



Buelow Vetter

Buikema Olson & Vliet, LLC

The Solution Starts Here.

Fate of President Biden’s Shot-or-Test Mandate Rests with Supreme Court – Oral Argument Set for January 7, 2022

Covid-19 is a global pandemic and a societal health problem, not a workplace hazard. This is the main argument advanced by a coalition of states and an alliance of business groups in their brief to the U.S. Supreme Court.

Final briefs were filed on December 30, 2021 ahead of oral arguments set for January 7, 2022. The issue before the Court is whether to impose a stay of President Biden’s shot-or-test mandate while the litigation over the enforceability of the mandate takes place. Thus, the Court will not actually be deciding the legality of the mandate. However, the granting or denying of a stay will reveal how the Justices view the merits of the mandate.

The Biden Administration reminded the Court that the “H” in OSHA stands for “health.” The Administration argued OSHA properly determined Covid to be a new health hazard, exposure to which presents a grave danger to unvaccinated workers. As such, the mandate is necessary to protect workers from getting infected on the job.

The Administration wholly ignored the fact that Covid exposure is not unique to the workplace and that many people face greater exposure in public than in the workplace. The Administration explained the mandate only applies to employers with 100 or more employees because they are better equipped to implement the requirements. However, the Administration failed to explain how employees of such employers are at great risk than employees who work for an employer with, for example, 98 or 88 employees.

The industry groups countered by arguing the government’s “position that OSHA can regulate any health problem threatening an employee’s health would remove any remaining limit on OSHA’s authority.” That could lead to other OSHA rules, such as one for cafeterias to prevent obesity and other health problems by only carrying certain types of food. The group also argued OSHA can only regulate hazards if they arise “directly out of the workplace,” quoting from a recent dissenting opinion from Jeffrey Sutton, the Sixth Circuit’s influential chief judge. “That generally excludes risks that arise out of routine human interaction as opposed to work or workplace risks like Covid-19 and violent crime,” the brief said. “And it generally excludes other risks we face by virtue of living on Earth in the present day – risks like exposure to community-wide air pollution.”

At the January 7, 2022 hearing, the High Court will address both the OSHA ETS applicable to employers with 100 or more employees and the Covid Executive Order applicable to the nation’s health care workers. Specifically, the Court will consider whether a stay of both actions should be put in place pending full judicial review. This means the Court will not specifically decide on the enforceability of either measure, but, rather, whether the measures should be stayed pending judicial challenge. That said, the primary basis for granting a stay is likelihood of success on the

merits; meaning, the Court's decision regarding the stay is a foreshadowing of how it will decide the ultimate issue of enforceability.

Once again, the timing adds to the complications for businesses who are trying to decide whether to put policies in place or wait for the High Court to rule. Employers with 100 or more employees will have until January 10, 2022 to comply with the Biden Administration's vaccine and testing requirements. OSHA will give companies until February 9, 2022 before issuing citations for violating the ETS provisions. The enforcement grace period hinges on employers "exercising reasonable, good faith efforts to come into compliance with the standard," the DOL said.

Given the high amount of uncertainty, the most prudent course of action is for companies to prepare as if the rule is going forward despite the possibility the Supreme Court's conservative majority will block it.

If you have any questions or concerns, please contact Joel S. Aziere at jaziere@buelowvetter.com or (262) 364-0250 or your Buelow Vetter attorney.