

Bidding Time While OSHA'S ETS Is On Hold

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On November 6, 2021, the Fifth Circuit stayed the implementation of OSHA's Emergency Temporary Standard ("ETS") requiring employers with 100 or more employees to mandate vaccination or implement COVID testing and masking requirements. In response, OSHA stated it is suspending its enforcement of the ETS "pending future developments in the litigation."

The case was consolidated with similar cases in the Sixth Circuit on November 16, 2021. Given upcoming deadlines in the case, it is unlikely that the Sixth Circuit will decide whether to lift the stay of the ETS before mid-December, which is after December 6th (the ETS's deadline for implementation of a vaccination policy and tracking of vaccination status). However, the Court could conceivably act on the stay before January 4th (the ETS's deadline for all employees to be vaccinated and/or subject to testing requirements).

The uncertainty about whether the ETS will go into effect has left many employers debating what to do now. If the ETS is upheld, employers – particularly large ones – will have significant logistical challenges to work through, possibly in a short amount of time, to be compliant. For this reason, employers might consider engaging in some preliminary planning, at least with respect to the ETS's more significant requirements, to avoid a time crunch later.

Here are some issues for consideration in the planning process:

Employees' vaccination status must be determined.

- How will employees be queried?
- How will that information be transmitted and stored?

Employers will have to choose between a mandatory vaccination policy or one that allows employees to opt out of vaccination if they test weekly.

- Which option is best for the employer?
- Who will pay for weekly testing (i.e., will the employer pay for the tests)?
- Will the employer require PCR or antigen tests?

- Where or how will employees get tested (i.e., will a particular lab or brand of test be required)?
- How will they submit their results?
- How will the employer monitor whether unvaccinated employees test weekly and what their results are?

Employers will have to implement certain protocols for removal of COVID positive employees from work as well as for reporting of work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours.

- How will managers be trained on these sorts of obligations (so that they report what they know to the employer)?
- Who will make these reports on behalf of the employer?

We expect that the Sixth Circuit will rule on the ETS within the next few weeks, so please stay tuned for more information.

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