

## OSHA Ordered to “Take No Steps to Implement or Enforce the Mandate”

Employment Law, OSHA, Vaccination Requirements / November 13, 2021 / Andrea Johnson

*Watching the rule come into existence and then be court eviscerated, has been like imagining a bullet train flash by, but then, a second later, be derailed at high speed - twice.*

An explanation of the ETS is contained in this KRCL [blog](#), while the emergency stay is noted [here](#), and some of the rationale for the attacks on the OSHA rule is discussed in this [blog](#). KRCL’s webinar on these issues will be on November 17, 2021, at noon, and you may register [here](#).

**As the title above quotes the Fifth Circuit injunction, the November 12 order, is crystal clear that OSHA, at this time, may not enforce this controversial Mandate. *Period.***

The only remaining step for the Fifth Circuit is consideration of the permanent injunction motion, but, given that the petitioners’ arguments have staunchly swayed the appellate court two times in short order, bets would have to be on the permanent injunction motion being granted, too.

The lawsuit in which the Fifth Circuit made its injunctive ruling is *BST Holdings, L.L.C., et al. v. OSHA*, Cause No. 21-60845. This is one of the scores of cases pending in various jurisdictions, in which both private parties (e.g., businesses and religious groups) and state governments, including Texas, have brought suit challenging the “overreach” of the federal government.

**Reasons/factors/issues that the Fifth Circuit noted in its opinion stopping OSHA’s action are the following:**

- In June 2021, OSHA contradictorily “determined” that a mandate, as was eventually issued six months later, was “not necessary.”<sup>3</sup>
- OSHA has invoked its “emergency” rule process sparingly, and six of those attempts were challenged in court - with five of the six times resulting in the ETS being struck down.<sup>4</sup>
- Petitioners faced severe financial risk if they did not comply with the new rule, and there might be a negative effect on employment rolls, “by forcing unwilling employees to take their shots, take their tests, or hit the road.”<sup>5</sup>
- OSHA was designed for ensuring “safe and healthful working conditions” and should not be making “sweeping pronouncements in matters of public health affecting every member of society in the profoundest of way.”<sup>6</sup>
- The rule is flawed in both (A) its over-inclusiveness of employees, without accounting for differences of work (such as a solitary night guard as opposed to a meatpacker in a crowded plant); and (B) its under-inclusiveness, as it illogically

drew a line at 100-plus employee settings, while the “grave danger” cited was not applied to other employees.<sup>7</sup> The court also called the Mandate a “one size fits all sledgehammer”<sup>8</sup> and “staggeringly overbroad.”<sup>9</sup>

- The so-called “emergency” nature of OSHA’s rule appears flimsy, as COVID has continued for nearly two years, in various forms and with various (and changing) public concerns, and the action taken follows OSHA’s own delay of many months, including the two months after the Biden Administration announced in September that the “emergency” rule would be issued almost immediately (but it was not).<sup>10</sup>
- The Court suggested that the OSHA rule was merely a “workaround” that the Biden Administration glommed onto when the President was displeased with the vaccination rate in the United States.<sup>11</sup>
- OSHA had exceeded its statutory authority; the court found that OSHA had sought to “shoehorn” its authority concerning a virus that is largely “non-life-threatening to a vast majority of employees.”<sup>12</sup> Thus, in looking at the statute granting OSHA its authority to act generally and its authority to issue an emergency rule specifically, the Fifth Circuit simply doubted that OSHA had the broad authority it asserted in the Mandate.<sup>13</sup>
- The court questioned the fact that OSHA had not shown that every workplace should be governed by the burden of this across-the-board Mandate.<sup>14</sup>
- Overall, the court simply did not find OSHA’s evidence and arguments on several grounds compelled such that the emergency ruling.
- Rather, the court found that the “Mandate flunks the cost-benefit analysis here.”<sup>15</sup>

Despite noting all these factors in support of the temporary injunction, the Fifth Circuit, led by Justices Jones, Duncan, and Engelhardt, did *not* specifically rule on the constitutionality of the rule, though the court described the OSHA’s constitutionality argument as “dubious.”<sup>16</sup> The justices questioned, for example, whether the Commerce Clause of the Constitution provided OSHA the authority that the agency has exerted, and, thus, the issue should, instead, come under what the “State’s police power” has promulgated.<sup>17</sup>

Finally, raising a banner of individual freedom, the court concluded:

*Of course, the principles at stake when it comes to the Mandate are not reducible to dollars and cents. 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.*<sup>18</sup>

In the end, when weighing all the evidence and arguments presented, the court found a “substantial likelihood” that the petitioners would prevail,<sup>19</sup> and that denial of the stay would do “irreparable harm” to petitioners and to the millions of Americans affected by the Mandate.<sup>20</sup> Thus, the emergency stay continues with the temporary injunction in place, and we look to see if the permanent injunction follows.

### **The takeaways for employers:**

1. The OSHA rule is *not* in effect, as of right now. OSHA is barred from enforcing it. The Fifth Circuit’s order is very broad and does not appear to be limited to the Fifth Circuit’s purview (Texas, Louisiana, and Mississippi)
2. Can the stay change? Yes, if another court (*e.g.*, the Supreme Court) decides otherwise.
3. Without the Mandate in effect, employers must abide by other rules, such as state rules, that may be in contradiction to the OSHA mandate (see, *e.g.*, the Texas order from Governor Abbott, linked [here](#)).
4. Further, this private employer ruling does not change the *federal contractor* vaccine mandate. Even though court challenges exist as to that contractor mandate, as well, they do not have the likelihood of success that challenge to the 100-plus employee rule does (generally because the contractor mandate involves federal contracts that the government may control as it wishes; the 100-plus employee ETS, in contrast, involves only private employers and their private employees). Thus, employers subject to the federal contractor mandate probably still have to comply with that mandate regardless of the Fifth Circuit stay decision as to the 100-plus employee rule.

5. At a minimum, private employers will have to hedge their bets, some, as the matter is not over until the Supreme Court rules, which is the assumed final arbiter for this fight of the titans—the states *versus* the federal government, and national public demands *versus* private and individual rights. In other words, employers will have to be prepared, in case a different court order resuscitates the OSHA rule back to life.
6. Given that OSHA has promised that its enforcement would be tempered by an employer’s *good faith*, one would assume that, if an employer has taken steps to prepare for the rule coming back, and then acts appropriately and promptly if it must, the employer should be in a good position vis-à-vis the federal government, if any enforcement action starts up in the future.

The lawyers of KRCL’s **employment group** are here to help all employers manage through the confusion of this and other issues. Please call on us if you have questions.

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1 Order at 21

2 *Id.* at 8.

3 *Id.* at 2. Note that interior quotes from the Order are not included in this blog.

4 *Id.*

5 *Id.* at 4.

6 *Id.* at 6.

7 *Id.* at 6-7. It is noteworthy that the Biden Administration has voiced a desire to expand the Mandate to employers with less than 100 employees.

8 *Id.* at 8.

9 *Id.* at 13.

10 *Id.* at 7.

11 *Id.* at 7-8.

12 *Id.* at 9-10.

13 *Id.* at 13-14.

14 *Id.* at 14-15.

15 *Id.* at 16.

16 *Id.* at 6.

17 *Id.* at 16-18.

18 *Id.* at 20.

19 *Id.* at 18. [1]

20 *Id.* at 18-19.

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Andrea Johnson

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