

NOVEMBER 13, 2021 | KEY OSHA CASES EXPLAINED

[BREAKING] Fifth Circuit Orders a Stay of OSHA's COVID-19 Vaccination, Testing, and Face Coverings ETS

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

Emphasizing that the extraordinary power afforded to OSHA under the emergency provisions of the OSH Act should be delicately exercised, the US Court of Appeals for the Fifth Circuit issued a [22-page opinion](#) late yesterday, November 12th, reaffirming after briefing by both parties the Stay of OSHA's COVID-19 Vaccination, Testing, and Face Coverings emergency temporary standard (ETS) that it had ordered on November 6th. The Fifth Circuit panel ordered that OSHA may take no further steps to implement or enforce its newly issued ETS until further court order, and thus may not require employees of covered employers to undergo COVID-19 vaccination, take weekly COVID-19 tests, or wear a mask.

Why Did the Fifth Circuit Stay OSHA's ETS?



Notably, the Fifth Circuit commented in a footnote that debates over the Biden Administration's vaccine mandate have "roiled the country throughout much of the Fall," and that the ETS (referred to as "the Mandate" by the three-judge panel) "affects every person in America one way or another." Drawing from a variety of sources—including White House Chief of Staff Ronald Klain's retweet of an MSNBC anchor's tweet characterizing the ETS as a "workaround" for a federal vaccine mandate, the Court refused to accept the government's arguments that a sufficient emergency exists justifying a second COVID-focused ETS in less than 6 months. Indeed, the Court found that prior statements by the Administration "belie the notion that COVID-19 poses the kind of emergency that allows OSHA to take the extreme measure of an ETS." To that end, the Court seized on the fact that more than 78% of Americans aged 12 and older are either fully or partially vaccinated and thus face "little risk at all" according to the Administration.

While the November 12 opinion was issued after the Fifth Circuit conducted an "expedited" review, the Court leaves little doubt as to how it will likely rule on the petitioners' request for a permanent injunction, explaining—in addressing whether the petitioners have standing to sue—that "the Mandate imposes a financial burden upon [the petitioners] by deputizing their participation in OSHA's *regulatory scheme*, exposes them to *severe financial risk* if they refuse or fail to comply, and *threatens to decimate their workforces* (and business prospects) by *forcing unwilling employees* to take their shots, take their tests, or *hit the road*." (Emphasis added).

Concluding that the ETS “threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their job(s),” the Fifth Circuit rejected the idea that OSHA has the ability to “make sweeping pronouncements on matters of public health affecting every member of society in the profoundest ways,” signals that it believes the ETS will not pass constitutional muster and characterizes the ETS as “fatally flawed on its own terms” because it is both overinclusive (because it applies to virtually every industry without accounting for differences in exposure risks) and underinclusive (because it makes no attempt to protect employees with 98 or fewer coworkers).

Explaining why a continued stay is necessary, the Fifth Circuit stated that the “companies seeking a stay in this case will also be irreparably harmed in the absence of a stay, whether by the business and financial effects or a lost or suspended employee, compliance and monitoring costs associated with the Mandate, the diversion of resources necessitated by the Mandate, or by OSHA’s plan to impose stiff financial penalties on companies that refuse to punish or test unwilling employees.”

How Did OSHA Respond to the Fifth Circuit Ruling?

Not long after the Fifth Circuit’s opinion was released, OSHA issued the following statement:

“On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay OSHA’s COVID-19 Vaccination and Testing [ETS]. The court ordered that OSHA ‘take no steps to implement or enforce’ the ETS ‘until further court order.’ While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.”


What Does the Future Hold for OSHA’s Vaccinate-or-Test ETS?

We have been on the edge of our seats waiting to see whether the Fifth Circuit would extend its temporary stay of the ETS into a lengthier one while it decides whether or not to issue a permanent injunction, so this development was not terribly surprising. We do think this development greatly increases the likelihood that the current implementation dates of the ETS (December 6 for most compliance requirements and January 4 for testing the unvaccinated) will get pushed, at least a little, but that is not automatic.

If the stay remains in place for a meaningful period of time (i.e., if the Supreme Court does not very quickly overturn or if a different circuit does not take control of the consolidated legal challenges and lift the stay), then we would expect OSHA (or a court) to address/extend the implementation dates. But if the stay is promptly lifted by the Supreme Court or by a different circuit court, and no further stay is imposed by that new circuit court, OSHA may not feel obliged to push the implementation dates.

For now, the stay remains in place, and we think it is intended to apply on a nationwide basis. While it is not entirely certain that the Fifth Circuit has the authority to impose a nationwide stay, it appears that the Order was written with that intention. As noted above, the Fifth Circuit explicitly stated in its Order that OSHA shall not to take any further actions to implement the ETS. That sounds more like a nationwide stay than an preclusion of application of the ETS to workplaces just in Texas, Louisiana, and Mississippi.

The question of whether the ETS will remain stayed pending the full adjudication of the legal challenges could go to the Supreme Court in short order. At that point, the Supreme Court could either take up the stay in proper proceedings, setting an expedited briefing schedule and hearing oral argument, or it can handle it by way of the “shadow docket,” like it has the other similar challenges to vaccine-mandates that have come before the Supreme Court this year. If the Court requires briefing and oral argument, it is still possible to see a decision by the end of the calendar year, but more likely in January. If they Supreme Court address it through the shadow docket, and rules without full briefing, that decision could come as early as the end of this month.

Even before then, the Judicial Panel on Multidistrict Litigation will consolidate the challenges that have now been filed in at least nine circuits, including a couple of more liberal courts where unions filed challenges, and randomly assign the consolidated case into one of the federal circuit courts where a legal challenge was initiated through November 15th. 

In the days ahead, we will be tracking:

- What the Department of Labor does in response to the Fifth Circuit’s decision to reaffirm its November 6 stay. That is, do they request further review *en banc* at the Fifth Circuit (which I would not do if I was advising DOL), or petitioning for emergency review to the Supreme Court?
- What happens next week with the MDL lottery; which circuit takes over the consolidated challenges; and what does that court (if it is not the Fifth Circuit) do with the Fifth Circuit’s stay?

What Should Employers Do Now?


We will know a lot more within the week. But for now, we’re not quite ready to put a fork in the ETS, and still recommend employers continue their efforts to come into compliance with the ETS next month. The most important steps employers should take between now and December 6th (or whenever the first ETS compliance deadline arrives) are to:

1. Put in place the new written vaccination, testing, and face coverings policy (that is the low hanging fruit OSHA will check and cite more than anything);
2. Communicate that policy and the other required information by some form of mass communication (not training);
3. Make a demonstrable request to employees to provide their vaccination status by a set date; and
4. Document as much vaccination status information as you get back on an employee vaccination status roster, and fill in unvaccinated for the rest.

In case it would be helpful, Conn Maciel Carey’s national OSHA Practice is prepared to help employers with a turnkey solution for a custom written plan to comply with the ETS. We are developing a complete package of template policies and related documents (e.g., vaccination-status roster, employee communications, religious accommodation request forms, etc.). As we did early in the pandemic with COVID-19 Prevention Plans, we are offering a couple of options for our clients:

1. For a flat fee, we can provide a brief questionnaire that identifies the key decisions an employer has to make under the ETS (i.e., hard/soft mandate, who pays for testing, which forms of tests and test methodology, forms of documented verification of vaccination and tests, PTO options, etc.), and then, based on answers

employers supply either over a phone call together or in writing, we will deliver a customized written policy with all the related documents.

2. Alternatively, we are ready to perform an efficient gap assessment of any policy that an employer produces independently. 

Contact any member of [Conn Maciel Carey's OSHA Practice](#) for help with the written policy or with any questions about OSHA's ETS.

In the meantime, for more information about OSHA's vaccinate-or-test ETS, check out the [recording of our November 10th webinar](#).