

PUBLICATION

OSHA's "Vaccine or Test" ETS Reinstated: Next Steps Explained

Authors: Zachary B. Busey, Mary Katherine Campion
December 21, 2021

On December 17, 2021, the Sixth Circuit Court of Appeals dissolved the stay previously placed on OSHA's "Vaccine or Test" ETS by the Fifth Circuit. As we summarized in our previous alerts, the ETS was published on November 5, 2021 and mandates that private employers with 100 or more employees require all employees be fully vaccinated against COVID-19 or be required to wear face coverings and undergo weekly testing. The ETS was met with an avalanche of lawsuits, and by November 6, the Fifth Circuit Court of Appeals issued a preliminary nationwide stay of the ETS. Because similar lawsuits challenging the ETS were filed in a number of circuits, specific procedural rules required the selecting of a single circuit to determine which circuit would ultimately decide the cases. On November 12, after additional briefing and arguments, the Fifth Circuit continued its preliminary stay, and ordered that OSHA take no steps to implement or enforce the ETS until further court order. On November 16, the Sixth Circuit Court of Appeals was selected to hear all legal challenges to the OSHA ETS. Shortly thereafter, the Biden Administration filed a petition to lift the stay imposed by the Fifth Circuit, and the matter was briefed by the parties.

A three-judge panel of the Sixth Circuit, in a 2-1 decision, granted the Biden administration's request to dissolve the Fifth Circuit's stay on OSHA's ETS on December 17, 2021. The panel included Judge Jane B. Stanch, Judge Julia Smith Gibbons, and Judge Joan Larsen, who issued a dissenting opinion. In an opinion authored by Judge Stanch, the panel determined that OSHA has satisfactorily "demonstrated the pervasive danger that COVID-19 poses to workers—unvaccinated workers in particular—in their workplaces." The panel found that the injuries asserted by the petitioners are "entirely speculative," and the costs of delaying implementation of the ETS are comparatively high. The panel also concluded that OSHA did not exceed its administrative authority in issuing the ETS. Interpreting OSHA's limited grant of administrative authority to address HIV and blood-borne pathogens to mean that OSHA also has authority to regulate other viruses, like COVID, the panel found that "[g]iven OSHA's clear and exercised authority to regulate viruses, OSHA necessarily has the authority to regulate infectious diseases that are not unique to the workplace. Indeed, no virus—HIV, HBV, COVID-19—is unique to the workplace and affects only workers. And courts have upheld OSHA's authority to regulate hazards that co-exist in the workplace and in society but are at heightened risk in the workplace."

The Sixth Circuit panel stated that it would not "second guess what [OSHA] considers a 'risk worthy of Agency action' because that 'is a policy consideration that belongs, in the first instance to [OSHA].'" The Sixth Circuit panel did not address how its decision would impact the timing of the ETS's vaccination and testing and requirements, which were originally set to go into effect December 6, 2021, and January 4, 2022, respectively. However, shortly after the Sixth Circuit issued its decision, OSHA issued updated guidance providing that covered employers must be in compliance with the vast majority of the ETS no later than January 10, 2022 (as opposed to the original deadline of December 6, 2021). Accordingly, by January 10, 2022, employers subject to the ETS will need to:

- have determined the vaccination status of their employees;
- start providing the ETS-required support for employee vaccination;
- start/continue requiring that unvaccinated employees wear face coverings in the workplace;

- institute the written vaccination/testing policy required by the ETS; and
- start/continue requiring employees to promptly inform them of any COVID-19 diagnosis or positive test result, among other obligations.

In addition, employers that choose to provide the testing option to unvaccinated employees (as opposed to mandating vaccination) must begin weekly testing in compliance with the specifics of the ETS no later than February 9, 2022. Immediately following the Sixth Circuit's decision, several petitioners filed an emergency applications with the United States Supreme Court requesting a stay of the Sixth Circuit's order dissolving the Fifth Circuit's stay of the ETS and seeking to reinstate the stay of the ETS pending judicial review by the Supreme Court.

The Supreme Court has docketed the emergency applications, and Justice Kavanaugh, as the circuit justice for the Sixth Circuit, has directed that responses to the emergency applications be filed by Thursday, December 30, 2021. Although it is free to do so, it is unlikely that the Supreme Court will rule on any of the emergency applications before this response deadline.

For now, private employers with 100 or more employees should begin taking steps to comply with the provisions of the ETS. Baker Donelson's Labor & Employment Team will be watching for developments in the coming weeks. For more information, please contact [Zachary Busey](#) or [Mary Katherine Campion](#) or any member of the Baker Donelson [Labor & Employment Team](#).