

# Supreme Court Blocks Enforcement of OSHA's ETS – What's Next for Private Employers?

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On January 13, 2022, the United States Supreme Court blocked enforcement of the Occupational Health and Safety Administration's ("OSHA") [Emergency Temporary Standard](#) ("ETS") mandating large private employers (those with at least 100 employees) to require their employees to be vaccinated against COVID-19 or, alternatively, test at least weekly for COVID-19 and wear a mask while in the workplace.

The Supreme Court recognized OSHA's authority to address the unprecedented circumstances caused by the global pandemic but nonetheless determined that OSHA overstepped its authority by setting forth such a wide-scale mandate regulating all "large employers." To that point, the Supreme Court let stand an interim rule from the Centers for Medicare & Medicaid Services' similarly requiring COVID-19 vaccination (subject to disability and/or religious accommodations) for employees of health care facilities that receive Medicare or Medicaid funding. In short, the Supreme Court took issue with the overbroad scope of the mandate, not its purpose.

On January 25, 2022, OSHA withdrew the ETS. It now has a couple of options. First, it can go back to the drawing board and promulgate another emergency temporary standard or propose a rule more narrowly tailored to specific industries, workplaces or workforces. Second, if it declines to engage in additional rulemaking, OSHA can fall back on its authority to police employer violations of OSHA's "General Duty Clause," to protect workers from "recognized hazards" in the workplace that could cause serious injury or death. This could result in OSHA citations and penalties for private employers who do not take appropriate steps to ensure workplace health and safety. Accordingly, private employers (particularly large ones that would otherwise have been subject to the ETS) are well-advised to stay up-to-date in federal, state and local guidance, like recommendations from the CDC and, as appropriate, update and ensure compliance with company workplace health and safety policies, particularly those related to COVID-19 preparedness, awareness and prevention in the workplace, employee complaint reporting and anti-retaliation protections.

Importantly, the Supreme Court's action against OSHA's ETS does not prevent state and local governments from promulgating similar or other rules for private employers within their jurisdiction. For example, in [New York City](#), all workers who perform in-person work or interact with the public in the course of business were required to receive at least one dose of a COVID-19 vaccine by December 27, 2021 and must be fully vaccinated by February 10, 2022. Other jurisdictions, such as the State of [Illinois](#), have gone the other direction, halting its COVID-19 vaccination/testing mandate following the Supreme Court's decision on the ETS. Equally importantly, even in the absence of applicable federal, state, and local mandates, private employers may institute and enforce their own COVID-19 vaccination, testing and/or other health and safety (e.g., masking) policies and requirements, subject to applicable law. Employers should be sure to apply any such policies in a consistent manner and be aware of their legal obligations to engage in an interactive dialogue with employees who seek accommodations from such workplace requirements (i.e., exception from the COVID-19 vaccine), and potentially provide reasonable accommodations based upon disabilities and/or religious beliefs. Of course, employers should timely and clearly communicate all changes to their COVID-19 policies and requirements to their employees.

**If you have any questions on applicable federal, state, or local guidelines, the impact of the Supreme Court's decision on your organization, or implementation/enforcement of your own COVID-19 policies or requirements for your employees, please reach out to us for additional guidance. Click the hyperlink for contact information for Freeborn's [Labor and Employment](#) Practice Group.**