

Employers' Obligations Uncertain After OSHA Mandatory Vaccination Rule Enjoined By Federal Appeals Court

Effectiveness of the Emergency Temporary Standard (ETS) published by OSHA in the November 5, 2021 Federal Register—imposing [numerous](#) COVID-19 vaccination-related policy requirements on employers with over 100 employees—was stayed by a Order of a three-judge panel from the U.S. Fifth Circuit Court of Appeals on November 6. The stay, issued on a motion for a temporary stay of the ETS, by Petitioner BST Holdings, LLC, and joined by numerous other businesses and at least five U.S. States (the “Petitioners”), did not contain a full opinion, but observed that the motion papers “give cause to believe there are grave statutory and constitutional issues with the [ETS],” setting the matter up for expedited judicial review.

Although the Court itself did not issue an opinion, the moving papers offer several arguments in favor of staying the ETS—some rooted in OSHA’s statutory authority, and others in the manner in which the agency came to its policy conclusions. Foremost, from a Constitutional perspective, the Petitioners argue that imposing a vaccine mandate is an example of a “general police power” that even Congress has not opted to exercise, much less a federal administrative agency. By contrast, entities that *do* have a general police power and

a sovereign interest in providing for the general health and welfare of their residents—for example, the State Petitioners—would be undercut by OSHA’s rule, which seeks to preempt any state or local measures which are contrary to the ETS.

Beyond this, the Petitioners argue that OSHA’s ETS goes beyond the statutory authority given to the agency by Congress. Specifically, OSHA is given the power to address “agents,” “substances,” and “new hazards,” which terms the Petitioners argue have never historically been applied to infectious diseases like COVID. Moreover, the agency is given specific procedural tools to deal with its responsibilities (such as requiring labeling, or protective equipment in the workplace)—none of which include mandating medical measures like vaccination against disease. The Petitioners also point out that—to the extent Congress has ever given an agency the power to regulate communicable diseases—it has given them to the Centers for Disease Control (CDC), not to an occupational safety authority like OSHA.

Beyond their Constitutional and statutory arguments, the Petitioners noted that the agency’s explanations and rationales were “arbitrary” or “capricious,” meriting a stay. In particular, the Petitioners argue that OSHA has

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specifically adopted contrary positions in the past regarding mandatory vaccination and the agency's own power to enforce vaccination rules. The Petitioners highlighted past OSHA statements that voluntary vaccination programs were the "best approach to foster greater employee cooperation and trust in the system," as well as statements that the OSH Act (creating and empowering OSHA) did "not authorize OSHA to issue sweeping health standards to address entire classes of known and unknown infectious diseases on an emergency basis without notice and comment."

These statements serve as evidence in the Petitioners' moving papers that the agency has reversed its position in order to craft the current ETS—which an agency *may* do, but only with a "detailed justification" for the change, which the Petitioners contend does not appear anywhere in the commentary or text of the ETS. The Petitioners likewise argue that the agency failed to give consideration to the public's reliance on its previous positions before upending them in the ETS.

The matter has not been fully briefed for the Fifth Circuit, and the stay could still be lifted following new submissions from the parties. (The Court ordered responses by the Biden Administration on November 8; and reply papers by November 9.) In addition, the Fifth Circuit's Order does not state whether the injunction is national in scope, or only affects employers within the Fifth Circuit itself. Other circuit courts have seen the filing of lawsuits against the OSHA standard, some of which

may be accompanied by petitions for injunctive relief before the lawsuits can be consolidated and heard by a single Circuit Court (as provided by federal rules for multi-circuit litigation).

It is unclear, moreover, how the Order staying the ETS might affect states such as New York with "State Plans," whose workforces (public sector employees, in the case of New York) are not governed by the ETS itself, but who are obligated to demonstrate that their own plans are "at least equal" to the standards of the ETS. Typically, states with such plans simply adopt identical standards to OSHA. There may be considerable uncertainty over what the states' obligations are—if any—in the face of an enjoined federal standard.

It may be advisable for employers potentially affected by the ETS (or a corresponding State Plan) to continue to take preliminary steps toward compliance that do not require immediate commitment of resources, such as discussing and deciding on a vaccination policy (in the event that one is needed); and assigning individuals and departments their responsibilities for new record-collection, recordkeeping and reporting requirements under the OSHA rule. Bolaños Lowe will continue to monitor and update the status of the ETS as further agency guidance or litigation activity emerges.

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