

INSIGHTS

Given Deadlines Set by Sixth Circuit, ETS Likely Stayed Until at Least December 10, 2021

November 24, 2021

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Earlier this month, the Occupational Safety and Health Administration (“OSHA”) issued its “COVID-19 Vaccination and Testing; Emergency Temporary Standard” (the “ETS”) requiring employers of 100 or more employees to implement policies requiring employee vaccination or enhanced safety measures for unvaccinated employees (including wearing face coverings and weekly COVID-19 testing). Our alert on the ETS is [here](#). The ETS was subject to over 30 petitions for review in the federal circuit courts and was quickly stayed by the United States Court of Appeals for the Fifth Circuit.

Although the petitions for review were consolidated before the United States Court of Appeals for the Sixth Circuit, the Fifth Circuit’s stay remains in place. While OSHA has publically stated that it will comply with the stay, its position has been – and continues to be – that employers should prepare to comply with the ETS and that OSHA will succeed in litigation challenging the ETS. Yesterday, OSHA filed an emergency motion to immediately lift the stay.

With the stay in place, covered employers have been in the difficult position of trying to determine how much preparation to do to comply with the ETS’s requirements, many of which are scheduled to be effective on December 6, 2021. The question has been whether the stay will continue beyond the initial deadlines and, if not, whether deadlines will be extended to account for the period during which the ETS was stayed.

The deadlines set out in the Sixth Circuit’s Scheduling Order, which is available [here](#), provide some insight into the timing of the requirements of the ETS. The Scheduling Order sets the following briefing deadlines:

- Tuesday, November 30, 2021 – motions to join OSHA’s emergency motion or to modify, revoke, or extend the stay.
- Tuesday, December 7, 2021 – responses to motions regarding the stay.
- Friday, December 10, 2021 – replies to responsive motions.

Given these deadlines, it is likely that the ETS will continue to be stayed until at least December 10th (past the December 6, 2021 deadline) while the Sixth Circuit considers briefing. However, it is possible that, before December 10th, the Sixth Circuit lifts the stay. If the stay is lifted, the ETS requirements could become effective on the date of the court’s order or on a later date set

by the Sixth Circuit.

While the briefing schedule does not provide definitive answers to employers on the potential deadlines for ETS compliance, it suggests that the ETS's December 6, 2021, deadlines may be extended for at least a few days while the Sixth Circuit considers briefing.