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## OSHA Suspends Enforcement of ETS Following Fifth Circuit Stay

On November 16, 2021, the Occupational Safety and Health Administration (“OSHA”) [announced](#) it would suspend all implementation and enforcement efforts related to its Emergency Temporary Standard (“ETS”) published in the Federal Register on November 5, in which OSHA required large employers (100 employees or more) to develop and enforce a mandatory COVID-19 vaccination policy or permit weekly testing and use of face coverings in the workplace in lieu of vaccination. Our prior client alert discussing the ETS is available [here](#).

OSHA’s announcement follows a [temporary stay](#) issued by the U.S. Court of Appeals for the Fifth Circuit on November 12, 2021, which called into question statutory and constitutional issues related to the ETS. In granting the stay, the Fifth Circuit noted, “courts have uniformly observed that OSHA’s authority to establish emergency temporary standards . . . is an ‘extraordinary power’ that is to be ‘delicately exercised’ in only certain ‘limited situations.’” Rather than a delicate exercise of power akin to “a delicately handled scalpel,” the Fifth Circuit compared the ETS to “a one-size-fits-all sledgehammer that makes hardly any attempt to account for differences in workplaces.”

The Fifth Circuit’s temporary stay will remain in place pending judicial review of underlying motions for a permanent injunction. Although OSHA has suspended its implementation and enforcement of the ETS pending future developments in the litigation, it also “remains confident in its authority to protect workers in emergencies.”

Thirty-four lawsuits challenging OSHA’s ETS have been consolidated, and the U.S. Court of Appeals for the Sixth Circuit was randomly selected to hear those cases. At this time, the Sixth Circuit has not ruled on the ETS, but a decision is expected in the coming weeks.

In light of OSHA’s announcement, employers are no longer required to meet the compliance deadlines set by the ETS. The legal challenges surrounding the ETS, however, do not impact compliance with President Biden’s Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors, or with the recent interim final rule for the Centers for Medicare and Medicaid Services,

both of which remain intact. Our client alert discussing vaccination guidance for federal contractors is available [here](#).

If you have questions about your organization's management of COVID-19, including vaccination requirements or compliance with OSHA's workplace safety measures, please contact a member of Kutak Rock's [OSHA Compliance & Workplace Safety Group](#) or [National Employment Law Group](#). You may also visit us at [www.KutakRock.com](http://www.KutakRock.com).

