The Sad, Sad Story of OSHA’s Failure to Protect Workers From COVID-19

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Abstract
In the face of a global pandemic posing unprecedented risks to worker health, the Occupational Safety & Health Administration (OSHA), the agency charged with protecting workers from occupational illness, has floundered. Its efforts to protect workers have been too little, too late, poorly designed, and entangled in legal controversy. Two years into a pandemic that has posed the greatest threat to worker health in our lifetimes, OSHA has adopted no effective, COVID-19-specific protections for workers. This article chronicles OSHA’s efforts and the response of the courts.

Keywords
COVID-19, OSHA, emergency temporary standard

The global pandemic caused by SARS-CoV-2, the virus that causes COVID-19, is the worst occupational health crisis in our lifetimes. It has now been more than 2 years since the pandemic began, and as of this writing more than 1 million people in the United States have died and more than 100 million have been infected and may suffer long-term health effects. Among those who have been killed and made ill by the virus, many were infected at work. Throughout this crisis, Occupational Safety & Health Administration (OSHA) has been a toothless tiger, haplessly going back and forth with poorly designed, limited efforts to protect workers. Much of OSHA’s activities have been challenged in court. This article is an effort to chronicle the legal challenges to OSHA’s COVID-19 response and what it means going forward.

After several infectious disease outbreaks during the 1990s and early 2000s, many health and safety advocates recognized that OSHA lacked an effective strategy to protect workers from infectious disease exposure at work. Accordingly, in 2009, several unions filed a petition asking OSHA to promulgate an infectious disease standard. As with most petitions seeking regulation, OSHA moved glacially in responding. It took the weakest step possible in response in 2010 by publishing a Request for Information on infectious disease hazards seeking comments from stakeholders. It conducted a small business review. Then the Trump administration arrived, and OSHA abandoned its efforts to regulate infectious diseases (and any other health hazard for that matter). So, when the COVID-19 pandemic first began, OSHA had no specific standard to protect workers from exposure to infectious diseases.

OSHA’s initial response to the pandemic was to rely on voluntary measures. It posted several guidance documents on its website, but OSHA could not mandate that employers follow voluntary guidance documents. It opined that most COVID-19 infections were not covered by its recordkeeping regulations. OSHA claimed that the general duty clause, coupled with several general standards governing sanitation and personal protective equipment were adequate to prevent occupational COVID exposures. However, OSHA dramatically reduced its on-site inspections and instead relied on its phone/fax procedures to determine what protocols employers had in place. It announced that it would not cite employers who acted in good faith. Between January 2020 and February 2022, OSHA received 2513 formal COVID-19 complaints and inspected the facility in 19% of those cases. OSHA received 16,274 informal COVID-19 complaints and inspected just 4% of those cases.

Many labor organizations believed this was a wholly inadequate response to the pandemic. The AFL-CIO, on behalf of itself and 22 other labor organizations, petitioned OSHA calling on the agency to adopt an “emergency temporary standard (ETS)” to protect workers. National Nurses United and the National Education Association filed parallel...
petitions.\textsuperscript{6} Section 6(c) of the OSH Act requires OSHA to adopt an ETS when it finds workers are exposed to a “grave danger” from “new hazards” and an ETS is necessary to protect workers from that grave danger.\textsuperscript{10} OSHA may issue an ETS without notice and comment; the ETS serves as the proposal for a final rule. OSHA has adopted only a handful of ETS’s in its 50-year history and none since 1983, in large part because the courts have been skeptical of standards issued without notice and comment.\textsuperscript{6}

The Trump administration refused to issue an ETS, claiming it was unnecessary even though OSHA had stopped conducting most on-site inspections and issued few COVID-19-related citations. Workplace outbreaks of COVID-19 became commonplace in industries where people work indoors, physically close to others, such as detention centers, nursing homes, meatpacking plants and on buses, trains, and other modes of transportation. We don’t know how many workers got COVID=19, because OSHA told employers they were not required to record COVID-19 cases and refused to put in place any requirement for employers to report workplace COVID-19 outbreaks as was done by a No. of states.\textsuperscript{11}

When it became clear that OSHA’s voluntary approach and ineffective enforcement was failing to protect workers, the AFL-CIO filed a petition for writ of mandamus asking a court to force OSHA to adopt a COVID-19-specific emergency standard to protect workers.\textsuperscript{12} The D.C. Circuit declined to do so, deferring to OSHA, and writing that “[i]n light of the unprecedented nature of the COVID-19 pandemic, as well as the regulatory tools that OSHA has at its disposal to ensure that employers are maintaining hazard-free work environments … OSHA reasonably determined that an ETS is not necessary at this time.”\textsuperscript{13}

On the day he was inaugurated, President Biden issued an Executive Order directing OSHA to consider whether an ETS was necessary and if so, to issue one by March 15.\textsuperscript{14} In response, OSHA drafted, and sent to the Office of Management and Budget for review, a broad-based COVID-19 ETS that relied on traditional infection control procedures, such as masking, social distancing, disinfecting work surfaces and improved ventilation, to protect all workers. These mitigation measures are similar to the approach the AFL-CIO, the Centers for Disease Control, and other health and safety experts recommend.\textsuperscript{15} Unfortunately, that draft standard was never adopted. Instead, in June 2021, OSHA promulgated a narrower ETS, applicable only to healthcare workers.\textsuperscript{6}

OSHA has now “determined that Healthcare employees face a grave danger from the new hazard of workplace exposures to SARS-CoV-2.”\textsuperscript{6} OSHA made no finding on the danger facing other workers.

OSHA based its grave danger determination on several factors. OSHA pointed to the deadly consequences of COVID-19 infection; the “long-lasting and potentially permanent health effects” of COVID-19 infection; and the serious health effects of even moderate infection. OSHA found that “each of these categories of health consequences independently poses a grave danger to individuals exposed to the virus.” OSHA recognized that while vaccination reduced the risk of adverse health effects for healthcare workers, “it does not eliminate the grave danger faced by vaccinated Healthcare workers in settings where patients with suspected or confirmed COVID-19 receive treatment”.\textsuperscript{6} OSHA identified the following risk factors as creating the conditions which give rise to the grave danger:

[T]here are a number of factors – often present in healthcare settings – that can increase the risk of transmission: Indoor settings, prolonged exposure to respiratory particles, and lack of proper ventilation. First and most significantly, healthcare employees in settings where patients with suspected or confirmed COVID-19 receive treatment may be required to have frequent close contact with infectious individuals, these settings are typically not designed for physical distancing, and many areas in these facilities are not ventilated for the purpose of minimizing infectious diseases capable of droplet or airborne transmission.\textsuperscript{6}

Although the risk factors for COVID-19 can be found throughout the economy, OSHA did not explicitly make a finding—one way or the other—about the gravity of the danger facing workers outside of healthcare. In the only explicit finding OSHA made about the risk these millions of other at-risk workers face, the agency “determined that there is insufficient evidence in the record to support a grave danger finding for employees in non-healthcare workplaces (or discrete segments of workplaces) where all employees are vaccinated”.\textsuperscript{6}

OSHA also found that an ETS is necessary to protect healthcare workers “with the highest risk.”\textsuperscript{6} OSHA identified several reasons why an ETS is necessary to protect healthcare workers. First, OSHA found that “no other agency action is adequate to protect employees against grave danger.”\textsuperscript{6} Contrary to its earlier stance that the OSH Act’s general duty clause, voluntary guidance and existing OSHA standards were adequate to address the COVID-19 pandemic, OSHA acknowledged that its enforcement experience over the last year “has demonstrated that existing enforcement options do not adequately protect healthcare employees from the grave danger posed by COVID-19.”\textsuperscript{6}

This is true for several reasons. None of the existing OSHA standards directly address COVID-19 hazards.\textsuperscript{6} OSHA found that reliance on the general duty clause to protect workers from COVID-19 hazards “falls short of the agency’s mandate to protect employees from the hazards of COVID-19 in the settings covered by the standard” because general duty clause citations impose a heavy litigation burden on OSHA and “it is not a good tool for requiring employers to adopt specific, overlapping, and complementary measures” like those necessary to protect workers from
COVID-19 infection.6 OSHA has also concluded that employers do not comply with voluntary guidance “consistently or rigorously enough” to provide adequate protection to workers.6 OSHA observed that despite “the substantial promise that vaccines hold…OSHA does not believe that they eliminate the need for [the ETS]”16.

Because the Healthcare ETS failed to protect all workers at grave danger from occupational exposure to COVID, the AFL-CIO and the United Food & Commercial Workers (UFCW) challenged OSHA’s ETS in the D.C. Circuit as too narrow.16 Days before the unions were to file their brief arguing that all workers needed protection from COVID-19, President Biden announced that OSHA planned to issue an ETS requiring all employers with 100 or more employees to institute a policy mandating that all workers either be vaccinated or to wear masks while at work and test for COVID-19 weekly.17 The challenge to the Healthcare ETS was put on hold while OSHA moved forward with the “vaccine or test” ETS.

OSHA promulgated the “vaccine or test” ETS on November 5, 2021 which applied to workers who were not covered by the OSHA Healthcare COVID-19 ETS. Concurrently, the Centers for Medicare & Medicaid Services (CMS) issued a parallel vaccination rule that applied to these and other healthcare workers.18 Immediately, all hell broke loose. Dozens of opponents—including 27 states, a variety of businesses and trade associations, the Republican National Committee, and an array of religious organizations and conservative think tanks—filed petitions challenging the standard in circuit courts of appeals around the country. The AFL-CIO and 8 other labor organizations also petitioned for review of the ETS in several circuit courts because, among other reasons, the standard did not require mitigation measures in the workplace, as the Healthcare ETS had and, instead of requiring employers to pay for COVID-19 testing, the vaccine ETS shifted the cost of testing onto workers. Within days, petitions had been filed in all but one circuit court of appeals. The day after OSHA issued the ETS, the Fifth Circuit stayed the rule and allowed OSHA only 2 days to file a brief defending it, and then issued a scathing opinion suggesting the ETS violated the non-delegation and major questions constitutional doctrines as beyond OSHA’s statutory authority, and lacked a rational evidentiary basis.19 The non-delegation doctrine holds that Congress cannot delegate legislative functions to administrative agencies while the major questions doctrine requires specific Congressional approval of agency actions with vast social and economic impacts.

The Fifth Circuit’s decision was gratuitous since it was not the court chosen by lottery to hear the challenge to the Vaccine ETS. Shortly after its decision, the case was transferred to the Sixth Circuit where many opponents renewed their request for a stay of the ETS and sought initial en banc review. The request for en banc review was a thinly veiled attempt to make sure the ETS was not reviewed by a sympathetic panel; the Sixth Circuit has 11 judges appointed by Republican presidents and only 5 judges appointed by Democratic presidents. OSHA moved to dissolve the stay, and the coalition of unions, led by the AFL-CIO, filed a brief supporting OSHA’s motion. The Sixth Circuit, by a vote of 8-8, declined to initially hear the ETS challenge en banc.20 Chief Judge Sutton issued a lengthy dissent from the denial of en banc review signaling that the panel considering OSHA’s motion to dissolve the stay was poised to grant the motion.20 Two days later, a panel of the Sixth Circuit issued an opinion lifting the stay.21

In a decision written by Judge Stranch issued on December 17, 2021, the 6th Circuit fully embraced OSHA’s argument that COVID-19 was both a “physical hazard” and a “new hazard” that posed a “grave danger” in the workplace and that the ETS was “necessary” to address the grave danger facing workers.21 Moreover, the court pointed out that in Section 20 of the OSH Act, a section that grants a religious exemption from “immunizations” and “medical exams,” Congress explicitly recognized vaccines as among the tools OSHA could use in addressing workplace hazards. The court also found that, in directing OSHA to address blood-borne pathogens, Congress had clearly confirmed OSHA’s authority to regulate infectious diseases.21 And finally, she pointed to provisions in the American Rescue Act providing funding for OSHA to address COVID-19, including via enforcement. Based on all these indications of congressional intent, the Sixth Circuit found that OSHA was likely to prevail in demonstrating it had acted within its authority in issuing the ETS.21

Finally, contrary to the 5th Circuit, which had concluded that the balance of hardships favored the standard’s opponents—who, the court held, would incur unrecoverable costs in implementing the standard, whereas “a stay will do OSHA no harm”—the Sixth Circuit found that in the face of the raging pandemic, the high cost of delaying implementation of the standard “to the Government and the public interest” outweighed the petitioners’ “speculative injuries.”21

Before the ink was dry on the Sixth Circuit’s decision lifting the stay, a slew of opponents of the ETS filed emergency requests with the Supreme Court to reinstate the stay. The arguments before the Supreme Court mirrored those that had been raised in the courts of appeals. Opponents variously argued that OSHA lacked the authority to issue an ETS regulating COVID because it was a hazard of everyday life and not an occupational hazard, and that any general statutory provision that authorized a “vaccine mandate” affecting 84 million workers must violate the non-delegation doctrine unless Congress had clearly authorized a rule of such vast “political and economic significance.”22 OSHA, supported by the unions, responded that Section 6(c) clearly authorized the ETS, that vaccination was the most effective means of preventing COVID-19’s spread in the workplace, and that Congress had reaffirmed OSHA’s authority to regulate COVID as an occupational hazard by
appropriating money to OSHA for worker protection activities relating to COVID-19.23

The Supreme Court disagreed and on January 13, 2022 reimposed the stay.24 Its decision is disappointing and completely untethered to the language of the OSH Act. The Court’s 6-3 opinion starts by describing OSHA’s ETS as a “vaccine mandate,” which it was not. The Court held that OSHA could not issue a broad public health regulation such as the ETS, because many of those covered by the ETS faced no greater risk at work than in everyday life. And the Court also noted that vaccines were not a workplace-specific remedy. The Court found such broad public health regulation beyond OSHA’s authority absent a clear Congressional grant of authority. The Court did not mention Section 20 of the OSH Act, which specifically authorizes OSHA to mandate immunization. Justice Breyer filed a dissent, joined by 2 other justices, which largely agreed that COVID-19 posed a grave danger in the workplace that OSHA could regulate.

So, what does the Supreme Court’s decision mean for OSHA’s ability to protect workers? The Supreme Court ruled that OSHA may only regulate occupational risks, ie, the increased, incremental risk from workplace exposure or as a result of work. For a COVID-19 ETS, that means work-related exposures that pose a grave danger of health effects that are serious, not fleeting, to employees. The vaccine ETS was not limited to workers whose employment placed them at increased risk. Instead, it applied to all employers with more than 100 employees, even if many of those employees worked at home.

To understand this limit, it is useful to look back at the Benzene decision.25 There, OSHA determined that because benzene caused cancer at some levels, the Agency could assume that it caused cancer at all levels and regulate to the limits of feasibility. The Supreme Court rejected that interpretation. Instead, the court required that OSHA demonstrate that benzene caused a significant risk of cancer in the workplace (or from workplace exposures).

National Federation of Independent Businesses v. OSHA is no different. In the ETS, OSHA assumed that all unvaccinated workers faced a grave danger, regardless of what type of work they did, how many other workers or customers they encountered, or how confined their workplace was. The court required OSHA to show that workplace conditions created circumstances that substantially increased the risk of contracting COVID-19. Nevertheless, its decision leaves room for OSHA to move forward with COVID-19 regulations to protect workers at highest risk. The Court made clear that OSHA could adopt a rule protecting workers whose occupational risk was greater than the everyday risk faced by the general population, such as those who work in cramped indoor spaces or work directly with the virus.

In other words, OSHA can regulate COVID-19 when workplace exposure substantially increases the risk workers face. This holding is similar to that of an earlier case upholding OSHA’s hearing conservation standard. In Forging Industry Assoc v. OSHA,26 Fourth Circuit held that OSHA could regulate hearing loss from noise at work.26 The court made clear that the level of noise OSHA proposed to regulate was substantially above that which the general population encountered regularly, and it continued for 8 hours a day for a working lifetime.

The vaccine ETS also represented a significant departure from OSHA’s usual regulatory approach. Usually, OSHA requires employers to reduce exposure to the hazard in the workplace. The Supreme Court’s decision does nothing to limit OSHA’s ability to do so in the future. Rather, the Supreme Court requires OSHA’s remedy for occupational risk to focus on workplace conditions that create the risk. OSHA’s Healthcare ETS did just that. It required healthcare employers to implement physical barriers where possible, enforce social distancing, improve ventilation, screen patients, disinfect, and require masking at work. Each of these obligations is aimed at reducing employee exposure to the virus during work. The vaccine ETS did not impose a duty on employers to reduce exposure. It imposed a duty on employees to protect themselves from the effects of exposure. Employers were simply obligated to monitor whether they had done so. Past OSHA standards had made medical exams or vaccines voluntary.27

Even though mandating vaccines or medical testing is not OSHA’s usual approach, the OSH Act clearly authorizes it. Both the Supreme Court majority and dissent ignored the specific provision that demonstrates Congressional authorization of OSHA’s approach in the vaccine ETS. Section 20(a)(5) provides that OSHA may not require medical testing or immunization when someone objects on religious grounds unless it is necessary to protect the health and safety of others.28 COVID is the first time OSHA has attempted to regulate a hazard that could easily spread among workers. This provision presupposes that OSHA is authorized to mandate medical testing or vaccination when there are no religious objections. It also makes clear that OSHA’s duty to protect others overrides any religious objection. The court’s failure to mention this provision is inexcusable and inconsistent with its focus on “major questions.”

The White House led OSHA down this quixotic path and, in doing so, did a disservice to workers. In April 2021, OSHA drafted a comprehensive ETS that would have protected all workers by requiring mitigation measures in the workplace to slow the spread of SARS-CoV-2.15 The White House rejected that approach and forced OSHA to issue only a narrow ETS focused on protecting healthcare workers. Three months later, as the Delta variant caused another wave of infections, the White House announced a different approach and directed OSHA to adopt the vaccine ETS which would have been unnecessary had OSHA’s initial draft ETS been published. The vaccine ETS had several flaws—and these proved fatal in the courts. First, it applied only to employers with 100 or more employees. This was not a risk-based distinction. No prior OSHA
health standard applied only to larger employers regardless of workplace risk. Second, OSHA had only once—in very narrow circumstances—mandated any type of medical testing. Indeed, in earlier health standards, OSHA had made medical testing and vaccination mandatory. Finally, OSHA had previously opined that the OSH Act required employers to pay for all testing and protective equipment. But the vaccine ETS allowed employers to shift the cost of weekly COVID-19 testing onto employees.

Meanwhile, when the Healthcare ETS hit its 6-month mark in late December, OSHA announced that it was withdrawing that ETS, would publish a notice in the Federal Register explaining its decision, and would be working “expeditiously to issue a final standard to protect healthcare workers from COVID-19 hazards.”29 Section 6(c)(2) of the Act provides that an ETS remains in effect until superseded.10 The following Section 6(c)(3) directs OSHA to issue a permanent standard to replace the ETS within 6 months. By announcing its intent to withdraw the Healthcare ETS, without putting other protections for healthcare workers in place, OSHA left those workers with no greater protection than they had when the pandemic began in January 2020. OSHA did this even though it has found that the general protections the Act provides against “recognized hazards” are inadequate to protect workers from COVID-19.6 To ensure that the ETS remains in effect to protect healthcare workers from COVID-19 exposure, the AFL-CIO, together with National Nurses United, American Federation of Teachers, American Federation of State, County, and Municipal Employees, and several local affiliates, filed a second petition for mandamus in the DC Circuit seeking to compel OSHA to retain and enforce the Healthcare ETS until it is replaced by a more permanent standard.30 OSHA’s response to the petition was weak; it argued that it had discretion to decide what its priorities should be.31 However, OSHA did not identify any priorities of greater importance than protecting workers from COVID-19.

Further, OSHA decided not to publish a notice in the Federal Register formally withdrawing the ETS, pending the outcome of the most recent litigation. Instead, it has adopted a policy of “non-enforcement” even though it says the Healthcare ETS technically remains in effect.32 The D.C. Circuit heard an oral argument on the union petition seeking to keep the ETS in effect on April 4, 2022. Five months have now passed since the petition was filed with no decision from the Court.

Two years after the pandemic began, OSHA is back where it started. There are now no COVID-19-specific protections in place for any workers. Instead, OSHA claims it will enforce existing general standards and the general duty clause despite having concluded that these tools are not effective in protecting workers from COVID-19. Workers remain at serious risk of workplace exposure to the SARS-CoV-2 virus. The occupational health crisis caused by the virus continues; the toll of unnecessary infections, serious illness and deaths among workers continues to mount.

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