



Fifth Circuit Stays OSHA Vaccination and Testing Standard

November 15, 2021

On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) reaffirmed its initial stay of a new [Occupational Safety and Health Administration \(OSHA\) emergency temporary standard \(ETS\)](#) that would generally require private employers with 100 or more employees to establish and enforce mandatory Coronavirus Disease 2019 (COVID-19) vaccination policies. The stay bars OSHA from enforcing the standard during the pendency of judicial review. Shortly after its November 5, 2021 publication in the *Federal Register*, the ETS was challenged in the Fifth Circuit, as well as in the [Sixth](#), [Seventh](#), [Eighth](#), [Eleventh](#), and [District of Columbia](#) Circuits. Additional challenges have also now been brought in the [First](#), [Second](#), [Third](#), [Fourth](#), and [Ninth](#) Circuits, with petitions filed by labor organizations in the latter four circuits. The Fifth Circuit’s stay applies nationally as the court considers whether to enjoin the ETS permanently. This Legal Sidebar reviews OSHA’s authority to issue ETSs, what is required by the agency’s COVID-19 vaccination and testing standard, and the court’s holding in *BST Holdings, L.L.C. et al. v. OSHA*.

Background

Congress enacted the [Occupational Safety and Health Act \(OSH Act\)](#) in 1970 to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions.” The law seeks to reduce the frequency and severity of work-related injuries and illnesses by promoting a “comprehensive, nationwide approach” to workplace safety, and authorizes the Secretary of Labor to promulgate occupational safety and health standards to protect workers. The Secretary has delegated this authority to the Assistant Secretary of Labor for Occupational Safety and Health, who acts as OSHA’s administrator. OSHA conducts workplace inspections and investigations to ensure compliance with its standards, and may issue citations and penalties for noncomplying employers.

While OSHA’s safety and health standards generally do not become effective until the agency publishes a proposed standard in the *Federal Register* and offers interested parties an opportunity to comment on the standard, the OSH Act authorizes OSHA to promulgate emergency standards that have immediate effect when specified conditions exist. Specifically, section 6(c)(1) of the OSH Act, codified at [29 U.S.C. § 655\(c\)\(1\)](#), authorizes OSHA to issue an ETS that takes effect upon publication in the *Federal Register* if the agency determines that employees are exposed to “grave danger from exposure to substances or

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agents determined to be toxic or physically harmful or from new hazards, and . . . such emergency standard is necessary to protect employees from such danger.”

In its November 5, 2021 *Federal Register* notice, OSHA explained that a COVID-19 vaccination and testing ETS is appropriate because unvaccinated workers face a grave danger from exposure to the COVID-19 virus in the workplace. The agency contended that its grave danger finding was based on “the severe health consequences associated with exposure to the virus along with evidence demonstrating the transmissibility of the virus in the workplace and the prevalence of infections in employee populations[.]” OSHA further maintained that vaccination provides the most effective and efficient control available to mitigate the grave danger faced by unvaccinated workers and that the ETS, which requires regular testing, the use of face coverings, and the temporary removal of employees infected with COVID-19 from the workplace, will further protect workers who remain unvaccinated.

COVID-19 Vaccination and Testing ETS

OSHA’s new ETS generally requires private employers with 100 or more employees to establish, implement, and enforce a written mandatory vaccination policy by December 6, 2021. Employees across all of an employer’s locations will be counted to determine whether the ETS applies, with both full-time and part-time employees included in the count. Under the ETS, covered employers must determine the vaccination [status](#) of their employees. Employees are required to provide proof of vaccination status to the employers, and the employers must preserve such proof and maintain a roster of each employee’s vaccination status. Employers must support COVID-19 vaccinations by providing up to four hours of paid [time](#) to each employee for each primary vaccination dose and must provide paid sick leave to employees who experience side effects following any primary vaccination dose.

An employer’s vaccination [policy](#) must provide for the vaccination of all employees, except the following individuals: those for whom a vaccine is medically contraindicated; those for whom medical necessity requires a delay in vaccination; and those who are legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or a sincerely held religious belief that conflicts with the vaccination requirement. Alternatively, an employer may be exempt from maintaining this type of policy if it instead establishes, implements, and enforces a written vaccination or testing policy that allows an employee to either (1) be fully vaccinated against COVID-19, or (2) provide proof of regular testing for COVID-19 and wear a [face covering](#) when indoors or occupying a vehicle with another person for work purposes.

COVID-19 [testing](#) for employees who are not fully vaccinated must occur at least once every seven days for individuals who report at least once every seven days to a workplace where others, such as coworkers or customers, are present. Employees who do not report to such a workplace during a period of seven or more days must be tested within seven days prior to returning to the workplace. Employers are required to maintain a record of each test result but do not have to pay for any costs associated with COVID-19 testing. Employers have until January 4, 2022 to comply with the ETS’s COVID-19 testing requirements.

Employees who receive positive COVID-19 test results or diagnoses of COVID-19 must promptly [notify](#) their employers of such results or diagnoses. Employers must remove the employees from the workplace until they individually receive a negative result from a COVID-19 nucleic acid amplification test, satisfy the return-to-work criteria in the Centers for Disease Control and Prevention guidance [Isolate if You Are Sick](#), or receive a recommendation to return to work from a licensed healthcare provider.

BST Holdings, L.L.C. et al. v. OSHA

In its [motion](#) to stay the ETS filed in the Fifth Circuit, management company BST Holdings and a group of other petitioners argued that the standard violates the [nondelegation doctrine](#) under [Article I](#) of the U.S. Constitution. In general, the doctrine is based on the principle of separation of powers and limits

Congress’s authority to delegate its legislative power to other branches of [government](#). BST Holdings contended that the ETS is a “sweeping” legislative act that is directed toward increasing the number of vaccinated Americans and is unrelated to the OSH Act’s purpose of protecting workplace safety. BST Holdings further questioned OSHA’s assertion that COVID-19 poses a grave danger that requires an ETS. Noting that two-thirds of American adults are fully vaccinated and that OSHA did not issue the ETS until eight weeks after President Biden directed the agency to act, BST Holdings characterized the standard as an “interim relief measure” to “force [the unvaccinated] to get vaccinated.”

OSHA maintained, however, that Congress’s delegations to an agency are valid so long as they provide an “intelligible principle” for the agency to follow. According to OSHA, section 6(c)(1) of the OSH Act, [29 U.S.C. § 655\(c\)\(1\)](#), provides clear standards for the issuance of ETSS; permitting such standards only when employees face grave danger from new hazards or exposure to toxic or physically harmful substances or agents. OSHA contended that the COVID-19 virus is both a new hazard and a physically harmful agent.

In [staying](#) the ETS and determining that the petitioners were likely to succeed on the merits, the Fifth Circuit contended that the standard exceeds OSHA’s authority and raises serious constitutional concerns. The court observed that the OSH Act was not intended under either the nondelegation doctrine or the Commerce Clause “to authorize a workplace safety administration in the deep recesses of the federal bureaucracy to make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways.” The court thus held that ETS exceeded OSHA’s statutory authority, as the court determined that the ETS “derives its authority from an old statute employed in a novel manner.” The court further held that the ETS “likely exceeds the federal government’s authority under the Commerce Clause” because an individual’s choice to remain unvaccinated and forgo regular testing is a “noneconomic inactivity” that falls squarely within the states’ police power to regulate. Ultimately, the court concluded that the petitioners would be irreparably injured if a stay were not issued, that a stay would not harm OSHA, and that a stay was firmly in the public interest.

The timing as to when the Fifth Circuit may consider BST Holdings’ petition for review and the merits of its arguments is not entirely clear. In light of the other challenges to the ETS pending in various circuits, and consistent with [28 U.S.C. § 2112](#), which identifies procedures when an agency order is challenged in more than one federal appellate court, OSHA has notified the [Judicial Panel on Multistate Litigation](#), which is to consolidate the petitions in one of the appellate courts after conducting a so-called “multi-circuit lottery.” Under section 2112(a)(4), the selected appellate court may modify, revoke, or extend a previously ordered stay. The panel is expected to conduct the lottery in the near future.

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