



Supreme Court ETS Ruling And Thoughts on Our Labor Shortage

The Supreme Court and OSHA's ETS rule.

As most of you know the U.S. Supreme Court in a 6-3 decision recently stopped OSHA's vaccine rule requirements from being enforced. By way of background, the day after OSHA's Emergency Temporary Standard rule ("ETS") became effective, a federal appeals court issued an order blocking the rule from taking effect. Thereafter, the Sixth Circuit Court of Appeals was appointed by the Judicial Panel of Multidistrict Litigation to decide all of the litigation in the federal courts regarding the ETS. **The Sixth Circuit had lifted the stay on the ETS in a December 17 ruling. It was this ruling that was just overturned by the Supreme Court when it reinstated the temporary injunction (stay) on the [ETS](#).**

It is important to note that despite this ruling on the ETS, the Supreme Court in a 5-4 decision upheld the Centers for Medicare & Medicaid Services ("CMS") [interim final rule](#) requiring COVID-19 vaccinations for workers in most health care settings, including hospitals and health systems, that participate in the Medicare and Medicaid programs. This CMS rule does not provide for a testing option as opposed to vaccination that was available in OSHA's ETS.

Many of our clients were tracking OSHA's ETS even though they were not covered by the rule because they were fearful the initial ETS would eventually be expanded to employers with less than 100 employees. For now the ETS appears doomed. For those clients who are considering mandatory vaccination policies, the same rules apply as discussed in a prior Eye on the Law report. Please check our website (www.workplacelawyer.com) for those rules or contact us for help.

Many of you, especially those in the public sector, have asked questions regarding State of Connecticut OSHA as the ETS question winded through the courts. **The bottom line is that CT OSHA was watching and waiting on the U.S. Supreme Court.** This is due to the fact that under section 18(c)(2) of the OSH Act, State Plans are required to adopt and enforce occupational safety and health standards that are at least as effective as federal OSHA's requirements. Id. section 667(c)(2). In addition, the OSH Act requires that State Plans must cover State and local government employees (including, *e.g.*, State and local school systems within the scope of this rule), even though federal OSHA does not have coverage over such employees in States without OSHA-approved State Plans.

Once OSHA promulgated the ETS, OSHA's regulations provided that those States have “**30 days after the date of promulgation of the Federal standard to adopt a State emergency temporary standard,**” or to demonstrate “**that promulgation of an emergency temporary standard is not necessary because the State standard is already the same or at least as effective as the Federal standard change.**” [29 CFR 1953.5\(b\)\(1\)](#). The new ETS would have become part of the OSHA-approved State Plan through the State Plan's submission to OSHA documentation showing it adopted an identical ETS or a “Plan Change Supplement” showing that it has adopted requirements that are “at least as effective” as federal OSHA's ETS. [29 CFR 1953.5\(b\)\(3\); 1953.4](#).

Where is our labor force?

Employers are struggling to find and hire employees in this market. **In Connecticut, this struggle cuts across all sectors – private and public, and covers all types of employees from upper management to administrative personnel.** News reports regarding this sudden labor shortfall are endless, the most popular theme is that workers are lazy and simply satisfied to stay home and be paid unemployment and stimulus monies. *We think that a number of factors are actually at work, including: remote work opportunities; growing opportunities in the Boston and NYC markets, to include higher pay and equity opportunities; earlier retirement decisions; change in lifestyle decisions; and true fear of Covid.*

We will be writing on this topic in the next *Eye* and **would love to get your input over the next two weeks.** Please confidentially email us your thoughts, ideas, comments or questions at either tracy.yentsch@ryan-ryan.net or david.ryan@ryan-ryan.net. If any of your thoughts are included they will be kept private.

If you have concerns about this or any other workplace or litigation issue, please contact David Ryan at david.ryan@ryan-ryan.net or by telephone at 860.460.7139 (mobile) or 203.752.9794 (office). www.workplacelawyer.com