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## COVID-19 Update

### **Supreme Court of the United States Reinstates Stay on Covid Vax-or-Test ETS**

Last week, the Supreme Court issued its decision on the expedited motion practice on whether to stay two different Vax-or-Test requirements: one applying to health care providers that receive federal funding (via CMS), and the second involving employers with more than 100 employees (via OSHA). While the Court allowed the CMS requirement to go into effect, it has reinstated the stay of the OSHA ETS that was previously put in place by the Fifth Circuit, but later vacated by the Sixth Circuit. What this means is that the *government* mandate for employees to be vaccinated against Covid-19 or submit to weekly testing (and, as the Omicron variant surges, good luck scheduling a test right now-Health Partners is now limiting appointments to those patients who are symptomatic or otherwise an elevated priority) is on hold, at least for the short term. There is still a possibility that the merits decision will come down a different way, especially given the Sixth Circuit's (better reasoned) analysis, but absent something changing, it seems as if the 6-vote majority out in Washington has made its views pretty clear on whether the Occupational Safety & Health Administration has the authority to protect the safety and health of people engaged in their occupation.

In the latest round of litigation surrounding the Labor Department's Occupational Safety & Health Administration ("OSHA") issuance of the Emergency Temporary Standard ("ETS") that would require employers with more than 100 employees to enforce a vaccination-or-test requirement, the United States Supreme Court has reinstated a stay on the ETS. The six-

Justice majority held that the merits case was likely to conclude that OSHA does not have the authority to issue the ETS, and therefore the challengers to the requirement were likely to succeed on the appeal. The matter now will return to the Sixth Circuit, where a three-judge panel will hear the merits of the case.

The Court did, however, allow the vaccination-or-testing requirement to go into place for health care facilities that receive federal funding.

The fluid nature of the enforceability of the ETS has left some employers (outside of the health care industry) wondering what is required and what is permitted. While this is not intended to be a complete listing, a brief summary is below:

- The Federal Government is *not* currently requiring non-health-care-industry employers to adopt a mask requirement, a vaccine requirement, or a testing requirement for employees;
- While Minnesota (and other states) have not currently instituted a vaccine requirement or testing requirement for employees (and notably, after the Supreme Court order the City of Minneapolis and City of Saint Paul rescinded the part of their Vax-or-Test requirements as applicable to employees in the hospitality industry), any such requirements that may be adopted are not necessarily inconsistent with the Supreme Court's order, as state governments may have the authority to institute Vax-or-Test requirements;
- In most states, including Minnesota, individual businesses are free to adopt vaccination or vaccination-or-testing requirements for their employees.

The attorneys at Madigan, Dahl & Harlan continue to monitor the developments of the Vax-or-Test ETS, other developments related to the ongoing Covid-19 pandemic, and other issues related to labor & employment law, and remain committed to answering any questions you may have.

If you have any questions about the Vax-or-Test ETS or other labor & employment law matters, please email us at [email@mdh-law.com](mailto:email@mdh-law.com), visit our website at [www.mdh-law.com](http://www.mdh-law.com), or call us at 612-604-2000.

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Madigan, Dahl & Harlan, P.A.  
Two22/Campbell Mithun Tower  
Suite 3150  
222 South 9th Street  
Minneapolis, MN 55402  
Main: (612) 604-2000  
[email@mdh-law.com](mailto:email@mdh-law.com)  
[www.mdh-law.com](http://www.mdh-law.com)

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