



COMPLIANCE ALERT



EMPLOYEE BENEFITS | NOVEMBER 15, 2021

OSHA Emergency Temporary Standard for COVID-19 Vaccine and Testing Stayed By 5th Circuit Court of Appeals

On September 9, 2021, President Biden announced that he ordered OSHA to develop an emergency temporary standard (ETS) that would require private employers with 100 or more employees to mandate that employees either receive one of the three available COVID-19 vaccines or submit to weekly COVID-19 testing. On November 5, 2021, OSHA published its **COVID-19 Vaccination and Testing Emergency Temporary Standard**, which included a **summary**, **fact sheet**, and **FAQs**. The ETS was immediately challenged by a number of petitioners, including states and private companies, seeking to permanently enjoin enforcement of the ETS. On November 6, 2021, the United States Court of Appeals for the Fifth Circuit (the 5th Circuit), temporarily stayed enforcement of the ETS pending briefing by the parties and expedited judicial review.

After completing its expedited review, on November 12, 2021, the 5th Circuit affirmed its initial stay, holding that petitioners met all four factors to establish the need for further stay, and ordered OSHA to take no further steps to implement or enforce the ETS pending adequate judicial review of the request for permanent injunction. The U.S. Department of Justice disagreed that an immediate stay was necessary given that a “multi-circuit lottery” will occur on or about November 16, after which all lawsuits challenging the ETS will be heard by one federal appeals court.

OSHA ETS

As a reminder, the ETS requires employers with 100 or more employees to develop and implement a mandatory, written COVID-19 vaccination policy by December 5, 2021, or a written policy requiring employees to either be vaccinated or produce a negative COVID-19 test result and wear a face covering at work. Employers are required to begin enforcing the policy on January 4, 2022, meaning most employees of covered employers would have to submit to regular testing and wear a face covering or be fully vaccinated by January 4, 2022.

The ETS permits covered employers to allow for reasonable accommodation for employees who cannot be vaccinated and/or wear a face covering due to a disability, as defined by the ADA, or if vaccination, and/or testing for COVID-19, and/or wearing a face covering conflicts with an employee’s sincerely held religious belief, practice, or observance.

Further, the ETS requires employers to provide employees with time off for obtaining their vaccinations. Specifically, the ETS requires employers to provide employees with a reasonable amount of paid time (up to 4 hours at their regular rate of pay per dose, as applicable) to travel to and receive their COVID-19 vaccine dose(s). Further, employers are required to provide reasonable time and paid sick leave to employees who need the time to recover from the side effects of the either dose, as applicable, of the vaccine.

Temporary Injunction Order

As the 5th Circuit recognized, OSHA rarely implements an ETS, as this is an extraordinary power provided to the agency. The OSHA ETS powers have only been used ten times in fifty years. Six ETS's were challenged in court; only one survived. In this instance, the 5th Circuit found many issues with the ETS, including that it appears to be overly broad as it applies to employers in almost all industries and workplaces in the country without accounting for obvious differences in risks facing employees given these differences, and for not addressing how the ETS purports to save workers from grave danger in workplaces with 100 or more employees, but workers, including vulnerable workers, in workplaces with fewer than 100 employees do not require similar protection.

While OSHA attempted to address its basis for focusing on larger employers in its ETS (i.e., larger employers it believed would be better equipped to administer the mandate), the 5th Circuit points out that the agency's mission is to ensure "safe and healthy working conditions and to preserve human resources." Thus, if COVID-19 is a true workplace emergency, then it should be targeted to ensure workplace safety for all employees. Moreover, the 5th Circuit recognized that taking almost two months (from the date of the President's directive) to develop an ETS when we are almost two years into the pandemic calls into question the true "emergent" need for the ETS.

In its motion to oppose the stay, OSHA explained that it acted now because voluntary safety measures proved ineffective, COVID grew more virulent (e.g., the Delta variant), and fully approved vaccines and tests are increasingly available. OSHA believes the contention that it incorrectly applied the ETS to all job sites and employees of all ages disregards OSHA's explanation, supporting evidence, and permitted exemptions (e.g., for those working from home, alone, or outdoors). OSHA noted that its standards are not required to operate on an employer-by-employer basis or employee-by-employee basis.

Moreover, OSHA believes the petitioners did not show that their claims would outweigh the harm of staying the ETS,

which OSHA believes will save thousands of lives and prevent hundreds of thousands of hospitalizations. OSHA's analysis indicates that the stay would likely cost dozens or even hundreds of lives per day. OSHA believes that the petitioners' claims are speculative and remote and do not outweigh the interest in protecting employees from COVID-19 while the case progresses.

What Does This Mean for Employers?

With the temporary stay in effect, covered employers are, at this time, not required to meet the December 5, 2021 and January 4, 2022 deadlines to, among other things, develop their vaccine policies and require employees to be fully vaccinated or submit to regular testing and wearing face coverings at work, respectively.

It is unclear when the ETS will, if at all, be effective and enforceable against covered employers, though it is likely that this issue will move quickly through the courts. The next step for the ETS involves consolidating all outstanding lawsuits challenging it via a "multi-circuit lottery" to determine which federal appeals court will decide them. The lottery is expected to occur on or about November 16, 2021.

It is worth noting, however, the 5th Circuit's order only applies to OSHA's ETS and does not prevent employers from mandating on their own that their employees be vaccinated, subject to the ADA and Title VII if a reasonable accommodation is required. Employers have already successfully implemented such mandates that have withstood challenges in federal court. In the meantime, employers should be prepared to implement a mandatory vaccine policy if the 5th Circuit's temporary stay is lifted or overturned.

Finally, because the ETS does not apply to federal contractors (who must comply with the President's Executive Order and the Safer Federal Workforce Task Force COVID19 Workplace Safety: Guidance for Federal Contractors and Subcontractors) or employees providing healthcare services or healthcare support services who are subject to the Healthcare ETS while the Healthcare ETS is in effect, the 5th Circuit's stay does not

impact employers covered by these requirements. Employers and employees subject to these requirements must continue to comply at this time.

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