
FOR THE SIXTH CIRCUIT

IN RE: OSHA RULE ON
COVID-19 VACCINATION AND
TESTING, 86 FED. REG. 61402

On Petitions for Review

**PETITIONER BENTKEY SERVICES, LLC D/B/A THE DAILY
WIRE'S OPPOSITION TO RESPONDENTS' MOTION TO AMEND
SCHEDULE FOR STAY BRIEF (ECF #131) AND JOINDER TO
OPPOSITION FILED BY STATE PETITIONERS (ECF #144)**

Petitioner Bentkey Services, LLC D/B/A The Daily Wire does hereby file this notice joining in the Opposition to Respondents' Motion to Amend Schedule for Stay Briefing and the Set Schedule filed by the State Petitioners (ECF #144).

In addition to the arguments raised by the State Petitioners, Petitioner The Daily Wire also argues that the Court should reject OSHA's Motion to Amend Schedule for Stay Briefing and to Set Schedule for Merits Briefing (ECF #131) for the following reasons.

1. The Case Data The OSHA Cites Does Not Justify Its Proposed Schedule

It is a well-established principle that in order for an OSHA Emergency Temporary Standard (ETS) to be upheld by the court, OSHA must show that the proposed ETS is necessary to alleviate a grave risk of worker deaths during its six-month term. *Asbestos Information Ass'n/North America v. OSHA*, 727 F.2d 415, 427 (5th Cir. 1984). OSHA claims "that an ETS is necessary to protect unvaccinated workers from the risk of contracting COVID-19 at work." *See COVID-19 Vaccination and Testing: Emergency Temporary Standard*, 86 Fed. Reg. 61402, 61403 (Nov. 5, 2021).

In requesting an expedited merits briefing schedule, OSHA based its request upon the contention that “there is significant and ongoing transmission of COVID-19 in workplaces throughout the Nation. Employees are being hospitalized with COVID-19 every day, and many are dying. Case numbers and deaths have also recently been increasing.” (Resp’ts’ Mot.To Amend Schedule For Stay Briefing And To Set Schedule For Merits Briefing at 1.) OSHA’s only attempt to back up this assertion is a footnote that cites the CDC’s online COVID Data Tracker Weekly Review and a Colorado Department of Public Health webpage of outbreak data. (*Id.* at n. 1.)

As stated in the attached declaration of Dr. Jayanta Bhattacharya, the data contained in footnote 1 does not support OSHA’s claim that this ETS is necessary to protect the lives of unvaccinated workers. The fact that the CDC is reporting more cases does not automatically mean that these cases are the result of a workplace hazard. It is OSHA’s burden to show that the increase in COVID cases stems from workplace interactions, that those dying are unvaccinated, and that, but for this ETS, these workers would not have died. “[T]he fact that cases are growing is not a sufficient scientific basis

for claiming that the OSHA mandate is required to address the problem.” (Bhattacharya Decl. ¶ 2).

The data in footnote 1 makes no distinction between COVID recovered patients and employees who have never had COVID. (Bhattacharya Decl. ¶ 5). The data does not report if the employees are vaccinated or unvaccinated. (*Id.*) In fact “it is impossible to tell whether imposing the OSHA mandate would be efficacious against the risk posed by COVID-19 in the workplace.” (*Id.*)

Dr. Bhattacharya found, upon examining the Colorado Public Health data, a potential that seven of the 64 reported COVID deaths stemmed from a workplace outbreak. However, this conclusion was far from clear. (Bhattacharya Dec. ¶ 7). Even assuming arguendo that the link had been conclusively determined, at least three of the seven employees who passed away work for employers who would not have been covered by the OSHA mandate. (*Id.*) Also, it is important to note that the data does not list the cause of death, so it is impossible to conclude that these deaths occurred because of COVID infection. (*Id.*)

The OSHA mandate requires unvaccinated workers to wear a mask and be tested on a regular basis in order to protect them from

catching and spreading the virus. Neither the CDC nor the Colorado Public Health data cited by the OSHA as a reason to expedite the merits briefing shows any evidence as to whether COVID transmissions are occurring in the workplace and, if they are, whether is it being spread by vaccinated or unvaccinated workers as opposed to customers, patients, students, or vaccinated co-workers, or if the unvaccinated workers were wearing masks, and if they had been recently tested.

The simple fact that more people have been testing positive for COVID or that people have died who are employees at a company in Colorado are not facts that will assist this Court in determining whether COVID-19 exposures in the workplace present a grave danger to workers, and whether the record considered as a whole substantially supports OSHA's conclusion that an ETS mandating employee vaccines for employers with more than 100 workers is necessary to alleviate a grave risk of worker deaths during the next six months. *See Asbestos*, 727 F.2d at 427.

2. Reports That The Federal Employee Vaccination Mandate May Be Suspended For Another Month Undermine The OSHA's Proposed Schedule

The OSHA's assertion that the virus poses such an urgent and

grave threat that this Court must rush its consideration of the numerous and substantial constitutional, statutory, and factual issues raised by scores of petitioners is belied by reports that the President is reportedly decreeing a reprieve in its enforcement of the existing federal worker vaccination mandate. *See Biden To Delay Suspending Unvaccinated Federal Workers Until After Holidays*, ABC News, Nov. 29, 2021, <https://abcnews.go.com/Health/live-updates/coronavirus/?id=81441585#81447706>. If the virus is indeed as grave threat as OSHA claims, the President's actions are inexplicable.

It is for these reasons that Petitioner The Daily Wire request this Court deny OSHA's proposed schedule for merits briefing.

Dated: November 29, 2021

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 27(d)(2)(A) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 6th Cir. R. 32(b), this document contains 884 words according to the word count function of Microsoft Word 365.

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/s/ Harmeet K. Dhillon

Date: November 29, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2021, a true and accurate copy of the foregoing was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

/s/ Harmeet K. Dhillon

Date: November 29, 2021

Lead Case No. 21-7000
(Member Case No. 21-4027/4028/4031/4032/4033/4080/4082/4083/
4084/4085/4086/4087/4088/4080/4090/4091/4092/4093/4094/4095/4096/
4097/4099/4100/4101/4102/4103/4108/4112/4114/4115/4117)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: OSHA RULE ON
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DECLARATION OF JAYANTA BHATTACHARYA

DECLARATION OF JAYANTA BHATTACHARYA

I, Jayanta Bhattacharya, declare, pursuant to 28 U.S.C. § 1746:

1. I am a former Professor of Medicine and current Professor of Health Policy at Stanford University School of Medicine and a research associate at the National Bureau of Economic Research. I hold an M.D. and Ph.D. from Stanford University. I have published 155 scholarly articles in peer-reviewed journals in the fields of medicine, economics, health policy, epidemiology, statistics, law, and public health, among others. My research has been cited in the peer-reviewed scientific literature more than 12,000 times.

2. I have reviewed the filing by OSHA in support of their motion to expedite a hearing by the 6th circuit regarding the mandate. In particular, I understand that OSHA has made two primary arguments in support of their request for an expedited hearing. First, OSHA points to increasing numbers of COVID cases throughout the U.S. in recent months. However, the fact that cases are growing is not a sufficient scientific basis for claiming that the OSHA mandate is required to address the problem.

3. A study from Qatar by Chemaitelly and colleagues (recently published in the *New England Journal of Medicine*), which tracked 927,321 individuals for six months after vaccination, concluded that the Pfizer vaccine's "induced protection against infection appears to wane rapidly after its peak right after the second dose, but it persists at a robust level against hospitalization and death for at least six months following the second dose."¹ Vaccine-mediated protection against infection peaks at 77.5% one month after the second dose and then declines to 22.5%, five months after the second dose. The scientific evidence shows that the vaccine, though it protects versus severe disease from COVID infection, does not stop disease transmission. Even if the OSHA mandate were to induce every single employee in the firms it covers to be vaccinated, the disease would still continue to spread.

4. Second, OSHA provides a reference to COVID-19 Outbreak Data (<https://go.usa.gov/xeqH4>), a spreadsheet collected by the

¹ Chemaitelly H, Tang P, Hasan MR, AlMukdad S, Yassine HM, Benslimane FM, Al Khatib HA, Coyle P, Ayoub HH, Al Kanaani Z, Al Kuwari E, Jeremijenko A, Kaleeckal AH, Latif AN, Shaik RM, Abdul Rahim HF, Nasrallah GK, Al Kuwari MG, Al Romaihi HE, Butt AA, Al-Thani MH, Al Khal A, Bertollini R, Abu-Raddad LJ. Waning of BNT162b2 Vaccine Protection against SARS-CoV-2 Infection in Qatar. *N Engl J Med*. 2021 Oct 6;NEJMoa2114114. doi: 10.1056/NEJMoa2114114. Epub ahead of print. PMID: 34614327; PMCID: PMC8522799.

Colorado Department of Public Health & Environment, to support their contention that workplaces are a primary location of mortality risk from COVID infection. I do not believe that this data support the government's claim the OSHA vaccine mandate is necessary to protect workers.

5. The COVID-19 Outbreak Data makes no distinction between COVID-recovered patients and employees who have never had COVID, or between vaccinated and unvaccinated individuals. The data set report raw counts of cases and deaths among staff at various facilities where outbreaks have occurred, but it does not report whether the individuals who contracted COVID-19 were already vaccinated or not, nor whether the workplaces involved have many COVID-recovered patients with strong immunity against subsequent COVID infection. Without such information, it is impossible to tell whether imposing the OSHA mandate would be efficacious against the risk posed by COVID-19 in the workplace. If, for instance, a workplace already has a highly vaccinated or COVID-recovered employee population, there is little to no marginal benefit from the imposition of the OSHA mandate.

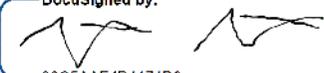
6. Even if such information were available, it would be hard to adjudge the wisdom of the OSHA mandate since imposing the mandate also imposes harms. This harm comes in the form of coerced medical treatment (vaccination, masking, and frequent testing) not desired by some employees. If some decide to leave employment instead of accepting this coerced treatment, this will harm both the employees who leave and the firms that must replace their labor. The government's COVID-19 outbreak data provide no way to measure these marginal harms.

7. I searched the COVID-19 outbreak dataset to analyze the outbreaks under active investigation. I found exactly six settings where outbreaks involved deaths, for a total of seven deaths. While every death is lamentable, it is notable that three of these locations are not employers that would be covered by the OSHA mandate (Colorado State University, Pueblo; Cornerstone Christian School; and Sandrock Elementary School). It is also not clear from the data whether the employees contracted COVID-19 in the workplace or elsewhere. Finally, these data do not list the cause of death, so from the data provided, it is not possible to conclude that these deaths occurred because of COVID

infection. To summarize, these contact tracing data by themselves are insufficient to conclude to any degree of scientific certainty that imposing the OSHA mandate would have any appreciable effect on protecting employees covered by the mandate against the harms caused by COVID-19 infection.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 29, 2021

DocuSigned by:

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Gayatri Bhattacharya, M.D., Ph.D.