



AGC
THE CONSTRUCTION
ASSOCIATION

AGC of America Continues to Litigate COVID-19 Vaccine Mandates

January 13, 2022

AGC of America is pursuing two [Construction Advocacy Fund](#)¹-backed lawsuits regarding COVID-19 vaccination mandates impacting the construction industry.

AGC of America filed the first lawsuit on November 15, 2021, challenging OSHA's Emergency Temporary Standard (ETS) on COVID-19 in the U.S. Court of Appeals for the Fourth Circuit. On December 14, 2021, the association filed a second lawsuit in the U.S. District Court for the Northern District of Texas against the mandate that federal contractors and subcontractors require many and perhaps all of their employees to be fully vaccinated for COVID-19. The following is an update on these two cases and related litigation.

I. AGC LAWSUIT AGAINST OSHA COVID-19 VACCINATION-OR-TESTING ETS

Latest Updates

- **As of January 13, the Supreme Court has not issued a decision on whether or not the Sixth Circuit was correct when it removed the nationwide stay (freeze) on implementation and enforcement of the OSHA COVID-19 vaccination-or-testing emergency temporary standard (ETS).**
- **The Court heard oral arguments on January 7 and can issue a decision on whether to reinstate the stay or not at any moment.**
- Because the Sixth Circuit removed the nationwide stay on December 17, 2021, OSHA issued guidance that delayed ETS compliance into 2022.
- Under OSHA compliance guidance and because the Supreme Court has not issued a decision reinstating the nationwide stay, **all of the ETS requirements—except the weekly testing requirement for the unvaccinated—took effect on January 10 and are subject to enforcement. The weekly testing effective date is February 9, so long as employer is working on compliance in good faith.**
- **The pending decision in the Supreme Court has left employers with 100 or more employees taking different approaches to compliance.** On the one hand, some employers mandated compliance with the applicable January 10 requirements on that date, including the mask mandate for the

¹ Through the Fund, the Associated General Contractors of America is able to finance efforts to expand markets for contractors through research and lobbying, protect the industry from regulatory overreach through litigation, and advocate for the industry by financing critical advocacy campaigns that influence policy decisions. It also fights to increase your company's opportunities for growth by providing accurate data to government officials and opinion leaders to influence regulatory policy. By bringing sound data to the table, the Fund protects the industry's position in a competitive market. Corporate and/or personal contributions to support the Fund can be made here: <https://constructionadvocacyfund.agc.org/donate/>

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unvaccinated. On the other hand, some employers are delaying compliance with these requirements until the Supreme Court issues its decision. These employers fear the practical issue of telling employees to follow the ETS requirements in the field one day and then those requirements being suspended shortly thereafter. **Both approaches have their pros and cons, but technically speaking, the first approach is in line with OSHA's latest compliance guidance.**

- In an effort to assist AGC members with increasing the vaccination rates among their workforce and, in the event they have to comply with the ETS requirements, the association created a [vaccine tool kit webpage](#) that contains a construction-oriented summary of the ETS detailing employers' compliance options and obligations as well as additional resources. This toolkit also includes a series of vaccine Public Service Ads AGC of America created specifically targeting construction workers.

In-Depth Background on Litigation

On November 15, 2021, AGC of America filed this lawsuit in the Fourth Circuit in conjunction with the American Road and Transportation Builders Association (ARTBA) and the Signatory Wall and Ceiling Contractors Alliance (SWACCA). Two days later, the Judicial Panel on Multidistrict Litigation ordered that court to transfer the case to the Sixth Circuit for consolidation with approximately 34 other cases also brought against OSHA's ETS on COVID-19.

By that time, a large group of temporary staffing agencies had already persuaded the Fifth Circuit to issue a nationwide stay of the of the ETS, pending a final decision on the merits of their case. OSHA responded on November 23, 2021, moving the Sixth Circuit to dissolve that stay. On December 17, 2021, a divided three-judge panel of that court agreed to allow the ETS to go into effect.

Immediately, a large coalition of 26 trade associations representing the trucking, retail, food and other industries filed an emergency application for a stay of the ETS in the Supreme Court. A coalition of 27 states quickly followed suit. The Supreme Court consolidated those applications and set a December 30 deadline for OSHA to file a response. The court also scheduled the applications for oral argument on January 7. At this point, OSHA has filed its response and the parties are preparing for that argument.

While awaiting the Supreme Court decision, AGC has commissioned an expert report that promises (1) to strengthen the brief that AGC will later file in the Sixth Circuit on the merits of the case and (2) to support the regulatory comments that AGC will be submitting to OSHA on the ETS. In this regard, AGC would underscore that the ETS also serves as a proposal for a permanent standard on COVID-19 and that the courts do not review the agency's permanent standards as stringently as they review its Emergency Temporary Standards. AGC is keenly aware of the risk that a permanent standard along the lines of the ETS might survive judicial review even if the ETS does not.

The ETS requires all employers with 100 or more employees to require their employees to be fully vaccinated for COVID-19 or tested on a weekly basis. In the pending case, the association's core contentions are that:

- OSHA exceeded its authority when it went beyond workplace safety and health and sought to address a broader threat to public health;
- OSHA failed to establish that COVID-19 is a grave workplace hazard;
- OSHA failed to establish that the ETS is necessary to protect employees from such a hazard;
- OSHA failed to make obvious distinctions between the construction and other industries; and
- in many of the settings that the ETS covers, the risk of contracting COVID-19 is merely hypothetical.

II. AGC LAWSUIT AGAINST FEDERAL CONTRACTOR COVID-19 VACCINATION MANDATE

Latest Updates

- **A December 17, 2021, decision by the U.S. Court of Appeals for the Eleventh Circuit effectively maintains a Georgia federal district court’s nationwide stay (or freeze) of the federal contractor COVID-19 vaccination mandate until—potentially—as late as April 2022.**
- The Eleventh Circuit denied a Biden Administration request to immediately remove the nationwide stay and instead requested that the parties to the lawsuit fully brief their arguments on the stay by February 22, 2022. Oral argument on the briefing has been tentatively scheduled for the week of April 4, 2022.
- As a result, it appears as though the Eleventh Circuit may not issue a decision on the stay of the federal contractor vaccine mandate until as late as April. The Biden Administration, consequently, will have to further push back implementation of this federal mandate.
- The argument here does not go to the merits of the mandate, but instead as to whether the existing freeze of the mandate should be maintained or not. As such, litigation is far from over in this particular case and those throughout the country, including by AGC in a federal court in Texas.
- Even as the association challenges the Administration’s two coronavirus vaccine mandates, it continues to work to encourage all construction workers to get vaccinated. AGC recently released a series of **public service ads** featuring construction workers who nearly died from the virus, urging their peers to get vaccinated. AGC has been urging its members to show the videos to all their workers and is also placing ads featuring the videos in key construction markets. AGC also created a **vaccine toolkit** for the industry.

In-Depth Background on Litigation

AGC of America filed this lawsuit in the U.S. District Court for the Northern District of Texas on December 14, 2021. When it filed its complaint, the association also filed a motion for a Temporary Restraining Order (TRO) and a preliminary injunction against the mandate that federal contractors require many and perhaps all of their employees to be fully vaccinated for COVID-19. In support of that motion, the association filed eight declarations to the effect that the mandate will not promote economy and efficiency in the procurement of federal construction projects, and instead, that it will increase the cost and time to construct such projects.

The court quickly ordered the government to file a status report on the other cases also pending against the federal contractor mandate. The government filed that report on December 20, 2021, and the court then ordered AGC to file a response. AGC took the step on December 22, 2021. Without addressing the association’s motion for a TRO, the court set a January 4, 2022, deadline for the government to respond to the association’s motion for a preliminary injunction and set a January 18, 2022, deadline for AGC of America to reply. As this report is written, AGC of America is reviewing the government’s response to that motion and preparing to file its reply.

In the background are several other cases also pending against the federal contractor mandate. One has already yielded is a preliminary injunction that extends to all 50 states and will continue to bar the enforcement of that mandate at least until the week of April 4, 2022, when the parties to that case will appear in the Eleventh Circuit for an oral argument on the government’s pending appeal of that injunction. Three

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other cases have yielded preliminary injunctions that collectively extend to the states of Alaska, Arkansas, Florida, Iowa, Kentucky, Missouri, Montana, New Hampshire, Nebraska, North Dakota, Ohio, South Dakota, Tennessee and Wyoming. Yet another case has yielded a preliminary injunction that extends to the states of Indiana, Louisiana and Mississippi but is limited to federal contracts with the states themselves.

The procedures for challenging the federal contractor mandate are different from the procedures for challenging OSHA's ETS, and for that reason, they cannot be consolidated. At the moment, all eyes are focused on the Eleventh Circuit. If AGC also succeeds in getting a preliminary injunction that extends to all 50 states, that is likely to change. A ruling on AGC's motion for such an injunction could easily come by the end of the month.

The association's core contentions are that the president has exceeded his statutory and perhaps constitutional authority and that the Office of Management and Budget, the Federal Acquisition Regulation (FAR) Council and the procurement agencies all violated the statutory and/or regulatory standards and procedures for developing and implementing government-wide amendments to the FAR.