Cooley

US Supreme Court Blocks OSHA's Vaccine-or-Test Mandate

January 14, 2022

On January 13, 2022, the US Supreme Court (SCOTUS) granted the consolidated applications for stays of the federal Occupational Safety and Health Administration emergency temporary standard (ETS), including the vaccine-or-test mandate, on the grounds that OSHA had exceeded its regulatory authority without clear congressional authorization. Specifically, the majority SCOTUS opinion analyzed the authority granted to OSHA under the Occupational Safety and Health Administration Act and ruled that OSHA's authority under the act was limited to occupational safety hazards, whereas COVID-19 is a general risk that is not particular to the workplace.

SCOTUS did not block the vaccine mandate applicable to workers in nursing homes, hospitals and other facilities that receive federal funds.

Must employers implement the OSHA ETS mandate?

No. SCOTUS blocked the OSHA ETS vaccine-or-test mandate pending further proceedings.

What is the likely future of the OSHA ETS mandate?

The enforceability of the OSHA ETS mandate is cast into serious doubt by the ruling. While SCOTUS only ruled on whether the mandate should be stayed pending a final resolution of the lawsuit regarding its enforceability, it held that the applicants seeking to invalidate the OSHA ETS "are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate." To that end, the premise of the decision – that OSHA lacked statutory authority – cuts to the core of the issue of whether the mandate is enforceable, and thus it is unlikely that it would ultimately be upheld.

What if an employer already implemented a vaccination policy or other measures called for by the OSHA ETS?

An employer is not prohibited from voluntarily maintaining a vaccination policy or implementing the other measures in the OSHA ETS, subject to state or local laws that prohibit or limit such policies, as well as anti-discrimination laws.

What about local and state laws requiring vaccination?

All local and state laws unrelated to the OSHA ETS requiring masks, vaccination or related protocols remain in effect. It remains to be seen whether US states, which have broader authority to regulate health and safety issues, will impose their own mandatory vaccination policies or will expressly prohibit them. Some states already have statutes that limit employers' ability to implement a mandatory vaccination policy and these statutes, which would have been preempted by the OSHA ETS, remain in effect.

What about the federal contractor vaccine mandate?

The federal contractor vaccine mandate was blocked nationwide by a Georgia federal court, and in Ohio,

Tennessee and Kentucky by a Kentucky federal court. There are pending appeals of those decisions that also may reach SCOTUS. The vaccine mandate applicable to federal contractors is not being enforced by the federal government while lawsuits and related appeals make their way through the legal system.

If you have any questions about or related to the vaccine mandates, please reach out to a member of the Cooley employment team.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

Key Contacts

Ann Bevitt **London**	**abevitt@cooley.com** **+44 (0) 20 7556 4264**
Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Helenanne Connolly Reston	hconnolly@cooley.com +1 703 456 8685
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Gerard O'Shea New York	goshea@cooley.com +1 212 479 6704
Miriam Petrillo Chicago	mpetrillo@cooley.com +1 312 881 6612

Ryan Vann Chicago	rhvann@cooley.com +1 312 881 6640
Summer Wynn San Diego	swynn@cooley.com +1 858 550 6030

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.