

EMPLOYMENT LAWSCENE ALERT: FIFTH CIRCUIT ISSUES STRONG REBUKE OF OSHA'S AUTHORITY TO MANDATE VACCINATIONS IN THE WORKPLACE-OSHA SUSPENDS EFFORTS

On Friday, November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit issued a 22-page decision (linked [here](#)) continuing its November 6th order that stayed the implementation and enforcement of OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace. In a strong rebuke of the Biden's Administration's desire to vaccinate as many Americans as possible through use of OSHA's emergency temporary standard provision (29 U.S.C. § 655(c)) found in the Occupational Safety and Health Act, the Fifth Circuit found that OSHA exceeded its statutory and constitutional authorities when it issued its emergency temporary standard by finding that "[t]here is no clear expression of congressional intent in § 655(c) to convey OSHA such broad authority, and this court will not infer one...[n]or can the Article II executive breathe new power into OSHA's authority—no matter how thin patience wears." The Fifth Circuit further found that continuing the stay was in the public interest because it "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." (Emphasis original).

The Fifth Circuit concluded that the Constitution vests Congress with limited legislative powers; and these powers cannot be usurped by federal regulatory action. The Fifth Circuit stated:

The Constitution vests a limited legislative power in Congress. For more than a century, Congress has routinely used this power to delegate policymaking specifics and technical details to executive agencies charged with effectuating policy principles Congress lays down. In the mine run of cases—a transportation department regulating trucking on an interstate highway, or an aviation agency regulating an airplane lavatory—this is generally well and good. But health agencies do not make housing policy, and occupational safety administrations do not make health policy. Cf. Ala. Ass'n of Realtors, 141 S. Ct. 2488-90. In seeking to do so here, OSHA runs afoul of the statute from which it draws its power and, likely, violates the constitutional structure that

safeguards our collective liberty.

The Fifth Circuit ordered that OSHA take no steps to implement or enforce its emergency temporary standard mandating COVID-19 vaccinations in the workplace until further order of the court. In response, OSHA issued the following statement on its website:

On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard, published on November 5, 2021 (86 Fed. Reg. 61402) ("ETS"). The court ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order." While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.

Despite the Fifth Circuit's decision, the issue is far from being resolved as challenges to OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace is now pending in multiple federal circuits. On Tuesday, November 16, 2021, pursuant to the federal rules for multi-circuit litigation, a lottery will be held by the Judicial Panel on Multidistrict Litigation randomly selecting the federal circuit that will host and decide the ultimate fate of OSHA's emergency temporary standard—albeit the U.S. Supreme Court will most likely have the final word in this important debate on the reach of federal regulatory authority. As always, we will keep you updated on this important issue as matters develop.