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*National Federation of Independent Business v. Occupational Safety and Health Administration*, No. 21A244

**Introduction:** Today, the Supreme Court voted 6-3 to stay OSHA’s rule requiring large US employers to have a mandatory COVID-19 vaccination policy, or to give employees the option of vaccinating or undergoing weekly COVID-19 testing, holding that the challengers are likely to prevail in their lawsuit to enjoin the rule.

**Background:** The Occupational Safety and Health Act authorizes OSHA to promulgate emergency rules if the agency shows (1) that employees are exposed to a “grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards” and (2) that the rule is “necessary to protect employees from such danger.” 29 U.S.C. § 655(c)(1). In November 2021, OSHA published an emergency rule that requires employers with 100 or more employees either to have a mandatory COVID-19 vaccination policy or, alternatively, to give employees the option of vaccinating or undergoing weekly COVID-19 testing.

Many parties, including States, businesses, and trade groups, filed suit in federal courts of appeals to enjoin OSHA from enforcing the rule. The Fifth Circuit stayed the rule pending further judicial review. The cases then were consolidated in the Sixth Circuit, which dissolved the Fifth Circuit’s stay. The Supreme Court granted emergency review of the Sixth Circuit’s decision.

**Court’s Holding:** In a per curiam opinion, the Court stayed OSHA’s rule, concluding that the challengers are likely to succeed on the merits of their claim that OSHA lacked authority to issue the rule under the Occupational Safety and Health Act. Although there is a risk of contracting COVID-19 in many workplaces, the Court determined that it is not usually an “occupational” risk, because it is no different from other day-to-day public-health dangers that all people face, such as crime and air pollution. The Court explained that OSHA does not have authority to regulate those sorts of daily hazards.

The Court noted that OSHA has the authority to issue more targeted regulations where COVID-19 poses a “special danger” because of the particular features of a job or workplace, such as risks associated with working in a crowded or cramped environment.

Although the Sixth Circuit is currently reviewing the challenges on the merits, the Supreme Court’s holding that OSHA lacks the power to enact the rule seems to leave OSHA with few options. Moving forward, OSHA may consider issuing a narrower emergency rule focused on workplaces where COVID-19 poses a “special danger.” State and local COVID-19 rules that impose similar requirements as the OSHA rule are unaffected by the Court’s decision.

Justice Gorsuch filed a concurring opinion, joined by Justices Thomas and Alito.

Justices Breyer, Sotomayor, and Kagan filed a dissenting opinion.

In a separate decision issued today, the Court voted 5-4 to stay injunctions of a Department of Health and Human Services rule that requires facilities receiving Medicare and Medicaid funding to ensure that staff are vaccinated against COVID-19.