

# Fate of OSHA's COVID-19 Vaccine ETS in the Hands of Sixth Circuit Court

Article By:

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The U.S. Court of Appeals for the Sixth Circuit has won the much-anticipated Multi-District Litigation lottery and will get to decide the merits of the challenges to the Occupational Safety and Health Administration's (OSHA) [COVID-19 vaccine Emergency Temporary Standard](#) (ETS). Under the ETS, employers with at least 100 employees must adopt a vaccination policy that requires employees to be fully vaccinated or submit to at least weekly testing.

The Sixth Circuit has the second highest number of petitions filed challenging the ETS. The Fifth Circuit has the highest number. One of the original Sixth Circuit petitions also included a band of states comprised of Idaho, Kansas, Kentucky, Ohio, Oklahoma, Tennessee, and West Virginia, which represent states in the Fourth, Sixth, Ninth, and Tenth Circuits.

The Sixth Circuit is comprised of a majority of Republican President-appointed judges, which some view as friendly to the petitioners' arguments. However, a judge's personal politics or who appointed them do not necessarily dictate the outcome of a case. The looming question is whether the Sixth Circuit will keep in place the Fifth Circuit's stay on the ETS entered before the cases were transferred from all the other circuits. From a practical standpoint, the timing of OSHA's ETS is challenging for employers, given current labor shortages, inflation, supply chain issues, and, of course, the holiday season. It is likely that the Sixth Circuit will keep the stay placed in effect by the Fifth Circuit, which that court reaffirmed in an order on November 12, 2021.

The Fifth Circuit reaffirmed its [initial stay](#) of the ETS in a 22-page order. [BST Holdings LLC et al. v. OSHA et al.](#), No. 21-60845 (5th Cir. Nov. 12, 2021). It stated that the challengers are likely to succeed on the merits, meaning, OSHA's ETS is an overreach of the agency's authority probably on a variety of grounds. The Fifth Circuit also outlined arguments on why the continued stay is necessary to avoid irreparable harm to the consolidated group of petitioners, comprised of private employers and states both inside and outside the geographical boundaries of the Fifth Circuit.

The Fifth Circuit has jurisdiction over Louisiana, Mississippi, and Texas.

## OSHA's ETS is a "Sledgehammer"

The Fifth Circuit said the ETS is both overinclusive in its application to employers and employees

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across all industries and workplaces in America and underinclusive because it does not apply to employers with fewer than 100 employees.

The Court also questioned the “grave danger” needed to justify the ETS because the country (and the world) has been battling COVID-19 for nearly two years. Although OSHA’s ability to establish an emergency temporary standard is an extraordinary power that should be delicately exercised in limited situations, the Court noted, “rather than a delicately handled scalpel, the Mandate is a one-size-fits-all sledgehammer that makes hardly any attempt to account for differences in workplaces (and workers) that have more than a little bearing on workers’ varying degrees of susceptibility to the supposedly ‘grave danger’ the Mandate purports to address.”

## **OSHA’s ETS is a Pretext**

The Fifth Circuit pointed out that the Administration previously held the opposite position on vaccines and on why an emergency temporary standard was not necessary. Without giving a detailed explanation for its current flip, the Administration has issued the mandate, the Court noted. On the day of President Joe Biden’s pronouncement of his “[Path out of the Pandemic](#)” action plans, including directing OSHA to promulgate an emergency temporary standard for vaccines, the White House chief of staff stated that the emergency temporary standard “is the ultimate work-around for the Federal govt to require vaccinations.”

The Court also noted that in litigation before the U.S. Court of Appeals for the D.C. Circuit in 2020, the government argued that an emergency temporary standard for COVID-19 was unnecessary. The Court also quoted previous OSHA language in the preamble to its regulation on bloodborne pathogens, which stated, “Health in general is an intensely personal matter .... OSHA prefers to encourage rather than try to force by governmental coercion, employee cooperation in [a] vaccination program.” 54 Fed. Red. 23,042, 23,045 (May 30, 1989). OSHA’s bloodborne pathogen standard does not mandate that employees be given the hepatitis B vaccine if they are exposed to a bloodborne pathogen in the workplace — only that an employer offer the vaccine series to exposed employees. Employees may decline the vaccine if they so choose and sign a declination form.

## **Mandate Raises Serious Constitutional Concerns**

The Fifth Circuit noted that the ETS “likely exceeds the federal government’s authority under the Commerce Clause and threatens States’ powers” under the Tenth Amendment to the U.S. Constitution, which reserves to the states powers not specifically granted to the federal government. The Court further noted that the ETS regulates noneconomic activity — an employee’s personal choice about their individual health and their decision not to get vaccinated or to undergo testing — which falls squarely within the states’ police power.

Judge Stuart Kyle Duncan in his concurrence granting the continued stay noted that the sweeping mandate of the OSHA ETS poses a difficult constitutional question of whether Congress would be authorized to pass such legislation under the Commerce Clause. But, in his opinion, OSHA clearly does not have that authority.

## **OSHA Halts Implementation and Enforcement on ETS**

Employers can breathe a sigh of relief given OSHA’s [pronouncement](#) on its website’s ETS page, which reads:

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 Emergency Temporary Standard, published on November 5, 2021 (86 Fed. Reg. 61402) ("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.

## **A Look Ahead**

Currently, the Sixth Circuit has not set a briefing schedule. However, given the number of parties, the complexity of the legal issues that are unlikely to be resolved within a few weeks, and the irreparable harm the petitioners would suffer if the ETS remained in effect, as outlined by the Fifth Circuit, there are strong arguments in favor of the Sixth Circuit maintaining the stay already in place. Moreover, the Fifth Circuit's order signaling potential serious constitutional defects with OSHA's ETS can serve as a roadmap for the Sixth Circuit as it adjudicates the merits of the case. If the challengers to the ETS prevail and the Sixth Circuit permanently enjoins the ETS, the government will have to evaluate whether it should appeal to the U.S. Supreme Court and risk an adverse decision that potentially could limit OSHA's authority in the future.

## **What Should Employers Do?**

While the ETS is stayed, employers do not have to comply with its terms. Some employers may choose to do so, while others attempt to draft policies and put procedures in place in case the stay is lifted, and still others may choose to do nothing. State OSHA plans may choose to adopt the ETS or similar measures or may wait and see how the litigation plays out. Employers should make decisions about what is right for their operations depending on a number of factors.

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