

NOVEMBER 6, 2021 | KEY OSHA CASES EXPLAINED

# [BREAKING] 5th Cir. Temporarily Stays OSHA's COVID-19 Vaccination, Testing, and Face Coverings Emergency Rule

By Conn Maciel Carey's [COVID-19 Task Force](#)

On Saturday, November 6th, a three-judge panel of the US Court of Appeals for the [Fifth Circuit issued a Temporary Restraining Order \(TRO\) staying the effect of OSHA's vaccination, testing, and face coverings emergency temporary standard \(ETS\)](#) that it had promulgated just the day before. The entirety of the court's explanation for the stay Order was this:

***"Because the petitions give cause to believe there are grave statutory and constitutional issues with the Mandate, the Mandate is hereby STAYED pending further action by this court."***

The suit challenging [OSHA's new vaccination, testing, and face coverings ETS](#) was initiated on behalf of a group of private businesses and religious organizations, as well as several states, including Texas, Louisiana, South Carolina, Utah and Mississippi. The petitioners argued that OSHA overstepped its legal authority in issuing an emergency standard to address COVID-19 in US workplaces at this point in the pandemic. The petitioners assert that an emergency stay is necessary because these employers will face workforce shortages if unvaccinated employees quit their jobs in lieu of receiving a COVID-19 vaccination, and the ETS forces them to expend resources to develop and implement written compliance and reporting procedures beyond what the law authorizes under the circumstances. 

Specifically, their objections to the OSHA ETS include:

- OSHA's authority to issue an emergency standard is limited to workplace-related hazards, but the risk of COVID-19 infection is a "society-wide danger."
- OSHA cannot show that COVID-19 is a grave danger now for all employers with 100 or more employees because just a few months ago OSHA concluded that COVID-19 was only a "grave danger" to healthcare employees.
- COVID is not a "grave danger" to all workers – the risk depends on individual employees' age and health, not how many co-workers they have.

- OSHA ETS is not sufficiently “narrowly tailored” because the mandate applies regardless of individual employee’s personal risks and differences in workplace conditions.
- OSHA’s emergency authority is limited to “new hazards” from “substances or agents determined to be toxic or physically harmful” which cannot be stretched so far to cover the spread of any communicable disease.

The [5<sup>th</sup> Circuit’s two-page opinion](#) holds that petitioners met their burden in demonstrating that the Administration’s issuance of the ETS poses grave statutory and constitutional issues, and, therefore a stay is appropriate. Further consideration of the issue will be given based on the briefings filed over the next several days by the parties.

Although the Stay Order is silent as to its scope — nationwide vs. just the geographic reach of the 5th Cir. — a clerk at the 5th Cir. indicated to us that the **the Stay would only apply to those states within the 5<sup>th</sup> Circuit.**

This 5th Circuit decision follows the filing of four separate lawsuits in the 8th Circuit, 11th Circuit, 6th Circuit, and 5th Circuit in the last several days challenging the Administration’s vaccine mandates. The lawsuit that was filed late in the week by the 8th Circuit was initiated by Missouri Alaska, Arizona, Arkansas, Montana, Nebraska, New Hampshire, North Dakota, South Dakota and Wyoming and Iowa.

The 5th Circuit’s Order to stay the OSHA ETS is the first court to stop implementation of any vaccination-related mandate by the federal government or a state government during the pandemic. The panel of judges that issued that Order was composed of one Reagan-appointee and two judges appointed by former President Trump.

The Department of Labor’s response to the stay Order and the issue of whether this temporary stay should become a permanent injunction of OSHA’s ETS indefinitely is due to be filed with the court on Monday at 5pm, with the petitioners’ reply due by 5pm on Tuesday. Presumably a hearing will be set imminently and a prompt decision in the case is likely to be made soon after in what are clearly very expedited proceedings.

There is no guarantee the stay of the ETS remains in place after that, and whether higher courts will need to get involved, including the Supreme Court. To date, none of the parties challenging the companies and governmental entities that have implemented vaccinate mandates have stopped the mandates, and the OSHA ETS is not even vaccine mandate. So there is a reasonably foreseeable outcome that the ETS is fully implemented and even on the current schedule.

Our CMC COVID-19 Task Force is monitoring the situation and will provide a more in-depth update as developments unfold.

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In the meantime, [join members of the CMC COVID-19 Task Force on Wednesday, November 10 at 1 PM ET for a webinar to review OSHA’s new COVID-19 vaccination, testing, and face coverings ETS](#), what the rule requires, who is covered, whether and how much employers pay for requirements in the rule, and of course, the status and likely future of the rule after the 5th Circuit’s recent stay Order. 

Also, if your organization is forging ahead assuming the stay will be lifted, or if the stay is lifted or overturned, CMC is well-positioned to efficiently help you develop the necessary policies, procedures and tools needed to comply with the ETS. We are developing a questionnaire we will use to solicit information and the decisions

needed to prepare the vaccination, testing, and face covering written plan that is called for by OSHA's new ETS. There are quite a few options and approaches that employers can include in a plan that complies with the OSHA rule, depending on how the organization wants to handle:

- The vaccination requirement (i.e., a hard or soft mandate);
- Assistance with vaccination (education programs, information sharing, or even on-site vaccine clinics);
- What cap to set for recovery sick leave
- Whether to account for other previously accrued and not-yet-used leave to offset sick leave for recovery time;
- Whether to pay for any aspects of the testing program;
- Whether and how to administer the testing program;
- The type(s) of testing and test proctoring you will accept (or administer);
- How you will manage documenting/verifying vaccination status; and
- Similarly, how you will manage documenting/verifying negative test result for entry;

Supporting materials that would need to be developed to accompany the policy include:

- Vaccination-status roster;
- Log to record/track test results; and
- Mass email or postings (hard copy or electronic) to use to "communicate information" to all of the employees that is required under the ETS.

While this will involve quite a bit of work, we anticipate offering this suite of services for a flat fee that will include advice and counseling necessary to complete development of a final plan. Contact any of the attorneys on the [CMC COVID-19 Task Force](#) if you have any questions about the ETS, the status of the challenges against the rule, and plans for your organization's implementation of the ETS, if necessary.