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# After High Court Loss, OSHA Looks to Other Covid-Curbing Means

By Bruce Rolfsen

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- Workplace safety regulator has other measures
  - Employer programs may still face state restrictions
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The U.S. Supreme Court's decision to stay enforcement of OSHA's shot-or-test mandate could limit some employers from implementing their own programs and signals trouble for the regulator's other infectious disease rulemakings.

The high court ruling Thursday put on hold a major component of President Joe Biden's multipronged approach to combating the coronavirus pandemic now raging through its third U.S. winter.

The Occupational Safety and Health Administration measure covered most employers with 100 or more workers who fell under the jurisdiction of federal OSHA or its state counterparts, applying to an estimated 80 million people. OSHA required that by Feb. 9 workers had to be either fully inoculated or pass a weekly Covid-19 test.

While they stayed the OSHA rule, opining that those suing were likely to prevail on the merits at the lower court, the justices in a separate decision allowed the federal Centers for Medicare and Medicaid Services to enforce a vaccination mandate for health-care employees at facilities receiving Medicare or Medicaid payments.

U.S. Labor Secretary Marty Walsh said he was disappointed with the court's decision but defended the agency's effort. The workplace safety regulator is a part of his department.

“OSHA promulgated the ETS under clear authority established by Congress to protect workers facing grave danger in the workplace, and COVID is without doubt such a danger,” he said in a statement, adding the agency “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.”

### **Other Tools**

OSHA declined to immediately comment on the court’s decision. While the majority opinion was unsigned, Republican appointees Neil Gorsuch, Samuel Alito and Clarence Thomas issued a concurring opinion while the Democrat-appointed Stephen Breyer, Elena Kagan, and Sonia Sotomayor dissented.

The high court decision doesn’t halt OSHA’s other Covid-19 curbing efforts, including the issuance of workplace hazard citations under that general duty clause, which has been a bulwark of its enforcement efforts thus far.

Brent Clark, a partner with Seyfarth Shaw L.L.P. in Chicago and co-chair of the firm’s Workplace Safety and Environmental Group, said he was pleased that the court’s majority opinion upheld OSHA’s ability to regulate occupational hazards while rejecting the emergency standard as a public health measure.

“It seemed like OSHA was trying to address a public health issue through an occupational health standard,” Clark said.

Like Walsh, Clark said the ruling leaves in place OSHA’s ability to use other regulations and the general duty clause to cite employers for Covid-related violations.

### **Absent the Standard**

Even with the stay in effect, employers may still want to continue implementing portions of the standard, said Michelle Strowhiro, a partner with McDermott Will & Emery L.L.P. in Los Angeles and co-lead of the firm’s Covid-19 Employment Task Force. For example, she said, having information on workers’ vaccination status could be needed for a company’s own program or to comply with requirements at other workplaces.

But companies implementing their own vaccination, testing, or mask mandates now will have to comply with state and local laws meant to restrict employer Covid-19 efforts, Strowhiro said. When the federal standard was in effect it took precedent over state and local restrictions, but without that standard, those state and local limits on masks and vaccination mandates could be back in effect.

The court’s majority opinion likely means an end to OSHA’s plans to issue a comparable permanent rule after the emergency measure expired in May, said Robert Duston, a partner with Saul Ewing Arnstein & Lehr L.L.P. in Washington.

### **The Effect on States**

The justices, in their OSHA ruling and the companion CMS ruling, found the Department of Health and Human Services—not OSHA—was given authority by Congress to regulate public health, Duston said.

If OSHA moves forward with a broader infectious disease standard, that rule likely would face a similar hurdle from the court, he said. OSHA has said it would issue in April a notice of proposed rulemaking for the infectious disease rule.

The Supreme Court decision also is likely to slow or stop state worker safety agencies from adopting vaccination or test requirements. Twenty-six U.S. states have their own workplace safety agencies, which are required to adopt rules that are comparable to those adopted by the federal agency, but not identical to them. The U.S. OSHA holds sway over workplace safety in the remaining states.

After the court decision, Minnesota and Illinois worker safety agencies said they will suspend enforcement of the state standard pending future developments. Other states such as California and Oregon were considering rules, but hadn't enacted them.

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[OSHA standard website](#)

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