

What's Next for Employers: OSHA's Vaccine and Testing Mandate

Article

November 17, 2021

On Tuesday, November 16, 2021, litigation pending in several federal circuits regarding the federal vaccine/testing mandate described below was consolidated in the U.S. Court of Appeals for the Sixth Circuit. Below, we summarize the mandate, discuss the various court developments, and provide guidance as to steps employers could take while the legal challenges continue.

OSHA Issues ETS Mandate

As most employers are aware, on November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard (ETS) mandate requiring all employers with 100 or more employees to be vaccinated or undergo weekly COVID-19 testing. As background, the ETS applies to an estimated 84 million workers, is meant to minimize the risk of COVID-19 transmission in the workplace, and was to be enforceable beginning January 4, 2022. The ETS mandate provides that starting December 5th, employers must support vaccination efforts by providing their employees reasonable paid time off to receive the vaccination and recover from any potential side effects. The ETS mandate calls for civil liabilities if employers are found in violation of the rule with fines of up to \$13,653 per serious violation and ten times that for willful or repeated violations.

ETS Mandate Stayed; Further Litigation Pending

The following day, on November 5th, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit (covering Texas, Louisiana, and Mississippi) temporarily stayed the ETS Mandate and requested an expedited briefing from OSHA. On Friday, November 12th, the Fifth Circuit **ordered** a continuation of its stay, finding that OSHA had greatly overreached its authority on both legal and constitutional grounds, and ordering OSHA to take "no steps to implement or enforce the mandate until further Court Order."

That evening, the Department of Labor acknowledged the Fifth Circuit's November 12th Order, posting the following on its webpage: "OSHA has suspended its activities related to the implementation and enforcement of the ETS pending future development in the litigation."

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Of course, several other plaintiffs—both business groups and government entities—had also filed suit challenging the ETS mandate across the country. Since many lawsuits were filed in several other courts in various jurisdictions throughout the United States, OSHA notified the judicial panel on multidistrict litigation so that the panel could randomly select one appellate court from 12 of the 13 U.S. Courts of Appeals to hear the challenges. On Tuesday, November 16th, in accordance with this lottery-based case-assignment rule, the Fifth Circuit case was assigned to the U.S. Court of Appeals for the Sixth Circuit, which covers Tennessee, Kentucky, Ohio, and Michigan.

The Sixth Circuit is now authorized to uphold or lift the Fifth Circuit's stay halting the rule. A three-judge panel of the Sixth Circuit, which is based in Cincinnati, will now hear the case. That panel will come from the full court, which is made up of 11 judges appointed by Republican presidents, and five appointed by Democratic presidents. Whether or not the Sixth Circuit decides to lift the stay or leave it in place, the losing side will likely ask the Supreme Court to make a final decision. It is unclear whether the Supreme Court will take up the case promptly and/or before the Sixth Circuit rules on the merits.

How Should Employers Respond?

OSHA has taken some pressure off businesses that are subject to the ETS mandate by suspending implementation and enforcement pending the ongoing litigation. The December and January deadlines are thus stayed, at least until the Sixth Circuit and the Supreme Court have weighed in.

Yet, employers should also recognize that in the event the ETS mandate is ultimately upheld, it will take many weeks to prepare, implement a vaccination and testing policy, and organize the testing of their employees. Prudent employers will proceed with plans to implement the ETS in the following ways:

- Employers potentially affected by ETS should determine how many of their employees (and applicants) are unvaccinated and how many of those who are unvaccinated plan to remain so.
- Employers should prepare a mandatory vaccine/testing policy. A model policy template was included in the ETS mandate and can be found [here](#).
- Investigate COVID-19 testing options and testing availability.
- Develop a plan and process for handling medical and religious exemption requests from employees.

It bears mention that those employers who are subject to the **Federal Contractor Mandate** or who are health care providers subject to the **CMS Mandate** must still comply with those mandates, as they are unaffected by the ETS litigation described above.

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We will continue monitoring the litigation and will provide updates on any future developments.

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