



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Supreme Court Ruling on the OSHA COVID-19 ETS: What Happens Next?

January 19, 2022

Manesh K. Rath



Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. He has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," and C-SPAN.

Mr. Rath currently serves on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. He served on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years.

He was voted by readers to Smart CEO Magazine's Readers' Choice List of Legal Elite; by fellow members to The Best Lawyers in America 2016, 2017 and 2018; selected by Super Lawyers 2016 – 2017, 2017 – 2018; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.



Taylor D. Johnson



Taylor Johnson is an environmental lawyer specializing in the area of environmental regulation of products, including chemical control, pesticides, energy efficiency regulation, and importantly, domestic and international transportation of hazardous materials. Mr. Johnson also advises clients on community-right-to-know laws, Proposition 65, occupational safety and health matters, and supports a wide variety of commercial tort and other litigation issues.

Mr. Johnson has special expertise in the area of hazardous materials transport, including enforcement defense and compliance counseling. Mr. Johnson helps companies secure competent authority approvals, special permits, and letters of interpretation from regulatory authorities around the world. He has also prepared successful petitions to PHMSA on behalf of shippers seeking regulatory relief.

Prior to joining Keller and Heckman, Mr. Johnson promoted the development of energy and environmental legislation and policy at the state level.



Taylor Johnson
Associate
johnsont@khlaw.com
202-434-4255

Topics to be Discussed:

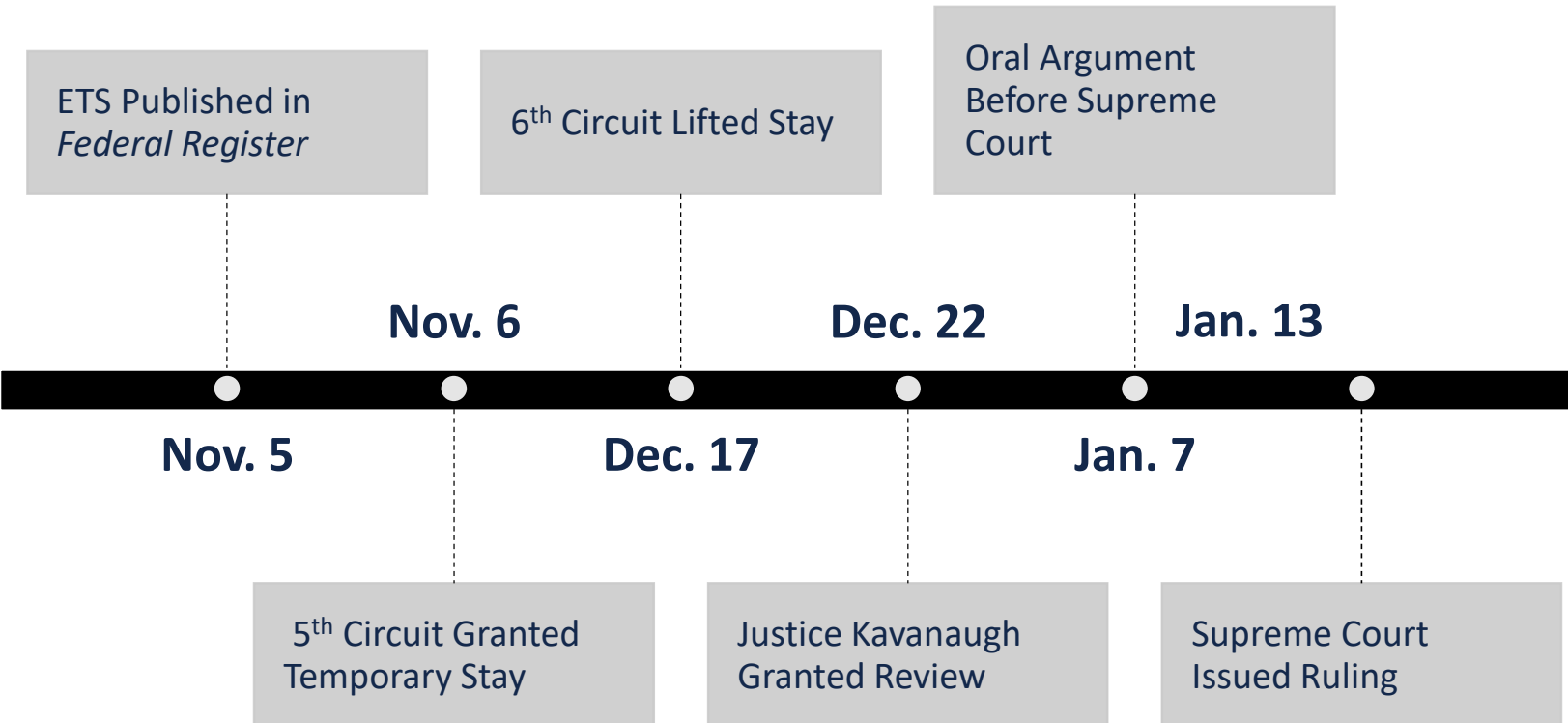
- ◆ Historical Precedent of ETSs
- ◆ Review Timeline of the COVID-19 ETS
- ◆ Analysis of the Supreme Court's Ruling
- ◆ Update on State Plan States
- ◆ What Happens Next?
- ◆ What Employers Should Do
- ◆ Off the Record

Historical Precedent

Table A-1. OSHA Emergency Temporary Standards (ETS)

Year	Subject of ETS	Federal Register Citation of ETS	Result of Judicial Review	Judicial Review Case Citation
1971	Asbestos	36 <i>Federal Register</i> 23707 (December 7, 1971)	Not challenged	—
1973	Organophosphorous pesticides	38 <i>Federal Register</i> 10715 (May 1, 1973); amended by 38 <i>Federal Register</i> 17214 (June 29, 1973)	Vacated	<i>Florida Peach Growers Ass'n v. United States Department of Labor</i> , 489 F.2d 120 (5th Cir. 1974)
1973	Fourteen carcinogens	38 <i>Federal Register</i> 10929 (May 3, 1973)	Twelve upheld, two vacated	<i>Dry Color Mfrs. Ass'n v. Department of Labor</i> , 486 F.2d 98 (3d Cir. 1973)
1974	Vinyl chloride	39 <i>Federal Register</i> 12342 (April 5, 1974)	Not challenged	—
1976	Diving operations	41 <i>Federal Register</i> 24271 (June 15, 1976)	Stayed	<i>Taylor Diving & Salvage Co. v. Department of Labor</i> , 537 F.2d 819 (5th Cir. 1976)
1977	Benzene	42 <i>Federal Register</i> 22515 (May 3, 1977)	Stayed	<i>Industrial Union Dep't v. Bingham</i> , 570 F.2d 965 (D.C. Cir. 1977)
1977	1,2-Dibromo-3-chloropropane (DBCP)	42 <i>Federal Register</i> 45535 (September 9, 1977)	Not challenged	—
1978	Acrylonitrile (vinyl cyanide)	43 <i>Federal Register</i> 2585 (January 17, 1978)	Stay denied	<i>Vistron v. OSHA</i> , 6 OSHC 1483 (6th Cir. 1978)
1983	Asbestos	48 <i>Federal Register</i> 51086 (November 4, 1983)	Stayed	<i>Asbestos Info. Ass'n v. OSHA</i> , 727 F.2d 415 (5th Cir. 1984)

Timeline of the ETS



Supreme Court's Ruling – Analysis



- ◆ Three opinions were issued in the case:
 - ◆ *Per curiam* decision: applicants likely to prevail, granted the applications for a stay – pending judicial review by 6th Cir.
 - ◆ Concurring opinion issued by Justice Gorsuch (joined by Justices Thomas and Alito)
 - ◆ Dissenting opinion by Justices Breyer, Sotomayor, and Kagan

Court: the ETS was tantamount to a *public* health mandate, which would exceed OSHA's statutory power



Supreme Court's Ruling – Per Curiam

- ◆ Two narrow circumstances in which OSHA can issue an ETS:
 - ◇ 1. Employees are exposed to grave danger *in the workplace*.
 - ◇ 2. Emergency standard is necessary to protect employees from such danger.
- ◆ Court: although COVID–19 is a risk that occurs in many workplaces, it is not an occupational hazard in most.
- ◆ Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority



Supreme Court – Dissenting Opinion:



- ◆ COVID-19 does pose a grave danger, particularly to workers
- ◆ As of the time of rule, 725k+ dead, millions more hospitalized
- ◆ OSHA has, in the past, regulated risks that originate both inside and outside workplace
- ◆ Congress *did* state its clear intent (in the American Rescue Plan Act)
- ◆ This Court would elevate the judiciary over the regulatory agency charged with workplace safety.
- ◆ Must balance result of stay vs. lifting stay,

State Plan States: Update

- ◆ 22 state plan states or territories are free to adopt standards “at least as effective” as federal OSHA standards.
- ◆ California, Virginia, Washington, and Oregon with existing COVID-19 standards
- ◆ Illinois, Minn., announced the state ETS will be stayed in light of the SCOTUS decision
- ◆ ETS is stayed, thus does not currently preempt state laws prohibiting vaccine mandates



What's Next? Sixth Circuit



- ◆ Case goes back to the 6th Circuit for a ruling on the merits
- ◆ Stay remains in place during 6th Circuit review as well as any second appeal to the Supreme Court
- ◆ Supreme Court ruling that plaintiffs are likely to be successful on the merits is influential but not binding
- ◆ OSHA has until May 5, 2022, to implement a final rule to replace the ETS

What's Next? Formal Notice and Comment Rulemaking



- ◆ S. Ct.: Agency lacked *emergency* power to engage in such broad rulemaking.
- ◆ But may perhaps still retain the ability to develop a rule through traditional rulemaking powers
- ◆ Court stated that **targeted regulations are “plainly permissible”**
 - ◆ (e.g., prisons, nursing homes, meat packing) and particular mitigation measures:
 - ◆ **Note:** The healthcare rule was upheld in a separate S.Ct. opinion.
- ◆ A general industry rule, alternatively, could narrow the requirements:
 - ◆ Masks
 - ◆ Distancing
 - ◆ Plastic barriers when possible
 - ◆ Handwashing



What's Next? – Other OSHA Actions



- ◆ Jan. 13 Sec. Walsh statement: “OSHA will be evaluating all options to ensure workers are protected from this deadly virus.”
- ◆ COVID-19 National Emphasis Program
- ◆ General Duty Clause
- ◆ New maximum penalty for a willful or repeat violation is \$145,027
- ◆ New maximum penalty for a serious or other-than-serious violation is \$14,502

What Employers Should Do

1

Follow rulemaking
and **submit
comments**

2

Monitor for state
regulations in state
plan states

3

Check for updated
CDC and OSHA
guidance – monitor
as guidance evolves

4

Tailor protections to
specific circumstances
Document source of
recommendation and
date of source,
Develop written safety
program for covid-19
protection measures



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Podcasts



A man in a dark blue suit, white shirt, and purple tie is positioned on the left side of the image. The background features a large industrial facility with several tall smokestacks and complex piping, set against a sky with a bright sun on the right side.

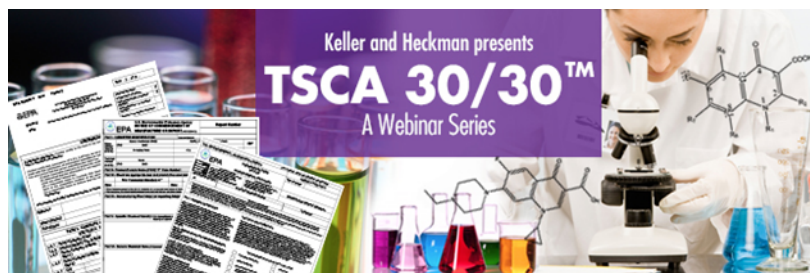
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at 1:00 PM Eastern U.S.
February 16, 2022
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Wednesday, February 9, 2022
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Thank You

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(stick around for the Off-the-Record)

Manesh Rath
Partner

1001 G Street NW Ste. 500W
202.434.4182
rath@khlaw.com



Off Record with Manesh Rath

Pre-submit your questions to osha@khlaw.com

Questions

Is it possible that OSHA could move forward with a final rule that mandates testing and drops the vaccination requirement?

Question

What effect, if any, does President Biden's comments to employers and business leaders have when he asked them to "step up" on COVID-19 protocol?

Question

Since the healthcare standard was not stayed, does it apply to contractors and vendors to hospital systems?

Also, if so, how should employers handle employees who have put in for religious or medical exemptions, do those employees need to do testing in lieu of vaccination?

Question

Now that the Supreme Court has ruled, is there still a reason to submit comments for the development of the permanent rule?

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Thank You

Manesh Rath

Partner

1001 G Street NW Ste. 500W

202.434.4182

rath@khlaw.com

