

SIXTH CIRCUIT WINS “LOTTERY” WHILE OSHA STANDS DOWN ON IMPLEMENTATION AND ENFORCEMENT OF ITS VACCINE MANDATE

Hodgson Russ OSHA Alert
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Following its formal publication in the Federal Register on November 5, 2021, the new Emergency Temporary Standard on COVID-19 Vaccination and Testing (“ETS”) promulgated by the U.S. Occupational Safety and Health Administration (“OSHA”) immediately faced legal challenges seeking to strike it down. As discussed in our prior [alert](#), the U.S. Court of Appeals for the Fifth Circuit promptly issued a November 6, 2021 Order that imposed a temporary stay of enforcement of the ETS pending expedited review of petitioners’ motion for an emergency stay.

After completing that expedited review, the Fifth Circuit issued a 22-page decision [1] on November 12, 2021 that granted the petitioners’ motion and extended its prior stay pending full judicial review of the application for a permanent injunction. The Court’s Order also went a step further, directing “that OSHA take no steps to implement or enforce the [ETS] until further court order.”

The Fifth Circuit’s Order is highly critical of OSHA and its ETS, calling it a “work-around” to bypass notice-and-comment requirements in order to achieve a national vaccine mandate where other federal authority to do so was lacking. The Court emphasized that OSHA’s ability to issue an emergency temporary standard is an extraordinary power that should be delicately exercised in limited circumstances. By contrast, the Fifth Circuit characterized OSHA’s ETS as a “one-size-fits all sledgehammer” that largely fails to take into account differences in workplaces and workers.

Applying a four-factor test[2] for evaluating the petitioners’ emergency stay motion, the Court concluded that all four factors were easily met. The Court determined that petitioners were likely to succeed on the merits for numerous reasons. The decision cites Constitutional concerns relating to the Commerce Clause, the States’ police powers, and general federal separation of powers issues associated with Congressional delegations of authority. The decision questions OSHA’s conclusions and its ability to meet the requirements of the Occupational Safety and Health Act (“Act”) for exercising emergency powers, including the assertions of workplace exposures to “grave danger,” whether an “emergency” exists given the passage of time and availability of vaccines, and whether an airborne virus fits within the statutory meaning of “substances or agents determined to be toxic or physically harmful.” The

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Court went on to criticize the ETS as being overbroad because it treats all covered employers and employees equally, despite differences in working conditions, nature of employment, or personal vulnerabilities to the virus. At the same time, the Court observed that the ETS is underinclusive because it affords no protection to vulnerable workers in workplaces with 99 or less employees. It went on to comment that “[t]he underinclusive nature of the [ETS] implies that the [ETS]’ true purpose is not to enhance workplace safety, but instead to ramp up vaccine uptake by any means necessary.”

Throughout the decision, the Court referenced and quoted various policies and statements previously issued by both OSHA and the Biden Administration, which in the Court’s view contradicted positions now being taken with respect to the ETS. The Court also raised concerns about OSHA applying the Act “in a novel manner, [that] imposes \$3 billion in compliance costs upon employers, involves broad medical considerations that lie outside of OSHA’s core competencies, and purports to definitively resolve one of today’s most hotly debated political issues.”

The Fifth Circuit further wrote that denying a stay would cause irreparable harm to employees because the ETS “threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their job(s).” Similarly, employers will suffer the “business and financial effects of a lost or suspended employee, compliance and monitoring costs associated with the [ETS], the diversion of resources necessitated by the [ETS], or by OSHA’s plan to impose stiff financial penalties on companies that refuse to punish or test unwilling employees.” By contrast, the Court recognized that OSHA would suffer no harm from granting the stay. And overall, the imposition of a stay would be in the public interest to avoid economic uncertainty and workplace strife, and to ensure that constitutional structure and the liberty of individuals to make personal decisions is maintained.

While the Fifth Circuit was the first Circuit Court to engage on issues surrounding the enforceability of the ETS, similar legal challenges to the ETS were filed in all twelve Circuits of the United States Court of Appeals within a matter of days. The filing of substantially similar cases in multiple jurisdictions triggered a procedural rule and mechanism for consolidation of the cases by the Judicial Panel on Multidistrict Litigation into a single Circuit Court. Under that procedure, a Circuit Court is selected by a random “lottery” among the Circuits where cases are pending. The “winning” Circuit Court would then take over the handling of the cases and conduct the more fulsome examination of the petitions on the merits to determine whether a permanent injunction should be issued.

The much-anticipated multi-district lottery occurred on November 16th, and the Sixth Circuit was selected as the winner. A panel of three Sixth Circuit judges will be appointed to hear the matter, and cases pending in other jurisdictions will be transferred to the Sixth Circuit. While the Sixth Circuit may have won the lottery, the dust is far from settled. The Sixth Circuit will have the power to extend or vacate the Fifth Circuit’s stay, which could prompt a new round of motions seeking to dissolve it.

In the meantime, and in light of the Fifth Circuit’s stay, OSHA has seemingly disengaged on its implementation and enforcement of the ETS for the time being, as reflected by the following public notice posted to its website:

On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay OSHA’s COVID-19 Vaccination and Testing Emergency Temporary Standard, published on November 5, 2021 (86 Fed. Reg. 61402) (“ETS”). The court ordered that OSHA “take no steps to implement or enforce” the ETS “until further court order.” While OSHA remains confident in its authority to protect workers in emergencies, OSHA

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has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.[3]

Employers within the scope of OSHA’s ETS should be prepared to comply with the ETS if the stay is lifted, but can take a breather on rolling out programs and compliance strategies for the moment. Of course, the state of affairs surrounding enforcement of the ETS will likely continue to evolve rapidly, and employers should continue to monitor the situation for further developments.

If you have questions about OSHA’s vaccination ETS or COVID-19 guidance, mandatory vaccination requirements, or other general questions about OSHA compliance, please contact [Jason Markel](#) (716.848.1395), [Glen Doherty](#) (518.433.2433), [Charles H. Kaplan](#) (646.218.7513), or any member of our [Labor & Employment Practice](#).

[1] *BST Holdings, L.L.C. v. Occupational Safety and Health Administration*, Case No. 21-60845 (5th Circuit) (Order entered November 12, 2021).

[2] The four factors are: (1) likelihood of success on the merits; (2) whether the applicant will be irreparably injured in the absence of a stay; (3) whether issuance of the stay will substantially injure other parties; and (4) where the public interest lies.

[3] <https://www.osha.gov/coronavirus/ets2>