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Multiple Appeals Leave Lingering Uncertainty for Employers After Federal Appeals Court Lifts Stay of OSHA Emergency COVID Vaccine Mandate

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What You Should Know

- On December 17, 2021, a divided three judge panel of the U.S. Court of Appeals for the Sixth Circuit reinstated OSHA's Emergency Temporary Standard (ETS) requiring employers with 100 or more employees to mandate COVID-19 vaccinations or regular testing for the virus, and to develop a related written policy.
- The Sixth Circuit's opinion, which lifts a previous stay of the ETS by the Fifth Circuit Court of Appeals, notes that "Covid-19 has continued to spread, mutate, kill and block the safe return of American workers to their job," and that to protect workers "OSHA can and must be able to respond to dangers as they evolve."
- While the Sixth Circuit has lifted the stay, it has not yet heard or decided on the merits whether the vaccine requirements of the ETS are enforceable.

Where Things Stand Now

To address the uncertainty created by the earlier stay and the Sixth Circuit's opinion upholding the ETS, OSHA stated in a December 18 news release that it would not issue any citations for noncompliance with any requirements of the ETS prior to January 10, 2022. OSHA further advised that it would not issue any citations for noncompliance with the testing requirements of the ETS prior to February 9, 2022, provided an employer is exercising reasonable, good faith efforts to come into compliance with the requirements.

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Following the Sixth Circuit's opinion upholding the ETS, 27 states and other parties filed emergency motions with the U.S. Supreme Court to block the enforcement of the stay. On January 7, 2022, the Supreme Court is scheduled to hear oral argument on the Sixth Circuit's decision to lift the stay on the ETS. While this argument will be heard on an expedited basis, it should be noted that this is scheduled to occur only three days prior to the first date on which OSHA has indicated it may begin issuing citations for noncompliance.

Guidance for Covered Employers

These are certainly unprecedented and uncertain times for everyone. Today's guidance may soon become dated in certain respects. Actions taken now may ultimately prove unnecessary depending on how the U.S. Supreme Court rules next month.

Notwithstanding this confusing situation, it is important for all employers to take the following steps:

- Stay current on all legal developments related to COVID vaccination and testing mandates and related issues.
- Develop policies to address COVID vaccination and testing in the workplace. Regardless of an employer's size and the outcome of the challenges to the ETS, it will be important to have well-defined policies in place to keep employees safe and avoid legal challenges relating to the pandemic. Of course, a well-defined and documented compliance approach will be necessary for private employers with 100 or more employees in the event OSHA's ETS is upheld by the U.S. Supreme Court.
- Consider other steps that can be taken, regardless of any legal requirements to do so, to protect the physical and mental health of all employees, as well as everyone who comes into contact with them. Such steps, while always important, are likely to be more significant now than ever before.

We will continue to monitor the status of the legal challenges to the ETS and report on future developments related to the rapidly evolving laws, rules, and regulations involving COVID vaccination and testing mandates. Please contact the authors of this Alert with questions or to discuss your specific circumstances.

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