

5th Circuit Court of Appeals Strikes Down Biden Administration Vaccination Mandates

By [Harvey R. Linder](#)

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On Friday, November 12, 2021, the Fifth Circuit Court of Appeals unanimously made its temporary injunction permanent, striking down the Biden Administration's attempts to mandate COVID-19 vaccinations for private employers with 100 or more employees. The Biden Administration attempted to mandate vaccinations through policies released by Department of Labor's Occupational Safety and Health Administration ("OSHA") and the Centers for Medicare & Medicaid Services ("CMS") at the Department of Health and Human Services. Calling the requirement a "mandate," the Court said the rule, instituted through the Labor Department, "grossly exceeds OSHA's statutory authority". The Court halted the policy, scheduled to take effect January 4, 2022, and ordered the OSHA not to take further steps to implement or enforce the mandate.

The Court reasoned that "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' the Mandate purports to address".

The three-judge panel said the Administration's ruling imposed a financial burden on businesses and potentially violated the commerce clause of the Constitution. "The Mandate imposes a financial burden upon them by deputizing their participation in OSHA's regulatory scheme, exposes them to severe financial risk if they refuse or fail to comply, and threatens to decimate their work-forces (and business prospects) by forcing unwilling employees to take their shots, take their tests, or hit the road," they wrote.

In its order, the Fifth Circuit held:

- "The Mandate threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their job(s).
- "The Mandate's stated impetus—a purported 'emergency' that the entire globe has now endured for nearly two years, and which OSHA itself spent nearly two months responding to—is unavailing as well."
- It "is critical to note that the Mandate makes no serious attempt to explain why OSHA and the President himself were against vaccine mandates before they were for one here."
- "OSHA's attempt to shoehorn an airborne virus that is both widely present in society (and thus not particular to any workplace) and non-life-threatening to a vast

majority of employees into a neighboring phrase connoting toxicity and poisonous is yet another transparent stretch.”

- “Health agencies do not make housing policy, and occupational safety administrations do not make health policy”

History of the Administration’s Mandates:

On Thursday, November 4, 2021, the Biden Administration announced the details of two policies mandating vaccinations for millions of Americans, aimed at “protecting workers, preventing hospitalizations, saving lives, and strengthening the economy”. Previously, the Administration implemented policies requiring millions of federal employees and federal contractors to be fully vaccinated.

First, OSHA announced the details of a requirement for employers with 100 or more employees to require that each of their workers is fully vaccinated, or in the alternative, tests negatively for COVID-19 on at least a weekly basis. The OSHA rule also requires that these employers provide paid-time for employees to get vaccinated, and require that all unvaccinated workers wear a face mask in the workplace. This mandate will cover approximately 84 million employees.

Second, CMS announced the details of its requirement that health care workers at facilities participating in Medicare and Medicaid are fully vaccinated. The rule applies to more than 17 million workers at approximately 76,000 health care facilities, including hospitals and long-term care facilities.

To make it easy for businesses and workers to comply with these new mandates, the Administration announced that the deadline for workers to receive their shots will be the same for the OSHA rule, the CMS rule, and the previously announced federal contractor vaccination requirement. Employees subject to these rules will need to have their final vaccination dose – either their second dose of Pfizer or Moderna, or single dose of Johnson & Johnson – by January 4, 2022. OSHA is also clarifying that it will not apply its new rule to workplaces covered by either the CMS rule or the federal contractor vaccination requirement. And, both OSHA and CMS are making clear that their new rules preempt any inconsistent state or local laws, including laws that ban or limit an employer’s authority to require vaccination, masks, or testing. The new mandate includes penalties of nearly \$14,000 per violation.

By Saturday evening, November 6, 2021, twenty-seven (27) States filed lawsuits in several federal Circuits challenging these mandates. The 5th U.S. Circuit Court of Appeals granted an emergency stay of the OSHA requirement that those workers be vaccinated by January 4, 2022, or face mask requirements and weekly tests. The Court stated that it was delaying the federal vaccine requirement because of potential “grave statutory and constitutional issues” raised by the plaintiffs.

Louisiana Attorney General Jeff Landry said the action stops President Biden “from moving forward with his unlawful overreach”. Further, he stated: “The president will not impose medical procedures on the American people without the checks and balances afforded by the constitution.”

Such circuit decisions normally apply only to states within a district — Mississippi, Louisiana, and Texas, in this case — but Mr. Landry said the language employed by the judges gave the decision a national scope.

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