

WILL: Sues Biden administration over OSHA vaccine-or-test mandate on businesses

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FEDERAL LAWSUIT CHALLENGES AUTHORITY OF AGENCY TO ISSUE SWEEPING EMERGENCY RULE

The News: The Wisconsin Institute for Law & Liberty (WILL) [sued](#) the Biden administration in federal court, on behalf of two Wisconsin businesses, challenging the Occupational Safety and Health Administration's (OSHA) sweeping new vaccine-or-test mandate for businesses with 100 or more employees. OSHA's emergency rule, issued November 4, requires businesses of a certain size to require proof of vaccination or regular COVID-19 tests for their employees. Companies that do not comply face penalties of over \$13,000 per violation, or over \$136,000 for a willful violation.

The lawsuit was filed in the Seventh Circuit Court of Appeals. Federal law requires lawsuits that challenge OSHA emergency rules to be filed in the Court of Appeals, rather than in a federal district court, where lawsuits typically originate.

The Quotes: WILL President and General Counsel, Rick Esenberg, said, "This new rule is illegal and unconstitutional. It circumvents the normal legal process, along with Congress, to claim emergency powers to impose a mandate on American business. However you feel about the COVID vaccine or even the very different question of a vaccine mandate, the Biden administration is claiming an

extraordinary power to rule by decree that could be used in the future in almost unlimited and unforeseeable ways.”

Steve Fettig, Secretary and Treasurer of Tankcraft and Plasticraft, said, “The order is unconscionable. OSHA does not know how to run our companies. We do. OSHA does not know how to keep our employees safe. We do. And we have done so successfully since the start of the pandemic without the interference of a federal bureaucracy. We respect our employees’ fundamental right to make their own private, difficult medical choices.”

Background: On September 9, 2021, President Joe Biden [announced](#) his intent to issue a rule to “require all employers with 100 or more employees, that together employ over 80 million workers, to ensure their workforces are fully vaccinated or show a negative test at least once a week.” The announcement came mere months after President Biden, and officials in his administration, assured the public there would be COVID-19 vaccination mandates from the federal government.

On November 4, OSHA issued the [rule](#) previewed by President Biden in September. The rule requires businesses of 100 or more employees to require proof of vaccination or weekly COVID-19 tests. Companies that do not comply face penalties of over \$13,000 per violation, or over \$136,000 for a willful violation. The rule is expected to apply to more than 80 million employees.

What is WILL Challenging? The OSHA rule forgoes the normal notice and comment period for federal regulations and relies on an emergency provision called Emergency Temporary Standard (ETS). This allows the agency to issue any “necessary” orders to address a “grave danger.” It is the reliance on ETS that puts the burden on OSHA to reliably prove why current circumstances require emergency action to bypass the normal process. This lawsuit challenges the authority and rationale for OSHA to issue this sweeping mandate using the ETS standard.

- **The application of ETS for this rule has no reasonable limits.** Federal law provides that OSHA can adopt an Emergency Temporary Standard (ETS) to protect employees from “exposure to substances,” “agents,” or “hazards.”

Adopting the ETS to mitigate a global pandemic allows for a limitless application never intended by Congress.

- **OSHA fails to prove the ETS is necessary to address a “grave danger” for all employees at businesses with 100 or more employees.** The arbitrary nature of applying the rule to so many businesses without regard to workplace conditions, employee risk factors, vaccination status, or previous bouts with the virus, reveals the mandate is far too broad to elide normal notice and comment.
- **OSHA cannot prove the ETS is necessary to address a new emergency in the present circumstances.** Given the widespread availability of tests and vaccines, OSHA must explain why an ETS is necessary now and not at a previous time. The [CDC](#) currently reports 80% of American adults have received at least one vaccine dose, and 70% are fully vaccinated. The agency must prove something has changed, not simply that the President is impatient.
- **A broad reading of OSHA’s authority to issue an emergency vaccine-or-test mandate raises constitutional concerns.** Congress cannot delegate its legislative power to executive branch agencies. And when OSHA was created, Congress did not provide OSHA with the sweeping authority to address any “grave danger” that affects workers or employees. Further, the OSHA mandate supplants state and local officials, violating the Constitution’s Commerce Clause.

WILL’s Clients: WILL represents Tankcraft and Plasticraft, manufacturers located in Darien, Wisconsin.

- **Tankcraft Corporation** is a metal fabricator specializing in products for the transportation market. They operate in a 400,000 square foot facility in Darien, Wisconsin with approximately 225 employees. The facility employs various means of air purification, including electrostatic air filtration, high-volume air exhaust, and high-volume air input. Tankcraft workers do not work in close quarters with the average employee working in an open-air space of more than 225 sq ft (the average American home living room).
- **Plasticraft Corporation** is a custom molder of hollow plastic parts using rotational molding and blow molding processes. They operate in a 300,000 square foot facility also in Darien, Wisconsin. Approximately 160 people work

at the Plasticraft facility over three shifts. Ventilation and hourly air turnover are excellent at Plasticraft with high ceilings and large overhead doors for shipping and receiving. Many Plasticraft workers complete projects with large separation and spaces between coworkers.