

ALERT: Sixth Circuit Ends Stay on OSHA Vaccine Mandate... For Now

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OSHA released the following statement regarding the immediate impact of this opinion: “To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard’s testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.”

The majority took a notably different approach in analyzing the scope of OSHA’s authority in relation to the mandate, when compared to the Fifth Circuit’s approach. Emphasizing COVID-19 as a “grave danger” and the history of “OSHA’s infectious disease authority,” the majority concluded “OSHA necessarily has the authority to regulate infectious diseases that are not unique to the workplace,” like COVID-19.

This conclusion contrasts with those reached by some other courts who have reasoned that OSHA exceeded its authority, in part, because COVID-19 is not simply a *workplace* issue but a broader issue over which OSHA does not have authority to regulate.

The majority also rejected the argument that OSHA exceeded its authority under the “major questions doctrine.” Other courts have applied this doctrine to reason that because the vaccine mandate has “vast economic and political significance,” Congress must clearly give an agency the authority to make such decision (and did not do so here with respect to OSHA and the vaccine mandate).

The majority disagreed finding that this doctrine is “seldom-used” and found it inapplicable because OSHA has regulated infectious diseases in the workplace for decades and the mandate “is not an enormous expansion of [OSHA’s] regulatory authority.”

The majority then moved onto other arguments adopted by the Fifth Circuit. First, it analyzed whether substantial evidence supported the mandate as an emergency temporary standard (“ETS”). The majority concluded such evidence existed based on the “153-page preamble” in the ETS and its “wealth of information” in the form of “extensive scientific evidence, including studies conducted by the CDC.” In short, the majority found it “inappropriate” for a court to “second-guess” such evidence.

In doing so, the majority also rejected criticism of the ETS as untimely and delayed, noting the evolving nature of its development and spread: “COVID-19 has continued to spread, mutate, kill, and block the safe return of American workers to their jobs.”

It also challenged the Fifth Circuit’s “cramped reading” of what constitutes “necessity” in terms of authorization to issue an ETS and that court’s claim the ETS was both “overinclusive” and “underinclusive.” In these regards, the majority ultimately stressed: “[i]t has long been the case that an agency ‘is not required to identify the optimal threshold with pinpoint precision. It is only required to identify the standard and explain its relationship to the underlying regulatory concerns.’”

Finally, the majority addressed the Constitutional concerns expressed by the Fifth Circuit, which it characterized as “miss[ing] the mark.” The majority explained that Congress has long had the authority to regulate employers under the Commerce Clause and that the “federal and state regulatory powers over economic activity are mutually exclusive” argument has been explicitly rejected by the United States Supreme Court. Fields such as education, for example, involve overlapping federal and state powers, the majority observed.

The majority also shot down the argument that Congress could not permissibly delegate OSHA the authority to issue such a vaccine mandate. It observed that the Supreme Court has “only twice” found an improper delegation of authority. This is because “[t]he Supreme Court has long recognized the power of Congress to delegate broad swaths of authority to executive agencies,” such as the authority to “regulate in the ‘public interest,’” “to set ‘fair and equitable prices,’” and “to issue air quality standards ‘requisite to protect the public health.’” The majority ended its opinion by describing the harm alleged by the challengers as “entirely speculative” and outweighed by the injuries to the government and public interest.

While joining the majority, Judge Gibbons also added a concurring opinion that stressed the limited role of the judiciary in these disputes and lamented some of the “sweeping pronouncements about Constitutional law and the scope of OSHA’s statutory authority” being made “untethered from the specific facts and issues presented here.” Judge Gibbons nonetheless affirmed her view that “OSHA has likely acted within the bounds of its statutory authority and the Constitution.”

Judge Larsen’s dissenting opinion echoed many of the arguments and perspectives adopted by other courts’ decisions adverse to the mandate. Judge Larsen first focused her concerns on what she saw as a lack of necessity for the ETS (and OSHA’s apparent failure to make a requisite finding of necessity).

But her dissent also stressed concerns about the scope of the authority delegated to OSHA. In particular, she questioned the majority’s dismissal of the “major questions” doctrine as “seldom-used,” noting the Supreme Court’s recent reliance on the “major questions” doctrine to strike down other COVID-19-related agency action.

Finally, the dissenting opinion concluded with a description of harms to both individuals and businesses that we have seen in other courts’ decisions—namely, the “loss of livelihood,” “unwelcome vaccination,” “unrecoverable compliance costs,” and “labor shortages.”

This decision by the Sixth Circuit is a stark reminder that private employers with 100 or more employees should be proactive and prepared to comply with the OSHA mandate during this period of uncertainty. Nonetheless, as we've noted before, we would expect the United States Supreme Court to weigh in sooner than later. In fact, a petition for review has already been filed with the Supreme Court.

Be sure to keep in touch with counsel and continue to check back here for more updates and developments.