

INSIGHTS

## Federal Court of Appeals Allows OSHA's Vaccination/Testing Rule for Employers with 100+ Employees to Go Forward

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Late this past Friday, December 17, a panel of the Sixth Circuit Court of Appeals issued an order dissolving the Fifth Circuit Court of Appeals' stay that had blocked implementation of OSHA's Emergency Temporary Standard (ETS). In other words, the "pause" on implementing the ETS was removed and the ETS is now in effect.

Consequently, covered employers need to promptly revisit their efforts to adopt a program to comply with the ETS requirements. This alert will (1) review the ETS deadlines and OSHA's statement about those deadlines, (2) review potential future litigation steps, and (3) provide six practical items for employers to complete now.

### ETS Deadlines

Originally the ETS required covered employers to have all elements of the program in place by December 6, except for the testing requirement for unvaccinated employees. The ETS required routine testing of unvaccinated employees to begin no later than January 4.

With respect to those deadlines, OSHA has now stated, and published on its website, that the agency "will not issue citations for noncompliance with any requirements of the ETS before **January 10** and will not issue citations for noncompliance with the standard's testing requirements before **February 9**, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard."

### History of ETS and Litigation Challenges

As many will recall, on Friday, November 5, OSHA issued its ETS requiring employers with 100 or more employees to take certain actions to protect their workforces against the spread of the COVID-19 virus in the workplace. The ETS included, among other actions, either (i) requiring employees to be vaccinated for COVID-19 or, alternatively, (ii) requiring that unvaccinated employees wear face coverings and undergo weekly testing for the virus. We summarized the ETS requirements in an alert we published at the time. See it [here](#).

Even before the ETS was formally issued, lawsuits were filed by various states and interest groups seeking to block the ETS. In response to one of those suits, a three-judge panel of the Fifth Circuit Court of Appeals issued a stay on Saturday, November 6, less than 24 hours following issuance of the ETS. The stay halted implementation of the new rule. While the Fifth

Circuit generally only has jurisdiction in Texas, Louisiana and Mississippi, the Fifth Circuit panel made the stay effective nationwide.

Late on Friday, November 12, the same Fifth Circuit panel issued an opinion reaffirming its stay and articulating the legal basis for that stay.

In the interim, more than 30 lawsuits challenging the ETS were filed in a variety of federal courts across the country by other states and business and labor groups. Under federal procedures for managing multiple lawsuits filed in different circuits over the same controversy, the various lawsuits were consolidated and randomly assigned to the Sixth Circuit Court of Appeals.

Following the assignment of the litigation to the Sixth Circuit, the Biden Administration filed a motion seeking to dissolve the Fifth Circuit stay and allow the ETS to go forward.

### **Sixth Circuit Decision**

On December 17 a three-judge Sixth Circuit panel issued a decision dissolving the Fifth Circuit stay and allowing the ETS to go forward. This decision was authored by Judge Jane Stranch, a 2010 Obama appointee. Judge Julia Gibbons, a 2002 appointee of President George W. Bush, issued a concurring opinion agreeing that the stay should be lifted. The third judge on the panel, Judge Joan Larsen, a 2017 Trump appointee, filed a dissent arguing that the stay should have been left in place.

In her decision dissolving the stay, Judge Stranch observed that the parties seeking to maintain the stay based their arguments primarily upon the “Fifth Circuit’s blanket conclusion that the ETS is beyond the scope of OSHA’s statutory authority.” In her opinion, Judge Stranch rejected the notion that the ETS was beyond OSHA’s statutory authority explaining that OSHA regulation is not just about such things as “hard hats and safety goggles.”

The decision methodically reviewed OSHA’s history of acting to protect employees against disease - including contagious diseases - such as the agency’s adoption of a bloodborne pathogen standard to protect employees against HIV, Hepatitis C and other bloodborne viruses. Judge Stranch further observed that, through its actions, Congress had effectively endorsed OSHA’s regulation of contagious disease hazards in the workplace.

In her dissenting opinion, Judge Larsen vigorously objected to the ETS, including the provision empowering employers to impose vaccination requirements, and portrayed vaccination as very much a personal choice that should be left to individual employees. Judge Larsen contended that “the mandate is aimed directly at protecting the unvaccinated from their own choices.”

Judge Stranch, however, recognized how those individual choices impact employees collectively, asserting “[v]accinated employees are significantly less likely to bring (or if infected, spread) the virus into the workplace.”

In concluding that dissolving the stay was appropriate, Judge Stranch further rejected the suggestion that testing and face coverings for unvaccinated employees are also purely personal matters, observing that “testing in conjunction with wearing a face covering ‘will further mitigate the potential for unvaccinated workers to spread the virus at the workplace.’”

In a very brief concurring opinion, Judge Gibbons agreed that the stay should be lifted. She noted that “[r]easonable minds may disagree on OSHA’s approach to the pandemic, but we do not substitute our judgment for that of OSHA, which has been tasked by Congress with policy-making responsibilities.”

### **Next Steps for the Litigation**

Within an hour of the December 17 decision dissolving the stay, several parties opposing the ETS filed an “Application for Immediate Stay of Agency Action Pending Disposition of Petition for Review” with the United States Supreme Court.

That stay request should now be considered directly by Supreme Court Justice Brett Kavanaugh, who currently has responsibility for the Sixth Circuit. What response will come from Judge Kavanaugh or the Supreme Court as a whole, and when, remains to be seen. In the meantime, covered employers should carefully follow developments.

### **Practical To-Do Items for Employers in the Meantime**

Currently, there is no stay in place and employers are subject to the ETS - at least for the time being. That said, OSHA has effectively recognized that the original December 6 and January 4 deadlines are no longer practicable for employers and has stated that agency compliance officers will not issue citations to employers for noncompliance prior to January 10 - “so long as the employer is exercising reasonable, good-faith efforts to come into compliance.” With respect to the testing component of the ETS, the agency is allowing employees even more time - until February 9 - to come into compliance before the agency starts issuing citations over that component of the ETS. Again, those extensions of time by OSHA presuppose that the employer is engaging in reasonable and good faith efforts to come into compliance.

So, what should covered employers be doing now? Employers should move expeditiously to put each of the ETS pieces in place. Accordingly, if not already done, employers should:

- 1) Collect the required vaccination information on employees mandated by the ETS. As a practical matter, that collection process should probably be completed no later than Friday, January 7, so the employer knows by January 10 which employees are required to wear face coverings.
- 2) Adopt, and distribute to all employees, the requisite written policy and additional information required by the ETS with all the necessary components (OSHA has provided templates for a policy on its website as a starting point for employers).
- 3) Have an apparatus in place to timely process requests for medical or religious exemption from various components of the plan, whether from an employer-imposed vaccination requirement or a face covering or testing requirement.
- 4) Have a testing program in place by February 9 that includes (i) the necessary testing resources and (ii) an established program to complete the testing and (iii) procedures to collect, and preserve in a confidential manner, the necessary information on a weekly basis as required by the ETS. Even employers who mandate vaccination for all employees need to have testing in place for any employee granted a medical or religious exemption from vaccination.

5) Implement the procedures to comply with the other necessary elements of the ETS such as (i) providing employees with reasonable time off for vaccination and for recovery from side effects of vaccination consistent with the very specific requisites of the ETS and (ii) strictly complying with the employee removal and isolation requirements for any employee testing positive or diagnosed with COVID-19.

6) Consider whether the employer is in one of the states where OSHA regulation is administered by a state agency pursuant to what is termed a “state plan.” Ascertain what the relevant state agency in that jurisdiction has done to adopt a comparable ETS for employees in that state, the provisions of that state ETS, and when those state requirements go into effect.