

# Fifth Circuit Stays OSHA Vaccine Rule, Citing “Grave Statutory and Constitutional Issues”

November 10, 2021

On Saturday, November 6, the United States Court of Appeals for the Fifth Circuit released an [emergency motion](#) to stay enforcement of the Emergency Temporary Standard (“Mandate” or “ETS”) issued by the Occupational Safety and Health Administration (OSHA) the day before. The ETS, under OSHA’s authority to regulate workplace safety, required certain employers (with more than 100 employees) to implement protective measures against COVID-19, namely that employees either be fully vaccinated or undergo weekly COVID-19 testing. It does not require that employers force their employees to be vaccinated.

Petitioners include the States of Louisiana, Texas, and Mississippi, sixteen corporate entities operating as supermarkets across those states, and six other individually-named corporations. They argue that the Mandate is in excess of OSHA’s administrative authority under its controlling statute and Congress’ authority under constitutional law. The Petitioners also argue that the ETS effectively mandates vaccinations because of the “steep costs” of requiring weekly COVID-19 testing and masking in the workplace.

In its response, the Government asserted that the emergency relief sought was inappropriate because the ETS would not go into effect for another two months and the petitioners’ alleged injuries were outweighed by the benefits of the measure. It also argued that OSHA was within its rights to implement the standard to address the “grave danger” presented by COVID-19. The deadline to file responsive briefs was Tuesday, November 9.

In the *per curiam* decision, the Court cited “grave statutory and constitutional issues” as their reasoning for staying enforcement of the ETS temporarily. This temporary stay will remain in place until a final decision is issued, which may either come in the form of a permanent injunction or dismissal of the petition. Based on the timing of the pleadings, a decision will likely come quickly.

The challenge is one of several among the federal circuit courts, as similar petitions have been filed in the Sixth, Seventh, Eighth, Eleventh, and District of Columbia Circuits. Under federal law, circumstances such as this may require all the cases to be consolidated into one action, which the Government states may take place “on or about November 16.” This indicates that the matter will reach the U.S. Supreme Court for a final judgment.

If no permanent injunction is issued, the ETS is set to go into effect on January 4, 2022.

## Related people

Andrew M. Albritton