

January 7, 2021

Litigation Update: Oral Argument before Supreme Court in OSHA ETS Case

The argument this morning, scheduled for one hour starting at 10:00 AM, ran for more than two hours. All of the attorneys who argued, including the government attorney, did an excellent job.

Knowing how concerned many of you are about having to begin implementing the mandate on Monday if the Court declines to grant a stay, our attorney in his rebuttal argument made the case emphatically (but politely, of course) that without a stay, employers will have to implement compliance plans on Monday and will start to lose workers, so a decision by the Court this weekend is needed.

It seemed from the questioning that the three liberal Justices are unlikely to vote for a stay; they did not seem concerned about the employer obligations or loss of workers, and one suggested that there would be no employer costs until next month when OSHA begins enforcing the alternative testing. When questioned about the availability of tests, the government's attorney acknowledged the reports that tests are not readily available today, and suggested that OSHA would adjust as necessary if tests are not available next month.

The remaining Justices seemed more sympathetic in their questions, and our attorneys are cautiously optimistic about the outcome, but believe it will be a very close call.

Of note for NAW members: in response to questions from Justices about whether employers would lose workers if the mandate takes effect, our attorneys cited the "declarations" that many of the petitioners – including NAW – filed with the original brief, arguing that in fact many workers will quit rather than submit to tests or vaccination. NAW's declaration was very specific on that issue, so thank you again to those of you who provided feedback and/or responded to our survey with specific information about your expected employee loss and the harm it would do to your businesses.

As we mentioned in our GR update earlier this week, we are scheduling a briefing by one of our attorneys for NAW members next Wednesday afternoon. If you would like to participate and have not already let me know, please do so and I will get everyone a Zoom link for the meeting.

And we will of course update everyone know as we learn more about next steps in the case.

Many thanks—

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