

Once More, with Feeling: Fifth Circuit Re-Affirms Stay of ETS and Then Loses Jurisdiction of the Case

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Litigation usually proceeds at a maddeningly glacial pace. Not this time.

The Past

The Occupational Safety and Health Administration's ("OSHA") well-publicized and controversial Emergency Temporary Standard ("ETS") was issued on November 5, 2021 (see our November 5 article detailing the ETS). The ETS requires employees of covered employers to undergo COVID-19 vaccination or take weekly COVID-19 tests and wear a mask (the "Mandate").

On November 6 (the following day), a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit (which covers Texas, Louisiana, and Mississippi) temporarily "stayed" (meaning that it suspended) the Mandate and requested expedited briefing from OSHA (see our November 8 article explaining the temporary stay).

Last Friday, November 12, the Fifth Circuit issued an order in the nature of a preliminary injunction **reaffirming** its initial temporary stay, and indicating that it would consider vacating and rendering unenforceable the ETS after additional judicial review. This result would stop the ETS dead in its tracks.

The Present

On November 16, in accordance with the obscure lottery-based case-assignment rule referenced in our November 8 article, the case was taken away from the Fifth Circuit and assigned to the U.S. Court of Appeals for the Sixth Circuit (which covers Tennessee, Kentucky, Ohio, and Michigan). The Sixth Circuit was selected at random from 12 of the 13 U.S. Courts of Appeals.

The Future

What happens next? That, at this moment, is anybody's guess.

The United States will ask the Sixth Circuit to reconsider the Fifth Circuit's stay. The Sixth Circuit could lift the stay and allow the ETS to be implemented pending the outcome of the litigation. Alternatively, the Sixth Circuit could deny the United States' request to lift the stay, which would keep the ETS on hold for the time

being.

In either circumstance, it is likely that the "losing" party will ask the Supreme Court of the United States ("SCOTUS") to step in and make a final determination. Whether SCOTUS short-circuits the typical litigation process and takes this case up expeditiously (and before the lower court rules on the merits) is still to be determined. **Thus, it is premature for any employer presumptively subject to the ETS to treat the publicized employer-obligations as inconsequential.**

Background on the Appellate Issue at Stake

While the Fifth Circuit is no longer in charge of this issue, it is instructive to review its order to see how, at least, one court views the ETS. The Fifth Circuit ordered OSHA to "take no steps to implement or enforce the Mandate until further court order."

Why did the Fifth Circuit decide as it has? The essence of the answer comes down to whether OSHA has the *Constitutional and statutory authority* to issue and enforce workplace rules that are as far-reaching and burdensome as the ETS. The Fifth Circuit's concerns are illustrated by a few excerpts from its opinion:

- "[I]n its fifty-year history, OSHA has issued just ten ETSs. Six were challenged in court; only one survived. The reason for the rarity of this form of emergency action is simple: courts and the Agency have agreed for generations that '[e]xtraordinary power is delivered to [OSHA] under the emergency provisions of the Occupational Safety and Health Act,' so '[t]hat power should be delicately exercised, and only in those emergency situations which require it.'"
- "The Occupational Safety and Health Act, which created OSHA, was enacted by Congress to assure Americans 'safe and healthful working conditions and to preserve our human resources.' ... It was not—and likely could not be ... 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"
- "After the President voiced his displeasure with the country's vaccination rate in September, the Administration pored over the U.S. Code in search of authority, or a 'work-around, for imposing a national vaccine mandate. The vehicle it landed on was an OSHA ETS. The statute empowering OSHA allows OSHA to bypass typical notice-and-comment proceedings for six months by providing 'for an emergency temporary standard to take immediate effect upon publication in the Federal Register' if it 'determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.' 29 U.S.C. § 655(c)(1)."
- "[C]ourts have uniformly observed that OSHA's authority to establish emergency temporary standards ... 'is an 'extraordinary power' that is to be 'delicately exercised' in only certain 'limited situations.' ... But the Mandate ... is anything but a 'delicate exercise' of this 'extraordinary power.' ... Quite the opposite, rather than a delicately handled scalpel, the Mandate is a one-size fits-all sledgehammer that makes hardly any attempt to account for differences in workplaces (and workers) that have more than a little bearing on workers' varying degrees of susceptibility to the supposedly 'grave danger' [that] the Mandate purports to address."

Conclusion

As it currently stands, here is what we know: The ETS, although clearly on life-support, isn't dead yet. It may

experience a dramatic recovery.

If it does, then covered employers should, in the meantime, consider the ETS requirements and be prepared to comply with them, possibly on short notice.

Ed. Note: Please contact Chris Edwards for questions regarding the appellate process, and Ken Gray or Grant Osborne for inquiries regarding the ETS.

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