



OSHA – REGULATOR OF THE AMERICAN WORKPLACE

President Biden has weaponized the Occupational Safety and Health Administration (OSHA) to compel Americans to receive the COVID-19 vaccine. While OSHA began as an attempt to create safe workspaces, it has become a bureaucratic machine to regulate the entire American workplace.

BACKGROUND

- **OSHA was established within the Department of Labor (DOL) by Congress in 1970 with the goal of ensuring safe and healthy working conditions.**¹
 - OSHA sets and enforces safety and health standards along with training, outreach, education, and assistance.² Federal OSHA standards apply to private sector employees, the United States Postal Service, and federal government employees. These employers are required to create workspaces that are free from hazards according to the standards OSHA sets.³ OSHA may assess fines of up to \$13,600 per violation for failing to comply with the standards.⁴
 - A state or territory may preempt federal standards if the state creates its own standards that are approved by OSHA, “at least as effective” as OSHA’s, and monitored by OSHA.⁵
- **The Biden Administration issued two OSHA Emergency Temporary Standards (ETS) related to the COVID-19 pandemic.**
 - An ETS allows OSHA to bypass the normal rulemaking process, including circumventing the public notice-and-comment period.
 - OSHA may issue an ETS if two conditions are met:
 - 1) Employees are exposed to grave danger; and
 - 2) An ETS is necessary to protect employees from the danger.⁶
 - An ETS is effective until OSHA creates a standard through the rulemaking process, which they must do within 6 months of publishing the ETS.⁷ OSHA has issued a total of nine ETSs, six of which were challenged in court—four were overturned and one was partially vacated.⁸
 - On June 21, 2021, OSHA published an ETS for healthcare workplaces.⁹ It requires covered healthcare institutions to create a “COVID-19 plan” that explains protocols for keeping record of COVID-19 cases and policies for preventing spread of COVID-19, including physical distancing, ventilation, and personal protective equipment.¹⁰
 - On November 5, 2021, OSHA published an ETS for all employers with more than 100 employees.¹¹ The ETS requires these employers to implement mandatory COVID-19 vaccinations by January 4, 2022. The ETS outlines an option for regular testing and wearing a face covering instead of getting a vaccine. It also allows exceptions for medical reasons, for harms to sincerely held religious beliefs, for those who work exclusively outside, and for those who work exclusively at home.
 - The American Action Forum estimates this mandate will cost \$3 billion over six months.¹²
 - Many industries have expressed concern about the severe negative impacts that this ETS will cause. For example, many trucking companies, who are already spread thin due to driver shortages, will be forced to add this mandate to employees who often work alone. Also, in this industry, a testing option is effectively unavailable because of nature of their responsibilities.¹³

- Multiple lawsuits have been filed against OSHA’s most recent ETS challenging OSHA’s authority to issue a vaccine mandate.¹⁴ On November 6, 2021, the Fifth Circuit Court of Appeals placed a temporary hold on OSHA’s mandates due to “grave statutory and constitutional issues.”¹⁵ OSHA agreed to suspend implementation and enforcement of this ETS.¹⁶
- **OSHA has become all powerful over the American workforce without adding substantial value.**
 - The vaccine ETS unconstitutionally intrudes in the private contracts between employees and their employers. The vaccine mandate does not meet the conditions for promulgating an ETS because the mandate is not necessary to prevent employees from “grave danger.” In fact, over 66% of Americans have already received the vaccine against COVID-19.¹⁷ The vaccine ETS serves only to coerce those who have chosen not to receive the vaccine for various legitimate reasons.
 - Workplace fatalities, injuries, or illnesses have steadily decreased in the last 50 years, yet OSHA is not the major cause.¹⁸ This decrease began before OSHA and continues afterwards. Many factors have contributed to this decline including worker’s compensation insurance, the ability to sue for work-related injuries, and the market of employees who want safe work.¹⁹

POLICY SOLUTIONS

Congress should consider reforms that ensure safe work environments by giving authority back to the states and reigning in the power of OSHA.

- Congress may consider reversing OSHA’s vaccine ETS through the Congressional Review Act.²⁰
- Congress may consider eliminating OSHA’s authority to create emergency standards. OSHA has demonstrated that its ETS authority is primarily a means to make decisions for huge portions of the American workforce without consulting Americans. Congress created the ETS authority, and Congress can take it away.
- Congress may also give greater autonomy to the states regarding health and safety standards for their unique industries. The 10th amendment requires that all power not delegated to the federal government by the Constitution are reserved to the states or to the people, and this includes workplace safety standards.

Publ. November 16, 2021

¹ “About OSHA.” Occupational Safety and Health Administration. <https://www.osha.gov/aboutosha>

² Id.

³ 29 U.S. Code § 654 - Duties of employers and employees. <https://www.law.cornell.edu/uscode/text/29/654>

⁴ “OSHA Penalties.” Occupational Safety and Health Administration. <https://www.osha.gov/penalties>

⁵ Szymendera, Scott. “OSHA State Plans: In Brief, with Examples from California and Arizona.” Congressional Research Service. April 18, 2017 <https://www.crs.gov/Reports/R46288?source=search&guid=02e912dc1a524893978b5da9724b5efb&index=1#fn2>

⁶ 29 U.S. Code § 655 - Standards <https://www.law.cornell.edu/uscode/text/29/655>

⁷ Szymendera, Scott. “OSHA State Plans: In Brief, with Examples from California and Arizona.” Congressional Research Service. April 18, 2017 <https://www.crs.gov/Reports/R46288?source=search&guid=02e912dc1a524893978b5da9724b5efb&index=1#fn2>

⁸ Yoo, John. “Why Biden’s vaccine mandate fails the constitutional test.” American Enterprise Institute. September 23, 2021. <https://www.aei.org/op-eds/why-bidens-vaccine-mandate-fails-the-constitutional-test/>

⁹ “COVID-19 Healthcare ETS.” Occupational Health and Safety Administration. <https://www.osha.gov/coronavirus/ets>

¹⁰ Szymendera, Scott. “OSHA: COVID-19 ETS on Health Care Employment and Vaccinations and Testing for Large Employers.” Congressional Research Service. November 10, 2021.

<https://www.crs.gov/Reports/R46288?source=search&guid=02e912dc1a524893978b5da9724b5efb&index=1#fn21>

¹¹ “COVID-19 Vaccination and Testing; Emergency Temporary Standard.” Federal Register. November 5, 2021.

<https://www.federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard>

¹² Bosch, Dan and Golbeck, Dan. “The Costs of Biden Administration’s COVID-19 Mandate Rules.” American Action Forum. November 4, 2021. <https://www.americanactionforum.org/insight/the-costs-of-the-biden-administrations-covid-19-mandate-rules/>

-
- ¹³ Stinson, Jim. “OSHA vaccine mandate on hold, Labor Dept. hints a truck driver exemption.” *Transport Dive*. November 8, 2021. <https://www.transportdive.com/news/Biden-administration-vaccine-exemption-truck-drivers/609656/>
- ¹⁴ “Southern Baptist Theological Seminary v. OSHA.” Alliance Defending Freedom. November 5, 2021. <https://adfmedia.org/case/southern-baptist-theological-seminary-v-occupational-safety-and-health-administration>
- ¹⁵ “Fifth Circuit Temporarily Halts Enforcement of OSHA ETS Amidst a Flurry of Litigation.” JDSupra. November 8, 2021. <https://www.jdsupra.com/legalnews/fifth-circuit-temporarily-halts-2808147/>
- ¹⁶ “COVID-19 Vaccination and Testing ETS.” Occupational Safety and Health Administration. <https://www.osha.gov/coronavirus/ets2>
- ¹⁷ “Coronavirus Vaccinations.” Our World in Data. https://ourworldindata.org/covid-vaccinations?country=OWID_WRL (accessed November 5, 2021)
- ¹⁸ Hale, Nathan and Leeth, John. “Evaluating OSHA’s Effectiveness and Suggestions for Reform.” April 23, 2013. <https://www.mercatus.org/publications/regulation/evaluating-oshas-effectiveness-and-suggestions-reform>
- ¹⁹ *Id.*
- ²⁰ “Congressman Keller leads challenge to Biden’s vaccine mandate.” Congressman Fred Keller. November 3, 2021. <https://keller.house.gov/media/press-releases/congressmen-keller-leads-challenge-biden-s-vaccine-mandate>