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Sixth Circuit Lifts Stay of OSHA ETS for Large Employers

The Sixth Circuit issued an [opinion](#) on December 17, 2021 reversing the stay of the Occupational Safety and Health Administration's ("OSHA") Emergency Temporary Standard ("ETS") requiring employers with 100 or more employees to implement a mandatory COVID-19 vaccination policy or weekly COVID-19 testing. As [we previously reported](#), enforcement of the ETS was blocked by the Fifth Circuit when it granted an injunction and implemented a nationwide stay of the ETS. When lawsuits across the country were consolidated within the Sixth Circuit, including the lawsuit in which the Fifth Circuit had issued the stay, OSHA sought and was granted reconsideration of the Fifth's Circuit's decision. The three-judge panel issued a split decision reinstating the ETS.

Congress established OSHA "to assure safe and healthful working conditions for the nations' work force and to preserve the nation's human resources." However, OSHA can only issue an ETS when it determines emergency action is necessary to prevent "grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." The original Fifth Circuit opinion focused heavily on the specific language of OSHA's authority, but the Sixth Circuit panel took a broader interpretation.

The Sixth Circuit noted that "OSHA can and must be able to respond to dangers as they evolve." In so holding, the judges issuing the majority's decision cited OSHA's history of combatting transmission of HIV, hepatitis B, and hepatitis C, in addition to the OSH Act, Congressional actions, and OSHA's "long asserted authority to protect workers against infectious diseases." The majority noted OSHA's authority is not limited only to "hard hats and safety goggles." In addition, it found that doctrine originally applied by the Fifth Circuit was not applicable where OSHA's ETS did not expand its regulatory authority. It further found OSHA acted within its discretion in waiting to issue the ETS until after the Federal Drug Administration approved the COVID-19 vaccines. Moreover, because OSHA is not required to conduct a cost/benefit analysis before issuing an ETS, the majority chose not to engage in evaluation of the studies OSHA relied upon when enacting the ETS.

In response to the Sixth Circuit opinion, OSHA issued a statement on December 18 announcing that it will not issue citations for noncompliance until January 10 at the earliest. Moreover, citations for noncompliance with the testing requirements will not issue until after February 9. The exercise of enforcement discretion, however, will be based on employers being able to demonstrate they engaged in good faith efforts to comply with the ETS.

Several petitioners have already filed an emergency appeal of the Sixth Circuit's ruling to the United States Supreme Court. That appeal will be reviewed by Justice Brett Kavanaugh, who is the justice assigned to the Sixth Circuit. Justice Kavanaugh has set a 4 p.m. December 30 deadline for the Biden administration to respond to the appeals that have been filed. Justice Kavanaugh may render a decision on his own, but he could, in his discretion, seek a review by the full Court.

Employers who fall within the scope of the ETS should continue their efforts to comply with the ETS while monitoring the status of the appeal to the Supreme Court. Before January 10, employers should obtain employee vaccination statuses, create a roster of vaccination status, prepare and roll out a written policy and accommodation process, and meet all other non-testing requirements imposed by the ETS. Employers who choose to offer a testing option will need to start testing employees no later than February 9.

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.

