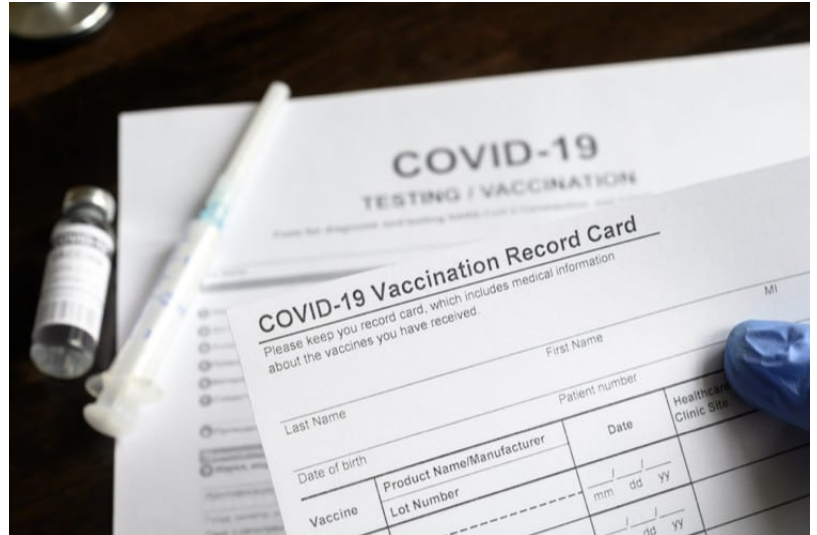




# OSHA's Vaccine Mandate Stayed, Flawed, and Unconstitutional

Millions of Americans and U.S. companies will be impacted by the decision of the U.S. Court of Appeals for the Sixth Circuit. On November 16, proceedings over the legality of the OSHA Emergency Temporary Standard (ETS) took a step forward with the Sixth Circuit Court being assigned to the consolidated cases that have challenged the legal basis of the ETS. If the ETS goes into effect, companies with 100 or more employees will be involuntarily required to manage the vaccine status of all employees, ensuring full vaccination, or if they choose, allowing the unvaccinated to test weekly for COVID-19 and to enforce wearing a mask while in the workplace.



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Two days after OSHA issued its controversial ETS, the Fifth Circuit Court “stayed” the ETS, ordering OSHA to “take no steps to implement or enforce [the ETS] until further court order.” Then, according to legal protocol, the Sixth Circuit Court was randomly chosen to hear the numerous consolidated challenges from across the nation. States, businesses, organizations, and institutions lined up to sue the federal government over this unconstitutional move and to halt this flawed attempt at vaccine coercion.

The Fifth Circuit Court did a brilliant job of poking holes in OSHA’s ETS, stating that it is both overinclusive and underinclusive. The overinclusive, “one-size-fits-all” nature of the mandate was criticized by the Court. As an example, a truck driver cruising along a desolate stretch of Montana highway does not experience the same risk of COVID infection from a co-worker as does a meatpacker crammed near multiple co-workers and throughout a long shift. OSHA failed to show, beyond the clusters of COVID exposure and transmission in some work environments, that there were findings of exposure in all covered workplaces. According to the Court, “The Mandate is a one-size-fits-all sledgehammer that makes hardly any attempt to account for the 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.”

The Court also criticized the mandate as being underinclusive meaning it is non-sensical to exclude companies with less than 100 employees from the ETS mandate. If there is a “grave danger,” it should include all employers regardless of work force size. “The underinclusive nature of the Mandate implies that the Mandate’s true purpose is not to enhance workplace safety, but instead to ramp up vaccine uptake by any means necessary.” Who can argue with that assessment? Joe Biden essentially admitted this to America in a September 9<sup>th</sup> speech.

The public health “emergency” claim used to substantiate the “grave danger” element required for an ETS mandate doesn’t seem to hold water, either. The Fifth Circuit Court cited that after enduring the



Written by [Cathy A. Spigarelli](#) on November 20, 2021

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global pandemic for almost two years, followed by a two-month delay in ETS issuance after Biden's September 9th speech, in which he revealed his frustration with the unvaccinated, and a two-month ETS implementation period, emergency is NOT an apt description of this Emergency Temporary Standard.

The Fifth Circuit Court also considered the lack of attempt by the Biden administration and OSHA to explain why they had flip-flopped on the issue of a vaccine mandate. In a December 2020 video, when asked about COVID vaccine mandates, Biden clearly stated, "I don't think it should be mandatory." There is a legal expectation that a credible justification would be offered that backs a change in policy and one that goes beyond just the frustration of one man, even if he is the President. "Such shortcomings are all hallmarks of unlawful agency actions," the Court stated.

In addition to finding the ETS flawed, the Fifth Circuit Court cited why the ETS is unconstitutional. Basically, the Court sees this mandate as the federal government stepping on state toes. Mandating a vaccine or undergoing testing should fall under a state's authority and not the Federal government under the Commerce Clause. The Commerce Clause was not "intended 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 24 state attorney generals, who collaborated on a warning letter to the Biden administration over the OSHA ETS and some who eventually sued over it, agree with the Court on this stating that, "Your edict is also illegal." OSHA, a federal agency, would be taking responsibility for local public health, a role traditionally played by the states. The State AGs pointed out that Congress would need to weigh in before such a radical change in the constitutional balance of power could take place. The Fifth Circuit Court agreed with the state AGs stating, "In sum, the Mandate would far exceed current constitutional authority."

The Court saw through this ETS work-around by the Federal government and stated its view of how unfair and devastating this would be to states, employers, and the American people. For the states, they, too, "have an interest in seeing their constitutionally reserved police power over public health defended from federal overreach." For employers, the ETS "imposes a financial burden upon them 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." For the American people, "The public interest is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions — even, or perhaps particularly, when those decisions frustrate government officials."

Although the Sixth Circuit Court has jurisdiction over appeals in Michigan, Ohio, Tennessee, and Kentucky, this Court's decision to modify, revoke, or extend the ETS stay will apply nationwide. The Sixth Circuit Court is comprised of 16 active judges with Republican nominated judges outnumbering Democratic nominated by 11 to 5. Such a balance may tip the Court in the direction of constitutional preservation. The Sixth Circuit Court would do well to adopt the sound and thoughtful rationale of the Fifth Circuit Court's ETS stay decision. A court decision, whether it's made through the Sixth Circuit Court or the Supreme Court (as many speculate will happen) that upholds the Constitution and preserves the rights of Americans is one that States, employers, and the American people all deserve.



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