

What's Next for OSHA's COVID-19 Emergency Temporary Standard?

by Jillian Kornblatt

On November 12, 2021, the Fifth Circuit Court of Appeals reaffirmed its stay pending judicial review of the Occupational Safety and Health Administration's ("OSHA") COVID-19 Vaccination and Testing Emergency Temporary Standard ("ETS") in a lawsuit by several private companies and other groups challenging the ETS. The challengers requested a stay pending the outcome of the litigation. The Fifth Circuit case was not the only challenge to the ETS. As of November 12, there were 34 lawsuits in all 12 of the nation's federal circuits challenging the legality of the ETS. As a result, under a procedural mechanism that allows similar cases to be consolidated and heard by one federal circuit, the cases went to a random lottery for assignment. On November 16, 2021, the ETS challenges were assigned by the lottery to the Sixth Circuit Court of Appeals.

In response to the stay, OSHA announced:

While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.

That means that as of today, employers are not under any obligation to comply with the ETS's December 5, 2021 and January 4, 2022 deadlines. However, employers should beware that this pause on implementation does not mean that the ETS has been struck down or that OSHA will rescind or decline to enforce it. Because the Sixth Circuit will determine whether to maintain, lift, or modify the Fifth Circuit's stay, the ETS could be reinstated at any time. To date, the Sixth Circuit has not issued a briefing schedule, nor is there any information available regarding the timeline for its decision. In addition, any decision issued by the Sixth Circuit will almost certainly be appealed to the Supreme Court of the United States. Thus, employers should expect that the Supreme Court will make the final decision regarding the OSHA ETS.

Even with the legal challenges, covered employers would be wise to prepare required

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policies and practices, including the logistics of processing employee requests for medical and religious exemptions, even if those plans are then put on hold. Because a decision could be issued at any time, and the ETS is immediately enforceable, it is possible that employers will be required to comply with the ETS on a tight schedule. More information about employer obligations under the ETS is available [here](#).