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## Does Supreme Court Vaccine Decision Signal Support for Other Individual Rights?

The Occupational Safety and Health Administration's (OSHA's) emergency temporary standard (ETS) would have required businesses with at least 100 employees to ensure workers are vaccinated against COVID-19 or undergo weekly testing, by Feb. 9.

By **Jeffrey Campolongo** | January 20, 2022



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The employment law world was given a reminder by the U.S. Supreme Court this past week as to why the institution continues to reign supreme when it blocked the Biden administration's vaccine mandate for large private employers. See *Biden v. Missouri* and *Becerra v. Louisiana*, 595 U. S. \_\_\_\_ (2022) (decided January 13, 2022). The Occupational Safety and Health Administration's (OSHA's) emergency temporary standard (ETS) would have required businesses with at least 100 employees to ensure workers are vaccinated against COVID-19 or undergo weekly testing, by Feb. 9. The emergency measure was said to cover as many as 84 million Americans employed by large businesses. Will the decision lead to the court upholding other individual rights in other contexts?

## **How It Started**

On Sept. 9, 2021, President Joe Biden announced "a new plan to require more Americans to be vaccinated." As part of that plan, the president said that the Department of Labor would issue an emergency rule requiring all employers with at least 100 employees "to ensure their workforces are fully vaccinated or show a negative test

at least once a week.” According to recent estimates, about 63% of the country is fully vaccinated. The Biden administration was counting on the ETS to compel an additional 20 million workers to get vaccinated by the deadline, while the current omicron strain continues to spread at a record pace.

Almost two months after the president’s pronouncement, OSHA announced the ETS on Nov. 5, 2021. The initial compliance dates were Dec. 5, 2021, and Jan. 4, 2022. There were numerous legal challenges to the ETS thereafter, and the U.S. Fifth Circuit Court of Appeals issued a legal stay that temporarily prevented OSHA from enforcing the ETS. Challenges from other jurisdiction ensued and were eventually consolidated and sent to the Sixth Circuit Court of Appeals for adjudication. The Sixth Circuit lifted the legal stay and allowed OSHA to move forward with enforcement. In response, OSHA issued new compliance dates of Jan. 10, and Feb. 9, while the case was appealed to the U.S. Supreme Court.

## How It’s Going

After a marathon 3.5-hour oral argument, the Supreme Court issued an unsigned opinion that employers are no longer required to comply with the ETS while litigation ensues. In blocking the regulation from going into effect nationwide, the majority of the justices on the court made it clear that they believed OSHA overstepped its authority. In its Jan. 13 order, the court criticized OSHA’s rule as a “blunt instrument” that “draws no distinctions based on industry or risk of exposure to COVID-19.”

In considering the mandate for private employers, the Supreme Court started its analysis by acknowledging that OSHA has the power to regulate occupational risks and dangers. While the court recognized OSHA’s explicit authority to regulate COVID-19 risks in environments that may be uniquely susceptible to transmission (i.e., COVID-19 research labs, and “crowded or cramped work environments”), it concluded that the breadth of the ETS went beyond clearly identifiable occupational hazards. “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 100 employees, certainly falls in the latter category,” the per curiam opinion said.

In contrast, in a separate opinion, the justices allowed the federal Centers for Medicare & Medicaid Services (CMS) to require COVID-19 vaccination for health care workers at Medicare- and Medicaid-certified providers and suppliers. See *National Federation of Independent Business v. OSHA* and *Ohio v. OSHA*, 595 U. S. \_\_\_\_ (2022) (decided January 13, 2022). The court reasoned that Congress has authorized the Secretary of Health and Human Services to impose conditions on the receipt of Medicaid and Medicare funds that “the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.” The court also pointed out the obvious, i.e., that vaccination requirements are a common feature of the provision of health care in America: Health care workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella.

The compliance date for employers covered by the CMS health care directive has been extended. The nation’s 10 million health care workers must receive their first COVID-19 vaccine dose by Jan. 27, and be fully vaccinated by Feb. 28. Employers are also required to track employees’ vaccination statuses and develop vaccination policies that include medical and religious exemptions and accommodations.

## To Vax, or Not To Vax?

Before the court’s Jan. 13 rulings, many businesses already started complying with the provisions of the ETS by requiring their workers to be vaccinated. In that sense, the Biden administration’s mandate was functioning as intended. While forced compliance may have been eliminated by the Supreme Court, voluntary compliance was well underway. To be clear, any employer can continue to comply with the ETS, if they so choose. The Supreme Court’s focus was on whether OSHA exceeded its statutory authority. The ruling has nothing to do

with whether private employers may mandate vaccination, testing or masking requirements for its employees. In fact, virtually every single legal challenge to private employer mandates have been upheld by courts throughout the country.

Moreover, OSHA still has authority under its general duty clause to inspect and penalize what it considers to be unsafe COVID-related practices. OSHA has made it clear that it will do everything in its existing authority to hold businesses accountable for protecting workers, including under the COVID-19 National Emphasis Program and general duty clause. (See Jan. 13, 2022 Statement From Secretary Of Labor Marty Walsh On Supreme Court Ruling On OSHA Emergency Temporary Standard On Vaccination, Testing (<https://www.dol.gov/newsroom/releases/osec/osec20220113>)). It also possible for states that have approved state OSHA programs to pursue implementation of their own versions of the ETS.

For all the talk of activist judges and strict interpretation of the law, these two opinions are symbolic of the divide that exists among us. In a scathing dissent to the ETS decision, Justice Sonia Sotomayor asked this single, simple question: “Who decides how much protection, and of what kind, American workers need from COVID-19? An agency with expertise in workplace health and safety, acting as Congress and the president authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?” Perhaps the biggest irony in this debate about protection from and for the public came in the form of the Supreme Court’s own COVID policy. The building itself remains closed to the public except for essential personnel, and lawyers are allowed to argue only if they have a negative PCR test. Meanwhile it was the court’s six vaccinated, boosted conservative justices who blocked the Biden administration’s vaccine-or-test requirement for private workplaces.

The current construct of the majority on the high court has demonstrated a commitment to protecting private businesses from overreach by the government. One could even say that striking down the vaccine mandate is a pivotal win for individual rights, personal liberty, and body autonomy. It will be very interesting to see how those same principles play out when these same justices are asked to opine in a different context involving overreach by the government. Will fundamental rights carry the day? Or will we see a much different approach to how the government controls the individual choices we make with our bodies?

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