



## Alerts

### Fifth Circuit Grants Stay of OSHA's Mandatory Vaccination ETS, Voices "Grave Statutory and Constitutional" Concerns

**November 15, 2021**

*Insights for Employers*

In the late afternoon of Friday, November 12, 2021, the Fifth Circuit Court of Appeals issued a written opinion granting a motion for a stay pending further judicial review of the Emergency Temporary Standard (ETS) [issued by the Occupational Safety and Health Administration \(OSHA\)](#) earlier this month. The Fifth Circuit order further stated that OSHA shall take no steps to implement or enforce the ETS until further court order.

A circuit court lottery will be held on Tuesday, November 16, 2021, to determine which federal circuit court of appeals will hear consolidated cases challenging the ETS. The Fifth Circuit was the first circuit court to issue a written opinion on whether the ETS is likely to survive judicial scrutiny. Even though Supreme Court review is likely to occur, the Fifth Circuit's opinion questioning the legal viability of the ETS increases that likelihood should it result in a split among the circuits.

The Fifth Circuit found "grave statutory and constitutional issues with the mandate." In analyzing whether to continue the stay of the enforcement of the ETS, the Fifth Circuit considered four factors: (1) whether the petitioners made a strong showing of likely success on the merits; (2) whether the petitioners will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties in the proceeding; and (4) consideration of the public interest. The Fifth Circuit found that each of the factors favored continuation of the stay.

The court found multiple infirmities with the ETS, including a concern that it may violate non-delegation principles, which in this case would prevent the exercise of legislative power by an administrative agency like OSHA. The court found that the ETS was underinclusive in the sense that it exempted employers with ninety-eight (98) or fewer co-workers from the very same provisions which were to protect workers of employers with one hundred (100) or more employees from a "grave danger" in the workplace. The court found the ETS was overinclusive in that it applied to employers in virtually all industries with little attempt to accommodate for the obvious differences and risks between different industries and different employees within those industries. The court also noted that an ETS should be an unusual response to exceptional circumstances and that the power to issue such a standard is an extraordinary one to be "delicately exercised" in "limited situations." In this regard, the Fifth Circuit found that the

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ETS is anything but a delicate exercise of extraordinary power and characterized it as a "one-size-fits-all sledgehammer, as opposed to a delicately handled scalpel."

The Fifth Circuit also indicated that OSHA, as an agency, has been inconsistent in its public pronouncements. While it is true that the agency under former President Trump took a different approach than the agency has under President Biden, those conflicting pronouncements were treated as if they were issued by the same singular agency. The Fifth Circuit also found that the vaccine mandate is "staggeringly overbroad" and applies the same rules to different workers with different duties and in different circumstances. As a result, the Fifth Circuit was greatly critical of the "one-size-fits-all mandate."

On the constitutional side, the Fifth Circuit found that the mandate activity falls squarely within the traditional police power of the states.

There will be additional developments in the coming days, and we urge you to consult your Hinshaw Labor & Employment counsel with any questions about compliance.