

OSHA ETS Vaccine Mandate for Large Employers: Sixth Circuit Decision Further Muddies the Waters

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Late in the day on Friday, December 17, 2021, the United States Court of Appeals for the Sixth Circuit (the “Sixth Circuit”) breathed new life into the Occupational Safety and Health Administration’s emergency temporary standard (for employers with 100 or more employees) mandating employee vaccinations or weekly testing (the “ETS”). As we previously reported, the Sixth Circuit was chosen through a lottery process to be the court responsible for reviewing the stay of the ETS that was issued by the United States Court of Appeals for the Fifth Circuit on November 12, 2021. Friday’s decision by the Sixth Circuit means that, at least for the time being, the Occupational Safety and Health Administration (“OSHA”) is cleared to move forward with enforcing the ETS against large employers as originally drafted.

This decision comes at a time when the country continues to struggle with the impact of the COVID-19 pandemic and the emergence of new variants, such as the Omicron variant. Experts have opined that the Omicron variant, although perhaps not as deadly as previous COVID-19 variants, is more easily transmissible. The Sixth Circuit identified these ongoing struggles as justification for the satisfaction of applicable legal criteria for emergency action by OSHA.

OSHA has been quick to respond – issuing a news release on Saturday, December 18, 2021 – that provides some level of grace period for affected employers to come into compliance. Specifically, OSHA has noted:

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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.

OSHA's full release can be accessed here: <https://www.dol.gov/newsroom/releases/osha/osha20211218>

In light of this development, affected large employers should continue moving forward with the implementation of plans and policies that bring the employer into compliance with the ETS. Although for employers acting in good faith there is a "grace period" for enforcement beyond the original deadline of January 4, 2022 (per the OSHA statement above), employers likely have limited time and bandwidth to further these policy implementations as the holiday season quickly approaches.

That said, employers should also note that the situation remains fluid. Advocacy groups have already appealed to the Supreme Court of the United States for intervention and many state attorneys general have publicly stated their intention to ask the nation's highest court to reinstitute the stay on the ETS. At this point, it remains unclear whether or when the court will agree to opine on the ETS.

Please note that the decision by the Sixth Circuit only relates to the ETS that applies to employers with 100 or more employees. This decision does not effect the current enforceability/applicability of the CMS Rules requiring vaccination of Staff members against COVID-19 for various health care providers nor the vaccine mandate for federal contractors.

As always, the Koley Jessen Employment, Labor, and Benefits Department continues to monitor the developments on the COVID-19 front and will provide additional guidance as needed. Employers with questions are welcome to contact a member of our Department with any questions they may have about this ETS or other COVID-19-related workplace matters.