

DECEMBER 23, 2021 | MSHA LEADERSHIP, RULEMAKING &amp; STANDARDS

# OSHA's Vaccinate-or-Test ETS in the Hands of the Supreme Court

*By Conn Maciel Carey LLP's [COVID-19 Task Force](#)*

As we shared over the weekend, at 6:50 PM on Friday night (December 17<sup>th</sup>), a three-judge panel at the US Court of Appeals for [the Sixth Circuit dissolved the nationwide stay of OSHA's Vaccinate-or-Test ETS](#) that had been issued in early November by the Fifth Circuit. That same night, several of the petitioners in the legal challenges to the ETS appealed the Sixth Circuit's decision to the Supreme Court.

As we have been discussing for a while, the decision about the Stay of the ETS (and ultimately the legality of the ETS) was destined for the Supreme Court, and the Court, at least on the issue of the TRO/Stay, could choose to address the question either by:

- the so-called "shadow docket," with no briefing and a decision perhaps issued by a single Justice; or
- more conventional proceedings, with briefing and oral argument, and likely a decision by all nine Justices.

Each of the nine Justices on the US Supreme Court is assigned to oversee one or more of the regional US courts of appeals. Justice Kavanaugh is the justice assigned to the Sixth Circuit, to oversee requests for emergency review or shadow docket consideration from cases before the Sixth Circuit. Justice Kavanaugh is part of what is becoming something of a triad of swing voters on the Court, along with justice Coney Barrett and Chief justice Roberts.

On Monday, Justice **Kavanaugh issued an Order to the Department of Labor to submit briefing in response to the emergency petitions with a deadline of 4 PM on Thursday, December 30<sup>th</sup>**. The Order does not provide for any additional briefing by petitioners or friends of the court. Then, just a few hours ago, the Court issued **another Order setting the case for oral argument a week later, on January 7, 2022**.

(ORDER LIST: 595 U.S.)

WEDNESDAY, DECEMBER 22, 2021

ORDER IN PENDING CASES

21A244 ) NAT. FED’N OF INDEP. BUS., ET AL. V. DEPT. OF LABOR, OSHA, ET AL.  
      ) )  
21A247 ) OHIO, ET AL. V. DEPT. OF LABOR, OSHA, ET AL.

Consideration of the applications (21A244 and 21A247) for stay presented to Justice Kavanaugh and by him referred to the Court is deferred pending oral argument. The applications are consolidated, and a total of one hour is allotted for oral argument. The applications are set for oral argument on Friday, January 7, 2022.

We now have a clearer picture of how and approximately when the Supreme Court will determine the fate of OSHA’s ETS (at least its fate while the Sixth Circuit considers the full merits of the legal challenges).

First, we know there will NOT be a very quick shadow docket decision from the Supreme Court. Justice Kavanaugh was apparently not sitting and eagerly waiting for a chance to shut down a piece of President Biden’s agenda. More importantly, it means we the Supreme Court is not going to take action in time to help employers avoid the heavy lifting to come into compliance with the ETS. Indeed, we know now that we will not have a decision this year, and since the applications for stay are “deferred pending [the Friday, January 7<sup>th</sup>] oral argument,” we will not even have a decision before the week of January 10, 2022. That is significant since the ETS is officially in effect right now, and for employers making reasonable good faith efforts to come into compliance, the new deadline for most of the elements of the ETS was moved by OSHA to January 10, 2022.

Second, we also know that unlike other very quick shadow docket decisions, where there is typically no additional briefing beyond the Court of Appeals level, the Supreme Court in this case is going to see a brief from the Department of Labor and hear oral argument from petitioners and the Department.

Finally, we also know that unlike the quick shadow docket decisions we have seen recently, which typically appear as decisions by a single Justice, it appears that Justice Kavanaugh here has “referred to the Court” these applications; i.e., all nine Justices will be involved in the consideration of the Stay.

These three differences in process could be meaningful. That is, it could be a sign that the Supreme Court views this federal vaccination rule as something different from the other vaccine-mandates that have recently come before the Court and quickly resolved by the shadow docket. For example, yesterday, the Court permitted a governmental vaccine-mandate remain in effect in the face of a legal challenge. This time it was a challenge by nurses to the State of New Mexico’s healthcare vaccine-mandate, and the Court ruled quickly by way of the shadow docket, with Justice Gorsuch issuing a simple order, on his own, declining to stop the State’s

implementation and enforcement of the mandate. For those keeping score at home, that increases the record to 6-0 of the Supreme Court siding with COVID-19 vaccine requirements. Four of them state issued and two imposed by private employers. All six of them decided via the shadow docket, without briefing or oral argument, and by opinion of a single Justice. However, this would be the first challenges to *the federal government's* authority to set vaccination requirements, and it is being handled by the Supreme Court by a different process.

It is also notable that the Court has set oral argument on the same day for the challenges related to President Biden's CMS healthcare vaccine mandate, which is currently stayed in half the states in the country.



In short, do not expect a Stay of the ETS as a Christmas gift from the Supreme Court, look out for a decision from the full Supreme Court about the status of OSHA ETS and the CMS healthcare worker vaccine-mandate likely during the week of January 10<sup>th</sup>, and accordingly either continue or begin to take steps to come into compliance with OSHA's vaccinate-or-test ETS.

To help you do that, we have prepared an [extensive set of FAQs about the ETS](#), and we are working with many employers to help them develop the written Vaccination, Testing, and Face Coverings Policy required by the ETS. [Let us know](#) if you have any compliance questions about the ETS or if we can help your organization with the written policy or any other aspects of the ETS.