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**COMMENTARY**

*Biden's Well-Intentioned Vaccine-Or-Test Mandate Faces Stiff Challenges*

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On September 9, 2021, President Biden announced a vaccine-or-test mandate for employers with over 100 employees,<sup>1</sup> which led to immediate opposition. Soon after OSHA announced the emergency temporary standard (“ETS”), Texas Attorney General Ken Paxton tweeted that he would challenge the rule.<sup>2</sup> Now, more than half of the states have filed lawsuits opposing the ETS. On November 5, 2021, the Fifth Circuit issued a temporary stay blocking the enforcement of the Biden administration’s mandate, citing “grave statutory and constitutional issues.”<sup>3</sup>

States opposing the ETS argue that the federal government is exerting too much authority – that vaccination falls solely under states’ police power to regulate the health and safety of their citizens. Their argument rests on *Jacobson v. Massachusetts*, which established states’ power to enforce vaccination of their citizens in response to the smallpox epidemic.<sup>4</sup> Additionally, two religious organizations argue that observing the rule would “wound the consciences of their employees and potentially cause them to sin.”<sup>5</sup> Some states also argue that OSHA lacks statutory authority to issue the ETS.

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<sup>1</sup> Press Release, President Joseph Biden, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

<sup>2</sup> Texas Attorney General (@TXAG), Twitter (Sept. 10, 2021, 11:46 AM), <https://twitter.com/TXAG/status/1436400690226663459>.

<sup>3</sup> *BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33117 (5<sup>th</sup> Cir. Nov. 5, 2021).

<sup>4</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

<sup>5</sup> Dave Simpson, *Religious Groups Fire Back In 5<sup>th</sup> Circ. Vax-Or-Test Rule Battle*, LAW360 (Nov. 9, 2021), <https://www.law360.com/employment/articles/1439380/religious-groups-fire-back-in-5th-circ-vax-or-test-rule->

The Biden administration's argument rests on the challenged statutory authority. The Occupational Safety and Health Act grants the Secretary of Labor the authority to issue an emergency temporary standard when workers are subjected to a grave danger and a new standard is necessary to protect them.<sup>6</sup> To succeed, the Biden administration would have to prove that the COVID-19 pandemic is such a grave danger that OSHA can wield this power. Though the ETS's legal future remains uncertain, the White House has directed businesses to move forward with the rule, which may leave employers feeling unsure how to proceed.<sup>7</sup>

Many businesses may find comfort knowing that they have federal support for COVID-19 vaccine mandates. While some large businesses such as Tyson Foods may have the means and workforce available to allow challenges to vaccine mandates to persist without worrying about significant loss of capital,<sup>8</sup> others may have put off requiring their employees be vaccinated in fear of legal battles or a reduction in their workforce. Additionally, the ETS may inadvertently protect businesses from liability if an employee develops COVID-19. Even if an employer has complied with applicable safety standards, it can be liable for violating the general duty that employers provide a work environment free from recognized hazards likely to cause death or serious physical harm if the employer knows of an obvious hazard.<sup>9</sup> Though a suit against an employer for contracting COVID-19 is probably unlikely to succeed, businesses may find the ETS's vaccine-or-test requirement reduces the hazard of contracting coronavirus at the workplace.

Many small businesses, even those outside of OSHA's vaccine-or-test rule, may decide to issue vaccine mandates for employees when the requirement goes into effect for larger businesses in January 2022. This could help the country reach herd immunity; some estimate that 80-90 percent of people will need to be immune to COVID-19 to reach herd immunity.<sup>10</sup> The ETS incentivizes vaccinations over tests, as the rule does not require employers to provide or cover costs for employees' COVID-19 tests.<sup>11</sup> With an increase in vaccinations, many people may feel comfortable enough to return to the workforce, filling a historically large amount of open jobs.

However, others impacted by vaccine-or-test requirements may feel the need to find employment elsewhere. Recently, many Americans have increasingly taken advantage of exemptions to compulsory vaccination requirements.<sup>12</sup> Further, even if the Biden administration's

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<sup>6</sup> 29 U.S.C. § 655(c)(1).

<sup>7</sup> Press Briefing, the White House, Press Briefing by Principal Deputy Press Secretary Karine Jean-Pierre and Secretary of Transportation Pete Buttigieg (Nov. 8, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/11/08/press-briefing-by-principal-deputy-press-secretary-karine-jean-pierre-and-secretary-of-transportation-pete-buttigieg/>.

<sup>8</sup> Lauren Hirsch & Michael Corkery, *How Tyson Foods Got 60,500 Workers to Get the Coronavirus Vaccine Quickly*, N.Y. TIMES, (Nov. 4, 2021), <https://www.nytimes.com/2021/11/04/business/tyson-vaccine-mandate.html>.

<sup>9</sup> *Safeway, Inc. v. OSHRC*, 382 F.3d 1189 (10th Cir. 2004).

<sup>10</sup> Matthew K. Wynia et al., *Why A Universal COVID-19 Vaccine Mandate Is Ethical Today*, HEALTH AFFAIRS BLOG (Nov. 3, 2021), <https://www.healthaffairs.org/doi/10.1377/hblog20211029.682797/full/>.

<sup>11</sup> COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 FR 61402 (Dep't of Labor Nov. 5, 2021).

<sup>12</sup> Steve P. Calandrillo, *Vanishing Vaccinations: Why Are SO Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J.L REFORM 353, 388 (2004).

rule is allowed to stand, employers and employees alike may opt not to adhere to the vaccine-or-test requirement. Though employers can face stiff fines for failing to cooperate with the rule, there is no instrument in place to check that employers are adhering to the ETS, and OSHA will mostly rely on employee complaints and add coronavirus-related inspections when they are already at workplaces.<sup>13</sup> The OSHA rule, though well-intentioned, may not have as much of an effect on vaccination rates as the Biden administration hopes.

To be sure, the Biden administration is facing large challenges to its vaccine-or-test mandate. If the ETS is permitted to stand, the rule's effect on businesses is uncertain. The country, however, may take one step closer to reaching herd immunity against the coronavirus.

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<sup>13</sup> COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 FR 61402 (Dep't of Labor Nov. 5, 2021).