

# Fifth Circuit Hits Pause on OSHA COVID-19 Vaccine or Testing Emergency Standard

November 8, 2021

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One day after the Occupational Safety and Health Administration (OSHA) released an Emergency Temporary Standard (ETS) titled “COVID-19 Vaccination and Testing; Emergency Temporary Standard” (Mandate) (*see* 86 Fed. Reg., 61,402), a panel of the U.S. Court of Appeals for the Fifth Circuit granted a nationwide stay of the OSHA ETS.

Lawsuits were filed in the U.S. Courts of Appeals for the Fifth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits when the ETS was released, with one lawsuit being filed the day before the ETS was officially published in the *Federal Register*.

### Background

On November 5, 2021, [OSHA released an ETS](#) that requires employers with at least 100 employees to adopt a vaccination policy that requires employees to be fully vaccinated or submit to at least weekly testing. The ETS further requires employer to provide paid time off to recover from and receive the vaccine, and unvaccinated employees must wear a mask when in contact with coworkers.

OSHA can issue a citation for noncompliance for \$13,653 per violation if classified as serious or other than serious, and up to \$136,532 if willful or repeated.

The rule took effect immediately upon publication in the *Federal Register*, but was stayed a day later by the U.S. Court of Appeals for the Fifth Circuit.

Currently, four separate groups of 26 states total have petitioned the Fifth, Sixth, Eighth, and Eleventh, Circuits to review the legality of the OSHA ETS. Private litigants, including temporary staffing agencies, manufacturing industry employers, and a coalition of small businesses and the Republican National Committee, have also filed petitions in the Fifth, Sixth, Seventh, Eighth, and D.C. Circuits, requesting a stay of OSHA’s ETS, outlining the irreparable economic harm they would suffer if the ETS remained in effect.

Because of the multiple lawsuits filed in various federal judicial circuits, by federal statute, the cases will be consolidated and transferred to one circuit chosen by lottery. The judicial panel on multidistrict litigation will randomly choose a circuit to hear the case. 28 U.S.C. § 2112(a)(3). The judicial panel consists of seven circuit and district judges from different circuits that are designated by Chief Justice of the United States John Roberts. *See* 28 U.S.C. § 1407(d). The Department of Justice informed the Courts of Appeal that it expects the multi-circuit lottery to take place on or about November 16.

### Arguments Against OSHA ETS

Common arguments in favor of throwing out OSHA’s ETS are that it violates the Non-delegation Doctrine and the Commerce Clause of the U.S. Constitution. Petitioners argue that OSHA’s ETS constitutes a major rule that requires specific legislative authority. The absence of such authority violates the Non-delegation Doctrine, they argue. The [petitioners in the Seventh Circuit argued](#), “Congress did not provide OSHA with such sweeping authority when it enacted OSHA fifty years ago, nor has it since provided a specific

delegation of authority to the agency to take the actions outlined in the ETS. To interpret [the statute] in this manner reflects no intelligible principle and no logical line of authority.” Multiple petitioners argue that the ETS constitutes a legislative act beyond the scope of OSHA’s authority. They cite recent federal court decisions overturning the Centers for Disease Control and Prevention’s (CDC) attempt to exercise authority over landlord-tenant relationships with an eviction moratorium, as well as case law overturning the ban on the cruise industry because of the administration’s concerns over the COVID-19 pandemic.

Petitioners argue OSHA’s ETS violates the Commerce Clause and the 10<sup>th</sup> Amendment of the U.S. Constitution, because there is no specific relationship to commerce that allows the federal government to act and the public health and safety are policy powers granted to the states. As [the Sixth Circuit petitioners point out](#), the decision not to receive the mandated injection is not a federal regulable commercial activity and, “as between the unvaccinated employee and either the employer or the vaccine provider there is likely no commerce or exchange of goods for money for Congress or OSHA to regulate.”

Petitioners also argue that OSHA cannot justify a “grave danger” necessitating an ETS nearly two years into the pandemic, with 70 percent of people having already received one dose of a vaccine, according to the CDC, and declining infection rates. They also argue that OSHA’s stated reasons for the ETS are pretextual, as the administration’s stated intent and directive to OSHA was to get more people in the United States vaccinated. Moreover, COVID-19 is a communicable disease threatening public health at large, not a hazard unique to the workplace or all workplaces and, therefore, beyond OSHA’s ability to regulate, they argue. It is a pandemic, after all. Further, petitioners argue that COVID-19 does not meet the definition of a “substance[] or agent[] determined to be toxic or physically harmful” nor is it a “new hazard” as prescribed by the Occupational Safety and Health Act of 1970 for emergency rulemaking and, therefore, the ETS is unlawful.

Petitioners also argue that OSHA has the science wrong for those with “natural immunity.” Perhaps one of the more surprising elements of the ETS, they argue, is that OSHA is discounting employees who have recovered from COVID-19 and have “infection-acquired immunity” by requiring those individuals to be vaccinated or be subject to the weekly testing requirements of the ETS. Petitioners in the Sixth Circuit argue this is flatly wrong. They note that the largest scientific study to date found natural immunity provides equal or better immunity than that induced by vaccination. These petitioners also note that ETS erroneously defines the “grave danger” as the lack of vaccination, rather than lacking immunity.

As for irreparable harm, the Fifth Circuit petitioners argue the administrative and financial burdens are too high as the petitioners face extraordinarily high penalties. The ETS requires the petitioners to manage the vaccination status and maintain the testing status of each employee. The petitioners in the Seventh Circuit argue that those administrative losses are unrecoverable. They also argue that they will lose employees to smaller corporations that are not subject to the ETS. The petitioners in the Sixth Circuit quantify the immediate loss as over \$900,000 in the first year. They also provide facts of the severe labor shortage in their markets that have led to many vacant positions. After surveying their workforce, they say they expect other employees will seek other employment if they have to be vaccinated or submit to weekly testing. The ETS will only exacerbate the labor shortage and imperil petitioners’ current and future business, they argue.

For the balance-of-equities element, all petitioners emphasize the strong equitable interest

they have in staying the ETS. The petitioners in the Fifth and Seventh Circuits point out the federal government will not suffer any harm from a stay. As for the public interest, the Fifth Circuit petitioners state the public interest favors a stay to maintain the separation of powers and prevent OSHA from illegally asserting its authority. The Seventh Circuit petitioners argue the public will not face any immediate harms as the vaccine is still available to those who would like it and every citizen can assess their own personal risk.

### Fifth Circuit Decision

The Fifth Circuit, in a per curiam decision (an agreement of three-judge panel) issued an order staying OSHA's Mandate pending further action of that court, because the "petitions give cause to believe there are grave statutory and constitutional issues with the Mandate." The panel ordered the Department of Labor to respond to the petitioners' motion for a permanent injunction of the Mandate by 5:00 p.m. on November 8. Petitioners will have until 5:00 p.m. on November 9 to file any reply.

### What Does the Stay Mean for Employers?

While the ETS is stayed, employers do not have to comply with its terms. However, that stay could be lifted by the Fifth Circuit or the Circuit that gets the consolidated cases for review on the merits. Once the stay is lifted, employers will have to comply with the terms of the ETS, but compliance deadlines should be tolled during the stay. Historically, though, stays of previous OSHA emergency temporary standards have remained in place pending resolution on the merits.

As a best practice, if an employer can do so without suffering significant economic harm, they should start creating policies and procedures for compliance with the ETS to be prepared should the stay be lifted pending a resolution on the merits or should the court decide to uphold the ETS.

If you need assistance, contact the Workplace Safety and Health Practice Group, the Disability, Leave and Health Management Practice Group, or our [COVID-19 team](#).

(Law clerk Nawal Chaudry contributed to this article.)

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