

SIXTH CIRCUIT DISSOLVES INJUNCTION AND STAY OF ENFORCEMENT OF OSHA'S EMERGENCY TEMPORARY STANDARD ON COVID-19 VACCINATION AND TESTING

Hodgson Russ OSHA and Labor & Employment Alert
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A divided three-judge panel of the United States Court of Appeals for the Sixth Circuit has dissolved the preliminary injunction entered by the Fifth Circuit on November 6, 2020^[1] that temporarily enjoined the Occupational Safety and Health Commission (“OSHA”) from enforcing its Emergency Temporary Standard on COVID-19 Vaccination and Testing (“ETS”).

As we [previously reported](#), following a multi-state lottery, cases challenging the ETS that were pending in multiple Circuit Courts were transferred and consolidated in the Sixth Circuit for disposition. On December 17, 2021, the Sixth Circuit panel released a 57-page decision consisting of an opinion (by Circuit Judge Jane B. Stranch), a concurrence (by Circuit Judge Julia Smith Gibbons), and a dissent (by Circuit Judge Joan Larsen) that nets a 2-1 majority in favor of dissolving the injunction in response to an emergency motion filed by OSHA. Earlier in the week, the Court by 8-8 vote denied motions requesting that all sixteen Circuit Court judges hear and decide the matter *en banc*.

Judge Stranch’s lengthy 33-page opinion considered various statutory and regulatory provisions surrounding the scope of OSHA’s authority to regulate employee health and safety in the context of biological agents, toxic substances, and other disease-causing agents. After noting that many diseases addressed by OSHA regulations are not unique to workplace circumstances, and OSHA has exercised authority with respect to viruses and other infectious diseases, she concluded that:

Longstanding precedent addressing the plain language of the Act, OSHA’s interpretations of the statute, and examples of direct Congressional authorization following the enactment of the OSH Act all show that OSHA’s authority includes protection against infectious diseases that present a significant risk in the workplace, without regard to exposure to that same hazard in some form outside the workplace.^[2]

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Having found it likely that OSHA did not exceed its authority in issuing the ETS, Judge Stranch was also swayed by OSHA's position, as outlined in the Preamble to the ETS, that an "emergency" situation remains notwithstanding the passage of time, and that "FDA-approved vaccines, more widespread testing capabilities, the recognized Delta variant and the possibility of new variants [citing *Omicron*] support OSHA's conclusion that the current situation is an emergency, and one that can be ameliorated by agency action." She further concluded that OSHA was likely to establish that COVID-19 presents a "grave danger" to workers who face risks of severe illness and death that may result from transmission of the virus in the workplace, as evidenced the death of more than 800,000 people in the United States, recent outbreaks and spiking infection rates in various locations and workplaces across the country, and virus mutation that has already revealed a more severe and more readily transmissible *Delta* variant. Judge Stranch was also satisfied that OSHA had marshaled substantial evidence in support of its conclusion that the regulation was "necessary" to protect employees from these grave dangers, and that the benefits of the regulation would outweigh the costs of implementing the ETS. She concluded her analysis by rejecting various Constitutional challenges to the regulation as unlikely to succeed, and by finding that factors regarding irreparable injury weighed in favor of the government and public interest.

In the wake of the Sixth Circuit's decision, OSHA promptly updated its website with the following statement setting forth its enforcement activity plans and expectation that employers become compliant by January 10, 2022, except for testing requirements:

OSHA is gratified the U.S. Court of Appeals for the Sixth Circuit dissolved the Fifth Circuit's stay of the Vaccination and Testing Emergency Temporary Standard. OSHA can now once again implement this vital workplace health standard, which will protect the health of workers by mitigating the spread of the unprecedented virus in the workplace.

To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance.

Within hours of the release of the Sixth Circuit's decision, emergency motions were filed seeking to stay it. Thus, the Sixth Circuit's three-judge decision is unlikely to be the final word on a stay of enforcement. However, employers who planned to take a wait-and-see approach pending final judicial determination on the legality of the ETS can no longer rely upon the protection of an injunction against OSHA enforcement action as the legal challenges proceed. That may or may not change in the coming weeks. Unless and until a superseding court determination materializes, employers with 100 or more employees who are covered by the ETS will now need to invest the time and resources necessary to meet the primary January 10 compliance deadline, while also dealing with the backlash and uncertainties surrounding the reaction of their workforces.^[3]

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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](mailto:jmarkel@hodgsonruss.com) (716.848.1395), [Glen Doherty](mailto:gdoherty@hodgsonruss.com) (518.433.2433), [Charles H. Kaplan](mailto:ckaplan@hodgsonruss.com) (646.218.7513), or any member of our [Labor & Employment Group](#).

[1] *BST Holdings, LLC v. Occupational Safety & Health Admin.*, 2021 WL 5166656 Case No. 21-60845 (5th Cir., Nov. 6, 2021), and *adhered to at* 17 F.4th 604 (Nov. 12, 2021).

[2] *In Re: MCP No. 165, Occupational Safety and Health Administration, Interim Final Rule: COVID-19 Vaccination and Testing; Emergency Temporary Standard* 86 Fed. Reg. 61402, Case Nos., 21-7000, et. al., at 13 (6th Cir. Dec. 17, 2021).

[3] <https://www.osha.gov/coronavirus/ets2> (December 18, 2021).