



Court of Appeals Halts OSHA Vax Mandate, Citing “Grave Constitutional Issues”

The U.S. Court of Appeals for the Fifth Circuit has issued an order temporarily halting the Occupational Safety and Health Administration’s Emergency Temporary Standard that mandates all private businesses employing 100 and more workers to ensure their employees get a COVID vaccine by January 4 or submit to weekly testing. The ETS took effect on Friday, after it was [published](#) in the Federal Register on Thursday.

On Saturday, a three-judge panel issued a brief order stopping the mandate in its tracks, while scheduling an expedited hearing that is expected to take place within the next few days.

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The order reads:

Before the court is the petitioners’ emergency motion to stay enforcement of the Occupational Safety and Health Administration’s November 5, 2021 Emergency Temporary Standard (the “Mandate”) pending expedited judicial review.

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 judges ordered the government defendants, including OSHA and the Department of Labor and their respective heads, to respond to the petitioners’ motion for a permanent injunction by 5:00 p.p. EST on Monday, November 8.

The lawsuit started with [BST Holdings v. OSHA](#) filed on November five by attorneys from Chicago-based Liberty Justice Center and the Pelican Institute for Public Policy of Louisiana, which represented a Louisiana supermarket chain and six employees of CaptiveAire, a Texas company that makes kitchen ventilation systems.

The petitioners [argued](#) that the ETS “is unprecedented in its scope” and “imposes substantial costs and burdens on employers and employees in every industry in the economy.”

The suit stated that by issuing such a sweeping order, OSHA has exceeded its own authority under the Occupational Safety and Health Act. Even if the agency was granted such a power by the U.S. Congress, which never happened, such a mandate would exceed the federal government’s power to regulate interstate commerce.



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Additionally, the petitioners note that the risk of COVID-19 infection is a society-wide danger, and not specifically related to the workplace; therefore, it lies outside of OSHA's legal domain.

To justify the requirement, OSHA would have to prove that COVID-19 poses a "grave danger" for all employers with 100 or more employees, which it cannot do for a couple of reasons, per the suit. First, just only a few months before expanding the ETS to all industries, OSHA concluded that COVID-19 was only a grave danger to healthcare employers. Second, the degree to which COVID may pose a "grave danger" to workers depends on individual employees' age and health, not how many co-workers they have. The suit also states that "because the mandate applies regardless of individual employee's risk and difference in workplace conditions, it is not narrowly tailored as emergency standards are required to be."

On November 6, Texas Attorney General Ken Paxton, along with the states of Louisiana, Mississippi, Utah, and South Carolina, and several private and faith-based companies, joined the BST Holdings petition. In an announcement of the challenge, Paxton [called](#) the Biden administration's mandate "a breathtaking abuse of federal power" that was "flatly unconstitutional."

At least [26 states](#), three of which are Democrat-led, have come out against OSHA's vaccine mandate. Four legal challenges to OSHA's rule have been filed in different courts.

The states contend that the Biden administration does not have the authority to issue the public-health order and argue it will inevitably result in staffing shortages and economic disruption.

As quoted by [The Hill](#), a filing from a coalition of attorneys general led by Missouri Attorney General Eric Schmitt states that

Its unlawful mandate will cause injuries and hardship to working families, inflict economic disruption and staffing shortages on the States and private employers, and impose even greater strains on struggling labor markets and supply chains.

White House Chief of Staff Ronald Klain, during an appearance on [NBC News' Meet the Press](#) on Sunday, said he expected that the administration's mandate for businesses would ultimately be upheld. Klain called the vaccination or testing requirements "simple measures to keep our workers safe" akin to "wearing a hard hat on the job" or "to be careful around chemicals."

U.S. Surgeon General Dr. Vivek Murthy, in a Sunday interview on [ABC's This Week](#), said the administration "is certainly prepared to defend" the OSHA rule, which he claimed was "appropriate and necessary."

Labor Secretary Marty Walsh [claimed](#) last week the ETS in question was "a process of getting people vaccinated" and "not a mandate."

Walsh claimed that the move was made because "some of the folks" don't wish to return to work out of fear of the virus, and if the vaccination rate is increased, that problem would be solved. "And what we want to do is just encourage people to get vaccinated," Walsh said.

Competitive Enterprise Institute [noted](#) that the mandate stands on shaky legal grounds, including ignoring people's right to bodily integrity. At the same time, this "legally dubious" rule "will throw the economy into turmoil at a time when it is still precarious."

According to the Institute,



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Realistically, the people who thus far refused to get a shot are unlikely to have their opinions changed by this announcement. People that strongly opposed are just going to become more adamant because they will see this, not unreasonably, as simple coercion.

Historically, OSHA has issued a total of nine ETSs. Of those nine standards, six were legally challenged, five of which did not withstand scrutiny, per the legal company [Fisher Phillips](#).

Currently, OSHA is [exploring the possibility](#) of expanding the ETS to small businesses that employ fewer than 100 workers.





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