



## Safety Alert

15 November 2021

### Appeals Court Affirms Stay of OSHA COVID Vaccine/Test Mandate for Large Employers

The U.S. Court of Appeals for the Fifth Circuit has issued a [decision affirming its earlier temporary stay](#) of the Occupational Safety and Health Administration's Emergency Temporary Standard requiring large employers to ensure their employees are vaccinated against COVID or submit to weekly testing and masking in the workplace.

The court held that OSHA's ETS has exceeded the agency's authority under the OSH Act because the ETS is not specifically related to the workplace but to public health, this ETS is much broader than any prior use of the ETS process (most of which were nonetheless struck down by the courts), and there is no "emergency" to address because the pandemic has been around for two years and vaccines were approved over a year ago.

In addition, the court noted that this ETS likely exceeds Congress's authority to regulate interstate commerce because the individual's decision to forgo a vaccine is not "economic activity," i.e., it is not an economic decision but a matter of personal health. This same reasoning was used by the U.S. Supreme Court to strike down the mandate to purchase health insurance under the Affordable Care Act in 2012.

Thus, the appeals court ruled that the OSHA ETS remains stayed pending adequate judicial review of the petitioners' underlying motions for a permanent injunction, and ***directed OSHA to take no steps to implement or enforce the mandate until further court order.***

Because similar petitions for review of the OSHA ETS have been filed by various parties in different appellate circuits throughout the country, the courts of appeal will hold a lottery on Tuesday, November 16 to determine which circuit court will take the lead in addressing the legal and constitutional issues presented in these cases. The decision from that circuit will presumably end up in the U.S. Supreme Court before the end of the year.

Finally, the American Trucking Associations and ten other trade associations have filed a similar [petition for review](#) in the Fifth Circuit Court of Appeals seeking an injunction of the OSHA Emergency Temporary Standard. That case has been consolidated with the case in which the stay was granted.

### **Argument Scheduled on Injunction of COVID Vaccine Mandate for Federal Contractors**

The States of Kentucky, Ohio and Tennessee have [filed suit](#) in federal court in Kentucky against the COVID vaccine mandate for federal contractors and subcontractors. That mandate covers up to one-fifth of all workers in the United States, and unlike the OSHA ETS for large employers, does not allow workers the option to submit to weekly COVID testing.

The complaint alleges the Safer Federal Workforce Task Force's [new guidance](#) on workplace safety for federal contractors and subcontractors, which mandates that all covered contract employees on existing contracts must be fully vaccinated against COVID-19 no later than December 8, 2021 (now extended to January 4, 2022), is beyond the scope of the President's power to regulate and violates the Administrative Procedure Act.

A hearing on the plaintiffs' motion for a preliminary injunction of the vaccine mandate is scheduled for November 18, 2021.

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