

# OSHA Suspends Emergency COVID-19 Vaccination and Testing Standard

## Labor & Employment Law Update

By Matthew Horn on November 18, 2021



In September, the Biden Administration directed OSHA to issue an Emergency Temporary Standard (“ETS”) requiring employers with one hundred or more employees to ensure their employees are either fully vaccinated or tested for COVID-19 on a weekly basis. That promised ETS was published on November 5, 2021, and linked

here are OSHA’s summary of the ETS and the FAQ’s relating to the ETS.

One week later, on November 12, 2021, the 5<sup>th</sup> Circuit Court of Appeals issuing a scathing opinion staying the enforcement of the ETS. In the week that followed, legal challenges were brought in every other Circuit Court of Appeals across the country. On November 16, 2021, the matter was assigned through a lottery to the 6<sup>th</sup> Circuit Court of Appeals, which has jurisdiction over Michigan, Ohio, Kentucky, and Tennessee. If the 6<sup>th</sup> Circuit upholds the stay of the ETS—which seems more likely than not—then the ETS will remain stayed while the issue proceeds to the U.S. Supreme Court. If the 6<sup>th</sup> Circuit lifts the stay of the ETS, then the ETS could potentially go into effect while the issue proceeds to the U.S. Supreme Court.

On November 17, 2021, OSHA formally acknowledged that it had suspended all activities related to the implementation and enforcement of the ETS. However, OSHA and the Biden Administration have vowed to continue the fight and implement the ETS if/when allowed, so at this juncture, we continue to recommend that employers plan and prepare for the potential implementation of the ETS—namely, preparing the required policies and compiling a roster of employees who have been vaccinated (and those who have not).

For a more thorough discussion of the ETS, the pending legal challenges, and our recommendation moving forward, please see our recent webinar on these issues. We will continue to keep you advised as to the status of the ETS and the related legal challenges.

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