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# COMPLIANCE ALERT

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EMPLOYEE BENEFITS | DECEMBER 20, 2021

## 6th Circuit Court of Appeals Dissolves 5th Circuit's Stay of OSHA Emergency Temporary Standard for COVID-19 Vaccine and Testing; OSHA Plans to Implement Beginning January 10, 2022

On December 17, 2021, the United States Court of Appeals for the 6th Circuit (6th Circuit) dissolved the stay of OSHA's November 5, 2021 Emergency Temporary Standard (ETS) for private employers with 100 or more employees issued by the United States Court of Appeals for the 5th Circuit (5th Circuit). As a result of the 6th Circuit's decision, OSHA announced that it intends to move forward with implementing the ETS. OSHA indicated it will not issue citations for noncompliance with its November 5, 2021 ETS before January 10 (which is now the deadline for employers to, among other things, develop their written COVID-19 vaccination policies). Further, if an employer is exercising reasonable, good faith efforts to come into compliance with ensuring its employees are fully vaccinated or submit to weekly testing, OSHA will not issue citations for any employees who are not fully vaccinated before (or if the employer is not testing prior to) February 9, 2022.

Note, the 6th Circuit's order only impacts private employers with 100 or more employees, it does not address the ETS for Health Care Workers or the COVID-19 Workplace Safety Guidance for Federal Contractors and Subcontractors, both of which have been separately enjoined in other lawsuits. Currently, the mandate for health care workers has been enjoined in twenty-four states and the federal contractor mandate has been enjoined nationwide.

### OSHA ETS

As a reminder, the ETS originally required 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 were originally 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.

## Litigation Background and 6th Circuit's Decision

The OSHA 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 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.

Given the number of legal challenges in multiple federal jurisdictions, a "multi-circuit lottery" occurred on November 16, wherein the 6th Circuit Court of Appeal was assigned to hear the consolidated cases. Just over a month later (after briefing by the parties), on December 17, 2021, the 6th Circuit issued an order dissolving the 5th Circuit's stay, finding, among other things, that OSHA's statutory mission to ensure safe and healthy working conditions for workers gives the agency broad authority to promulgate standards to meet this mission, including the authority to address viruses and infectious diseases in the workplace.

## What Does This Mean for Employers?

While the case is expected to be appealed to the United States Supreme Court ("Supreme Court"), there is no guarantee the Supreme Court will grant certiorari to review the decision or, if the Supreme Court does grant certiorari, that it will overturn the 6th Circuit's decision. Moreover, OSHA intends to move forward with implementing the ETS unless or until the Supreme Court decides otherwise.

Accordingly, if they have not already done so, covered employers are encouraged to begin developing their written policies, notifying their employees whether they will be expected to be fully vaccinated by February 9, 2022 (if the employer is not implementing a testing option), or communicating how their testing option will work beginning on February 9, 2022, for those who are allowing a testing option.

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