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Explaining the Supreme Court's Decision: Why the OSHA ETS Was Placed on "Stay"cation

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On January 13, 2022, in a per curiam opinion, the Supreme Court granted the application for a stay of Occupational Safety and Health Administration's (OSHA) ability to implement and enforce the "Vaccine or Test" Emergency Temporary Standard (ETS). The Supreme Court held that the applicants are likely to succeed on the merits of their claim that the Secretary of Labor lacked authority to impose the ETS. The Supreme Court's decision was based on the following reasons:

1. OSHA's authority is created by a clear expression from Congress, and the Supreme Court "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." The Court determined that the OSH Act does not "plainly authorize" the Secretary of Labor to impose a mandate like the ETS. Instead, the OSH Act "empowers the Secretary to set *workplace* safety standards, not broad public health measures." The Court determined that because the ETS would be a "significant encroachment into the lives – and health – of a vast number of employees," it must be founded on explicit Congressional approval.
2. The Court determined that while COVID-19 "is a risk that occurs in many workplaces, it is not an *occupational* hazard in most." The Supreme Court distinguished "occupational risk" from the "universal risks" and everyday dangers that people face in daily life, such as "crime, air pollution, or any number of communicable diseases." The Court identified COVID-19 as a universal risk because it spreads, not just in the workplace, but also "at home, in schools, during sporting events, and everywhere else that people gather." Permitting OSHA to regulate the hazards of daily life, the Court held, would unjustly expand OSHA's statutory authority.
3. The majority disagreed with the dissent that the ETS is comparable to a fire or sanitation regulation imposed by OSHA. Unlike the requirements of a fire and sanitation regulation in the workplace, said the Court, "[a] vaccination . . . cannot be undone at the end of a workday."
4. The Court did not go so far as to say that OSHA can never regulate COVID-19 risks. Instead, the Court recognized that OSHA does have the power to regulate specific occupational risks associated with COVID-19, such as when a particular function of a job would place employees in a special danger (e.g., researchers who work with the COVID-19 virus or employees "working in particularly crowded or cramped environments"). However, the broad application of the ETS to all industries, without distinction, "takes on the character of a general public health measure, rather than an "occupational safety or health standard."
5. Finally, the Court noted OSHA lacked any historical precedent for implementing a broad public health regulation like the ETS. The Court interpreted this lack of precedent to be a "telling indication" that the ETS exceeds the agency's authority.

Justice Gorsuch penned a separate concurrence, which Justices Thomas and Alito joined, analyzing the issue under the "major questions" doctrine. The concurrence underscored that the central issue before the Court was

"whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people." The concurring Justices concluded that it may not, finding that Congress has not delegated to OSHA the breadth of authority and power it seeks to exercise over the lives of such a large number of Americans.

Justices Breyer, Sotomayor, and Kagan authored a dissenting opinion, which focused on concepts of grave danger, the necessity for OSHA to address the ongoing COVID-19 pandemic in workplaces, and administrative deference to OSHA's conclusions in light of the evidentiary support, data, and studies.

Takeaway

As of January 13, 2022, the ETS was again stayed nationwide – a stay that would have remained in place until the final disposition of all litigation. In the wake of the Supreme Court's stay, OSHA announced on January 25, 2022 that it was withdrawing the ETS effective January 26, 2022. OSHA clarified that it is not withdrawing the ETS as a proposed rule. However, OSHA has indicated that it will be prioritizing its resources to focus on finalizing a permanent COVID-19 Healthcare Standard.

So what does this mean for employers? How do you ensure compliance with OSHA standards moving forward? For answers to these questions and a discussion of OSHA's response to the Supreme Court decision, please see our alert entitled "[Is COVID-19 Enforcement Stayed? OSHA's Path Forward After the Supreme Court's Decision](#)". For further information regarding the Supreme Court's decision, please feel free to reach out to Ashley Meredith Strittmatter or Mary Katherine Campion.