

**Why the Supreme Court's OSHA mandate decision likely won't end uncertainty for employers**

By [Ty West](https://www.bizjournals.com/bizjournals/bio/42089/Ty+West)  – Editor-in-Chief, The Playbook, Jan 6, 2022

Large employers could soon get some long-anticipated clarity on the [Occupational Safety and Health Administration's mandate-or-testing rule](https://www.osha.gov/coronavirus/ets2) for the Covid-19 vaccine.

The U.S. Supreme Court on Friday [is scheduled to hear arguments](https://www.supremecourt.gov/) about OSHA's emergency temporary standard for large employers, but experts say the court's ruling likely won't end all the uncertainty on the matter.

OSHA's rule [requires employers with at least 100 employees to either mandate the Covid-19 vaccine or require weekly testing](https://www.bizjournals.com/bizjournals/news/2021/12/17/vaccine-mandate-osha-large-employers.html) of unvaccinated workers.

While court watchers note emergency temporary standards have historically faced an uphill battle, [OSHA is also pursuing a more traditional permanent rule](https://www.bizjournals.com/bizjournals/news/2021/12/05/osha-deadline-vaccine-mandate-limbo.html) that could have a better chance of surviving court challenges.

In the event the Supreme Court blocks the emergency temporary standard, or ETS, from taking effect, [experts say employers could still find themselves potentially facing a similar rule down the road.](https://www.bizjournals.com/bizjournals/news/2021/12/02/vaccine-comment-extended-small-businesses.html) That would extend an [ongoing state of limbo that has frustrated many businesses](https://www.bizjournals.com/bizjournals/news/2021/12/05/osha-deadline-vaccine-mandate-limbo.html) at a time of employee turnover threats, record quit rates and a competitive labor market.

And, as experts have noted, the court's decision won't stop employers from mandating the vaccine or requiring testing on their own — [a step an increasing number of businesses were already taking](https://www.bizjournals.com/bizjournals/news/2021/06/21/covid-vaccine-mandate-employers.html) before the Biden administration's announcement about the OSHA rule.

If the court allows the OSHA ETS to proceed, employers are likely to face numerous other evolving questions. Experts have said those could include the definition of "fully vaccinated" employee, which could shift as new variants or booster protocols enter the mix.

Since plans for the rule, [part of a wider plan by the Biden administration to combat Covid-19,](https://www.whitehouse.gov/covidplan/) [were announced in September,](https://www.bizjournals.com/bizjournals/news/2021/09/09/new-order-vaccine-mandate-employers.html) many employers have been scrambling to plan for implementation. But court battles left businesses in a state of limbo for weeks, even as the initial deadlines approached. The ETS was temporarily blocked until a federal court [reinstated the rule Dec. 17,](https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0287p-06.pdf) [leading OSHA to move the deadline for mandating the vaccine or requiring weekly testing to Feb. 9.](https://www.bizjournals.com/bizjournals/news/2021/12/17/vaccine-mandate-osha-large-employers.html)

Those moves set the stage for Friday's hearing, which attorneys say has several unique factors to watch.

[Bob Nichols,](https://www.bizjournals.com/southflorida/search/results?q=Bob%20Nichols) partner at Bracewell LLP, said the court doesn't plan to decide the underlying case on the merits but will instead decide whether the rules can go forward while the merits are being litigated — a distinction that could lead to further limbo for employers.

"The most likely long-term policy impact could be to what extent federal agencies have authority to act on an emergency basis in the context of a pandemic to force employers to impose infection mitigation measures on their employees including vaccination and testing," Nichols said. "Some on the court will likely be concerned about sending a message that they have tied the hands of federal agencies to act on an emergency basis in the context of a pandemic."

The hearing will be conducted under the specter of the Omicron variant, which has caused a significant surge in Covid-19 cases [as well as disruptions to several industries.](https://www.bizjournals.com/bizjournals/news/2022/01/05/stock-market-inflation-covid-omicron-reserve-wages.html)

Even so, Nichols said the rise in cases likely won't change the [fundamental issues employers were dealing with on the mandate front.](https://www.bizjournals.com/bizjournals/news/2021/11/04/osha-vaccine-mandate-tips-businesses.html)

"Employees who fear infection will likely point to the very transmissible nature of Omicron and continue to push for employers to require their coworkers to be vaccinated," he said. "At the same time, individuals who oppose vaccination mandates will make the argument that Omicron apparently tends to produce somewhat less severe outcomes and, therefore, supports the view that mandatory vaccinations are an unnecessary intrusion into individuals’ lives."

[**Shannon Kelly,**](https://www.bizjournals.com/southflorida/search/results?q=Shannon%20Kelly) **a shareholder at Allen Norton & Blue PA**, said clients are being advised to prepare compliant policies on vaccinations, establish procedures for tracking vaccination status, create protocols for handling accommodation requests and establish a plan for testing.

Additionally, **Kelly** said employers should notify employees of the policies to set reasonable deadlines.

Experts have noted accommodation requests — [especially those seeking religious exemptions](https://www.bizjournals.com/portland/news/2021/09/15/vacc-exemptions.html) — are [likely to be pain points for employers because many managers](https://www.bizjournals.com/bizjournals/news/2021/11/04/osha-vaccine-mandate-tips-businesses.html) are unaccustomed to handling those requests.

**Kelly** said another pain point has been cases in which state laws are in direct conflict with federal guidance.

That's the case in Florida, where the "Keep Florida Free" law provides broader exceptions to the mandate rule than are included in OSHA's ETS.

"As the state and federal laws are in direct conflict in this regard, employers could be faced with potential fines from both directions," **Kelly** said.

Another pain point for those employers trying to be prepared for compliance has been testing.

If they want to allow a testing option, employers must decide [who will bear the cost burden](https://www.bizjournals.com/bizjournals/news/2021/11/17/how-companies-can-approach-covid-19-testing.html) — although employers may be required to shoulder those costs in certain locations, depending on the situation.

"Another issue is the availability of testing, which is something that unfortunately employers don’t have a lot of control over," **Kelly** said.