

Sixth Circuit Court of Appeals Reinstates OSHA ETS

December 20, 2021

WHAT: On December 17, 2021, the United States Court of Appeals for the Sixth Circuit dissolved the stay of the Occupational Health and Safety Administration's Emergency Temporary Standard (OSHA and the ETS) previously ordered by the Fifth Circuit Court of Appeals. As we discussed in previous Alerts, the Fifth Circuit granted a preliminary injunction that temporarily halted the implementation and enforcement of the ETS, and all of the challenges to the ETS were consolidated for review by the Sixth Circuit following a multi-district litigation lottery in November. The Sixth Circuit's decision to dissolve the stay has already led to several petitions for review to the U.S. Supreme Court. The Supreme Court might elect not to review the merits of the Sixth Circuit's decision and could allow the dissolution of the stay to stand and implementation and enforcement of the ETS to proceed.

The most straightforward summary of the current state of the litigation is that the ETS is back in effect, though with extended timelines, and covered employers must now take steps to ensure that they understand what is required of them and communicate effectively with their employees.

IMPACT ON INDUSTRY: On December 18, 2021, OSHA announced that it will not issue citations for noncompliance with the procedural requirements of the ETS before January 10, 2022, and will not issue citations for noncompliance with the ETS's vaccination requirements before February 9, 2022, so long as employers are making a good faith effort to comply.

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Employers with 100 or more employees nationwide should immediately begin or resume working with their counsel to determine whether the ETS covers their workplaces and employees, consider developing compliance training programs for managers, and deliver information about company policies to employees as required under the ETS.

Employers with covered workplaces should begin implementing plans to accomplish the following no later than January 10, 2022:

- Finalize and publish a COVID-19 vaccine policy requiring covered employees without an accommodation to be fully vaccinated or to choose between vaccination and weekly testing.
 - The policy should provide for up to four hours of paid leave per dose for employees obtaining a first or second dose of the vaccine (note that employers are not required to provide leave for employees obtaining boosters) and permit a “reasonable amount of time” (i.e., up to 2 days) of paid leave for recovery from vaccine side effects.
 - The policy should also require employees and visitors who are not fully vaccinated to wear face masks at all times (unless isolated in a closed office with four walls and a ceiling).
- Distribute and publish the following notices:
 - Notice of the requirements of the ETS and the policies the employer has implemented to comply with it.
 - A copy of a publication from the Centers for Disease Control & Prevention titled “Key Things to Know About COVID-19 Vaccines.”
 - Notice of employees’ rights under the whistleblower provision of the OSH Act and section 1904.35 (b)(1)(iv) of the recordkeeping regulation, which prohibit discrimination or retaliation for exercising their rights under the ETS, engaging in activities required by the ETS, filing a health and safety complaint, or reporting work-related injuries.
 - Notice of the criminal provisions in the OSH Act and federal law, which provide for criminal penalties related to knowingly supplying false statements or documents.
- Finalize a Vaccination Roster (i.e., obtain proof of vaccination to confirm who is and who is not vaccinated within their covered workforce).

By February 9, 2022, covered employers must require all covered employees to comply with the employer’s vaccination or testing policy (i.e., provide proof that they are fully vaccinated or, if permissible under the employer policy, submit to weekly testing).

State Law Conflicts

Several states recently passed laws, or have undertaken similar measures, prohibiting or limiting vaccine mandates and employers’ ability to inquire about employee vaccination status. Employers must be aware of state law conflicts with the ETS and consult with their counsel concerning how best to proceed.

Status of Other Vaccine Mandates

The OSHA ETS is not the only federal vaccination mandate currently on the books. Employers must continue to ensure that they understand the entire landscape to navigate it appropriately.

The Centers for Medicare and Medicaid Services (CMS) COVID-19 vaccination mandate for certain healthcare companies has been enjoined in approximately half of the United States and cleared for enforcement in the other half. Notably, the OSHA ETS does not exempt employers or workplaces covered by the CMS mandate. Accordingly, employers need to review their potential obligations under the CMS mandate and the ETS with counsel.

Executive Order (EO) 14042 (also known as the federal contractor vaccine mandate) was recently enjoined nationwide by a Georgia federal court. The OSHA ETS exempts workplaces that are covered by the federal contractor vaccine mandate from compliance with the ETS. Still, employers must carefully review their workforce with counsel to understand whether the ETS may cover a specific workplace while any injunction of EO 14042 is in effect.

Wiley will continue to provide updates on significant developments concerning the vaccination mandate litigation, implementation, and enforcement.

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