

OSHA Mandatory Vaccination Rule for Large Employers is Back in Force...For Now

The controversial Emergency Temporary Standard (ETS)—the emergency “mandatory vaccination” rule published by the Occupational Safety and Health Administration (OSHA) on November 5 and subsequently stayed by a federal appeals court only a day later—is back in force, after the stay was lifted late on December 15 by a decision of the United States Sixth Circuit Court of Appeals. (For our original legal alert regarding the staying of the ETS rule, click [here](#).) The lifting of the stay sets the stage for a potential showdown over the rule in the Supreme Court—but for now, leaves many large employers with limited time to meet OSHA’s revised compliance deadlines.

By a 2-1 opinion, the Sixth Circuit rejected the various reasons that had been used to impose the stay and stop the ETS from taking effect. Where the staying court had held that OSHA acted outside of the traditional scope of its authority in promulgating the rule, the Sixth Circuit panel disagreed, finding that OSHA had a history of regulating infectious disease agents, even those that—like Covid—are not confined solely to the workplace. Because the ETS was in line with the traditional scope of the agency’s authority, the court continued, there was no need for Congress to weigh in with an explicit authorization, as the stay asserted.

Moreover, the Sixth Circuit found, the situation met all the requirements for the

issuance of an emergency regulation: namely, that Covid was an “emergency” despite OSHA not having issued any emergency rules about it for more than a year into the pandemic; that Covid created a “grave danger” to the workplace, even if it did not impact every workplace evenly or in the same way; and that the ETS was “necessary,” because OSHA had tried other, alternative means (such as advisory guidance) to address Covid in the workplace before moving on to the emergency “mandatory vaccination” rule.

The Sixth Circuit’s opinion leaves large employers—many of whom had delayed their compliance efforts, pending the outcome of court challenges—in a state of uncertainty over what measures to take next. As of December 17, OSHA has advised that the agency will not issue citations for violations of the ETS until at least January 10—and will not issue citations for the violations of the ETS’ Covid-testing protocols for unvaccinated employees until at least February 9, 2022, if employers are acting in “good faith” to achieve compliance. (The original deadline imposed by the ETS for employer compliance was January 4, 2022.) However, the Supreme Court could intervene to re-issue a stay of the ETS, or even decide the ultimate fate of the OSHA rule, before the agency’s revised deadlines arrive.



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The rule furthermore leaves public-sector employers in states like New York—where a “state plan” with OSHA requires that public-sector employees be covered by regulations at least as effective as the federal agency’s, essentially requiring the state to adopt identical measures to the ETS—in even more uncertainty over the standards their state will adopt, and the deadline for their compliance with the measures in the ETS.

Because of the limited time frame remaining for compliance—even with the extensions provided by OSHA—affected employers may wish to strongly consider taking compliance measures with the ETS’ requirements now, including promulgating their vaccination (or testing) policies under the ETS; collecting and organizing required information regarding vaccination status; and disseminating information about ETS-related policies and procedures to employees. (For a summary of the ETS rule’s requirements for large employers, see our original legal alert [here](#).) Affected employers may also wish to reaffirm that they have designated and informed points of contact, ready to respond to OSHA requests for information, in the event that the agency begins aggressive enforcement of the ETS after the January and February deadlines have passed.