

Key Takeaways For Employers in the Aftermath of the Supreme Court's Halt to OSHA's Vax/Testing Mandate

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Political pundits and legal scholars have been engaged in frenzied debate trying to decipher the fallout of the United States Supreme Court's decision that stopped the Occupational Safety and Hazard Administration (OSHA) from enforcing its Emergency Temporary Standard (ETS) which mandated that employers with 100 or more employees require workers to show proof of vaccination against COVID-19 or submit to weekly testing. The Court's decision prevents OSHA from enforcing its ETS until all legal challenges have been heard. Because the Court concluded that those legal challenges are "likely to succeed on the merits" of their argument that OSHA does not have the statutory authority to issue its vaccine and testing mandates, there is significant doubt that they will ever come to fruition.

While the pundits and scholars have now had their say, employers, who are struggling to manage a highly contagious variant, a tight labor market, and employees with divergent and staunch views on vaccination, are also left wondering what the Court's decision means for them and what they should be doing. Here are some key takeaways for employers in the aftermath of the Court's decision.

EMPLOYERS ARE NOT REQUIRED TO COMPLY WITH OSHA'S ETS

The obvious takeaway from the Court's decision is that employers no longer have a legal obligation to follow OSHA's ETS which required them to roll out vaccine and testing policies by January 10th. This means that employers are free to forego their vaccine or testing policies unless there is a state or local law requiring them to have them. That, no doubt, comes as good news for employers who were concerned that vaccine and testing requirements would result in a loss of workers, additional administrative burdens, or unwanted backlash from employees.

EMPLOYERS DO NOT HAVE TO TEAR UP THEIR VAX/TESTING POLICIES IF THEY WANT TO KEEP THEM IN PLACE

While employers do not have to comply with the OSHA ETS, they also do not have to abandon their plans for vaccination or testing requirements. Employers who want to keep their testing or vaccine policies in place or desire to implement them in the future need not tear up those policies or head back to the drawing board. The Court's decision does not, in any way, suggest that employers are legally prohibited from mandating that their employees be vaccinated or tested. Rather, the Court focused on the issue of whether OSHA, (as the federal agency charged with enforcing workplace safety), has the statutory authority to force employers to put vaccine and testing requirements in place. Outside of the context of OSHA's ETS, courts routinely upheld vaccine mandates, including those implemented by state and local governments and private industry. In fact, simultaneously with its decision to stay OSHA's vaccine and testing mandate, the Court also issued a separate decision permitting a federal vaccine mandate for healthcare workers to proceed.

Simply put, notwithstanding the Court's halt to OSHA's ETS, private employers may still voluntarily choose to go forward with their vaccine or testing requirements for their workforce as long they are not subject to state or local laws preventing them from doing so.

EMPLOYERS WHO GO FORWARD WITH VAX/TESTING POLICIES CAN NOW PICK AND CHOOSE FROM THE OSHA MODEL

For those employers who desire to proceed with vaccine or testing policies, the OSHA ETS provides a comprehensive model of how to set up those policies. Just because the Court put a halt to OSHA's enforcement of the ETS does not mean employers can't continue to follow the OSHA model if they choose to. Moreover, because OSHA can no longer enforce the ETS, employers are not forced to abide by all of the components of the OSHA model and are free to pick and choose what they like, while also shedding away the parts which they dislike. For example, an employer could decide to mandate that its employees be vaccinated, but also decline to provide the paid time off for vaccination that the OSHA ETS required. Likewise, an employer could require its employees to submit to weekly testing and also accept the results of a self-administered at-home tests (something the OSHA ETS precluded).

In sum, employers can follow the OSHA model but are not constrained to comply with all of its directives and can pick and choose the parts that work best for them.

STATE, LOCAL AND INDUSTRY REQUIREMENTS MAY PREVENT SOME EMPLOYERS FROM DEVELOPING A UNIFORM COMPANY-WIDE APPROACH TO VACCINATION AND TESTING REQUIREMENTS

While the Court's stay of OSHA's ETS will result in employer's getting to choose their approach to vaccination and testing, state, local and industry requirements may limit that choice and prevent employers from developing a one-size-fits-all company-wide approach. Regardless of whether they refrain from, or proceed with, carrying out vaccine or testing requirements, employers will need to adjust their policy choices depending on where their employees work and what jobs they do.

Now that OSHA's ETS is off the table, state and local laws will come into play and employers will need to comply. This means that employers, (especially those who have employees in more than one state or locality), will have to carefully navigate the labyrinth of state and local laws—some of which may *prohibit*, limit or require vaccination or testing for employees. Currently, two states (Montana and Tennessee) prohibit employers from mandating vaccination for their employees, while nine other states provide certain limitations to vaccination requirements. At least one locality, New York City, *requires* that all employers implement employee vaccine mandates and it is anticipated that other states and localities will follow. Because of these varying state and local requirements, employers may find themselves in the position of having to implement one policy for employees in places where vaccine mandates are prohibited (e.g. Montana), while putting in place another policy for employees in places where vaccine mandates are required (e.g., New York City).

By the same token, employers may have to account for variations pertaining to vaccination or testing requirements for workers in different industries. For example, a federal rule requiring vaccination mandates for certain healthcare workers was upheld by the Court and multiple states and localities have laws requiring that workers in high-risk settings (e.g. healthcare, education, and nursing homes) be vaccinated or submit to testing. In addition, while blocking OSHA from enforcing its ETS for all employers with 100 or more employees, the Court suggested that OSHA could promulgate "targeted regulations" for those jobs or workplaces "where the virus poses a special danger." As a result, if states, localities or OSHA promulgate requirements for workers in certain settings, an employer may be faced with having one policy for certain workers (e.g. front-line workers) and another policy for other workers (e.g. back office workers).

Thus, while the Court's decision gives employers a choice over whether or not to implement testing or vaccine mandates, that choice may be limited by state, local or industry requirements.

In sum, the full impact of the Court's halt to the OSHA ETS remains to be seen. But, for now, employers should decide whether or not to proceed with vaccination and testing requirements for employees and make certain whatever decision they make complies with state, local and industry requirements.

If you have any questions or need assistance with respect to vaccine or testing policies, please contact Laura Corvo (corvol@whiteandwilliams.com; 201.368.7226) or another member of the Labor and Employment Group.

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