

Considerations for Large Employers Caught in the Middle of the OSHA ETS Litigation

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11.17.2021

On November 5, 2021, the highly anticipated OSHA COVID-19 **Vaccination and Testing Emergency Temporary Standard (ETS)** was issued. One day later, November 6, 2021, the U.S. Court of Appeals for the Fifth Circuit **temporarily enjoined** the implementation of the ETS, based on a lawsuit questioning the viability of the ETS. On November 12, 2021, the Fifth Circuit wrote a **stinging opinion** upholding its earlier decision following an expedited judicial review. Since the issuance of the ETS, over 30 lawsuits have been filed challenging the ETS. The lawsuits will be consolidated in Multi-District Litigation (MDL) and the Sixth Circuit Court of Appeals was chosen by lottery on November 16, 2021, to consider the merits of the cases and decide whether to dissolve or uphold the Fifth Circuit's injunction for the tenure of the case. Even then, the U.S. Supreme Court will likely have the last say on the matter. If the Sixth Circuit upholds the Fifth Circuit's stay, expect OSHA to ask the Supreme Court to lift the stay while the challenges are heard on the merits. Conversely, if the Fifth Circuit's stay is overturned, expect the mandate challengers to ask the Supreme Court to re-impose the stay.

Though OSHA has currently suspended activities related to the enforcement of the ETS, pending developments in litigation, we encourage employers to carefully consider their options. Keep in mind that the stay issued by the Fifth Circuit is temporary and can be lifted by the Sixth Circuit without much in the way of advanced notice. While a "wait and see" approach may work out in the end, employers should keep an eye on

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developments to avoid the risk of being caught flat-footed. There is no guarantee that OSHA would adjust the deadlines if it is ultimately permitted to enforce the ETS.

For purposes of complying with the ETS or preparing a contingency plan, employers with 100 or more employees must follow strict vaccination and testing policies within their workplace and have a written policy stating the same and giving notice to employees. The ETS' first deadline was originally December 6, 2021. While this deadline is not currently in effect due to the stay, employers need to be aware that the stay could be lifted soon depending on the decision of the Sixth Circuit in the MDL. As it stands now, employers subject to the ETS may be required to meet the following requirements by December 6, 2021 (unless OSHA is able to implement the ETS, but decides to move the date to accommodate the delay):

1. Draft, implement, and enforce a written mandatory vaccination policy, which, at the employer's option, may include weekly testing if an employee is not fully vaccinated or has a religious or disability related exemption from the vaccination requirement.
2. Determine the vaccination status of its employees and maintain a roster of the same.
3. Provide Paid Time Off (PTO) for time taken to receive the vaccination (up to four hours) and recovery from any reaction to the vaccine (up to two days).
4. Remove COVID-19 positive employees from the work environment until they meet certain "return to work" criteria.
5. Require face coverings be worn by all employees who are not fully vaccinated when indoors or in isolated areas with other people.
6. Provide notice to employees of the ETS, the benefits of being vaccinated, the anti-retaliation and non-discrimination provisions, and notice that providing false vaccination cards or testing results could result in criminal penalties.

By January 4, 2022, employers subject to the ETS must cause employees who are not fully vaccinated to undergo weekly testing or test within seven days before returning to work (if away from the workplace for a week or longer). Over-the-counter antigen testing is acceptable, but it must be observed by the employer or an authorized telehealth proctor. Employers may require employees to pay for the testing pursuant to the ETS. However, accommodation requirements, state law, or collective bargaining issues may require the employer to pay for the tests and the time spent in testing and travel to and from the testing site.

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Laner Muchin is dedicated to providing practical, legal advice for your workplace during this ever-changing regulatory landscape. Here is a **link** to a presentation hosted by Laner Muchin attorneys **Peter Gillespie** and **Brian Jackson** which addresses vaccine policies in the workplace and offers initial thoughts and reactions to the ETS. Employers are advised to review the resources on OSHA's **website** related to the ETS which include useful FAQs, fact sheets, and model policies.

Given the ever changing nature of the status of OSHA's ETS, employers should seek counsel regarding the options applicable to their specific business needs and workforce. Please contact your Laner Muchin servicing attorney for questions on how your organization should navigate this complicated matter.