate, however, the ETS's survival is unlikely. Nevertheless, employers should keep policies developed in anticipation of the ETS compliance deadlines handy and ready for implementation in the seemingly unlikely event the ETS is reinstated. Of course, employers are free to adopt or keep in force, ETS-compliant policies on a voluntary basis if so inclined.

As we continue to monitor developments in the ETS litigation, we'll also be on the lookout for OSHA to initiate the formal rulemaking process to implement a similar mandate through the usual rulemaking process. However, that process is likely to be lengthy and subject to similar legal challenges. For now, employers should stay tuned for developments and keep in mind that although they are no longer required to implement workplace vaccine, testing, and/or masking mandates, they remain free to do so.