

Sixth Circuit Lifts Stay on OSHA's Vaccine-or-Test Rule, Putting ETS Requirements Back in Effect

by Jillian Kornblatt

Litigation Update

On December 17, 2021, a three-judge panel for the Sixth Circuit Court of Appeals (with one judge dissenting) lifted the nationwide temporary stay of the Occupational Health and Safety Administration's (OSHA) Emergency Temporary Standard (ETS) for large employers previously entered by the Fifth Circuit Court of Appeals. The panel held that "OSHA has long asserted its authority to protect workers against infectious diseases," and "[g]iven OSHA's clear and exercised authority to regulate viruses, OSHA necessarily has the authority to regulate infectious diseases that are not unique to the workplace." In rejecting the Fifth Circuit's holding that the ETS is an enormous and transformative expansion of OSHA's authority to regulate workplace health and safety, the Court held, "[t]he ETS is not a novel expansion of OSHA's power; it is an existing application of authority to a novel and dangerous worldwide pandemic."

The panel disagreed with the Fifth Circuit's conclusion that the ETS was not necessary because COVID-19 does not present a true emergency in the workplace, finding such a conclusion has "no foundation in the record and law and ignores OSHA's explanations." In support of that argument, those challenging the ETS previously pointed out that if a true workplace emergency existed, OSHA would have enacted the ETS sooner. The panel rejected that logic as well, finding, "to hold that because OSHA did not act previously it cannot do so now only compounds the consequences of the Agency's failure to act." Further, that "COVID-19 has continued to spread, mutate, kill, and block the safe return of American workers to their jobs. To protect workers, OSHA can and must be able to respond to dangers as they evolve."

The panel also held that "OSHA is not required to investigate every business to show that COVID-19 is present in each workplace nor is it required to prove that every worker will experience the same risk of harm."

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Potential Applicability to Additional Employers

As we previously summarized, Centers for Medicare & Medicaid Services (CMS) issued an interim final rule (IFR) on November 4, 2021, requiring the COVID-19 vaccine as a condition of receipt of Medicare or Medicaid funds. To date, the CMS IFR has been enjoined in 25 states (per orders entered by a federal court in Missouri and the Fifth Circuit Court of Appeals). In addition, a federal court in Georgia enjoined the September 9, 2021, Executive Order mandating vaccinations for private employees work in connection with federal contracts was nationwide on December 7, 2021.

When OSHA initially rolled out the ETS, it clarified the applicability of the various federal vaccine mandates, stating that the ETS did not apply to the following employers:

- Workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and subcontractors
- Settings where any employee provides healthcare services or healthcare support services when subject to the requirements of the Healthcare ETS (§ 1910.502)
- Workplaces of employers who have fewer than 100 employees in total
- Public employers in states without State Plans.

In addition, FAQs accompanying the CMS IFR explained that facilities covered by both the IFR and OSHA's ETS for large employers should abide by the requirements established in the IFR.

Given that many of these mandates are not being enforced, at least temporarily, that means the compliance landscape has changed for some employers.

Specifically, healthcare facilities with 100 or more employees subject to the CMS IFR and operating in one of the 25 states where the CMS IFR is currently enjoined are now required to comply with the OSHA ETS. Likewise, employers with 100 or more employees that have federal contracts or subcontracts would be well-advised to comply with the OSHA ETS while the stricter contractor mandate is enjoined.

New Deadlines

The ETS originally mandated that employers have plans in place to comply with the order by January 4, 2022. However, after the nationwide stay, OSHA halted enforcement. OSHA's website now states:

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.

That means that as of today, employers subject to the ETS are expected to be making

“reasonable, good faith efforts” to comply with the ETS, and have a grace period until January 10, 2022 for all requirements except for weekly testing and until February 9, 2022 for regularly weekly testing before OSHA begins its enforcement efforts.

An Unknown Legal Future

The matter is not settled. The plaintiffs in the lawsuit immediately appealed the Sixth Circuit’s decision to lift the nationwide stay, asking the United States Supreme Court to place their appeal on the Court’s emergency docket. Justice Brett Kavanaugh is assigned to review emergency appeals from the Sixth Circuit, but he has the authority to refer the case to the entire Supreme Court. On October 29, 2021, Justice Kavanaugh joined Justice Amy Cony Barrett in rejecting an emergency appeal challenging Maine’s vaccine mandate for healthcare workers. In rejecting the emergency appeal, Justice Coney Barrett stated:

When this Court is asked to grant extraordinary relief, it considers, among other things, whether the applicant “is likely to succeed on the merits.” *Nken v. Holder*, 556 U. S. 418, 434 (2009). I understand this factor to encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case. *See, e.g., Hollingsworth v. Perry*, 558 U. S. 183, 190 (2010) (per curiam); *cf.* Supreme Court Rule 10. Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument. In my view, this discretionary consideration counsels against a grant of extraordinary relief in this case, which is the first to address the questions presented.

It is unknown whether the Supreme Court will intervene and if so, what that that intervention might look like.

Given the status of the ETS, we once again advise that large employers move forward with plans to comply with the ETS and be ready to comply by the end of the respective OSHA enforcement grace periods.