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Suspended: Implementation of OSHA's Vaccine Mandate for Large Employers

On November 12, 2021, in *BST Holdings, L.L.C. et al., v. Occupational Safety and Health Administration*, the U.S. Court of Appeals for the Fifth Circuit affirmed the initial temporary stay of the Occupational Safety and Health Administration's (OSHA) November 5, 2021 Emergency Temporary Standard (ETS). The ETS requires personnel of employers with 100 or more employees to receive a COVID-19 vaccination or take weekly COVID-19 tests and wear a mask. Enforcement of the ETS was temporarily stayed based on statutory and constitutional issues. Since the imposition of the temporary stay and with pending lawsuits in all federal circuits challenging OSHA's ETS, the Sixth Circuit has been selected to review the Fifth Circuit decision and to adjudicate the issuance of a permanent injunction. Due to the Fifth Circuit's decision, OSHA has suspended implementation and enforcement of the ETS. The Sixth Circuit will likely issue a decision regarding the temporary stay by next week. Employers' decisions moving forward will depend on their circumstances, as discussed in the **Next steps** section of this alert.

The decision to stay OSHA's ETS

The Fifth Circuit criticized OSHA's promulgation of the ETS and characterized "any interest...in enforcing an unlawful (and likely unconstitutional) ETS" as "illegitimate." At the outset, the court emphasized that OSHA's authority to impose an ETS is "extraordinary" and should be "delicately exercised" in "emergency situations which require it."

The court found that the challengers were likely to succeed on the merits of their request for a permanent injunction of enforcement of the ETS because promulgation of the mandate was not lawfully enacted and exceeded OSHA's authority. The court based its decision on the following conclusions:

1. The airborne nature of the virus and its spread by individuals does not fulfill the threshold requirement that employees in all covered workplaces are exposed to COVID-19;
2. OSHA's assertion that the virus presents a grave danger to employees is:
 - a) overinclusive because the virus poses different levels of risk to different populations, including a low risk to the vaccinated population; and
 - b) underinclusive because it fails to include vulnerable employees in workplaces of less than 100 employees;
3. The ETS is not necessary to alleviate employee's exposure to a grave danger based on:
 - a) statements made by OSHA's leadership under the prior administration that the "general duty" clause and guidance sufficiently addressed the threat of COVID-19 in the workplace; and
 - b) by the ETS' omission of workplaces with less than 100 employees;
4. Implementation of the ETS likely exceeds the federal government's constitutional authority under the commerce clause and invades police authority reserved to the states;
5. The challengers were likely to suffer irreparable harm absent a stay, while OSHA would not suffer irreparable harm if the stay was imposed; and
6. The ETS does not serve the public interest.

Consequence of Fifth Circuit November 12 ruling

The stay imposed by the Fifth Circuit is effective immediately, and OSHA has suspended implementation and enforcement of the ETS. But the court's decision to impose a temporary stay is not the final ruling on the ETS.

Parties that oppose OSHA's ETS have filed lawsuits to enjoin the ETS in all federal circuits of the U.S. Court of Appeals. All pending lawsuits contesting OSHA's ETS have been consolidated and will be decided by the Court of Appeals for the Sixth Circuit, which was selected by a blind lottery, as required by the rules of the Judicial Panel on Multidistrict Litigation.

The Sixth Circuit will review and issue a decision to lift or uphold the Fifth Circuit's temporary stay of the ETS by early next week and could issue a decision within a few weeks on the merits of the legal challenges that seek to permanently enjoin the ETS. Future decisions issued by the Sixth Circuit are reviewable by the U.S. Supreme Court.

Next steps

[Back to the top](#)

Employers covered by the CMS Interim Final Rule or Executive Order 14042

The Fifth Circuit decision does not impact employers covered by the Centers for Medicare and Medicaid (CMS) Interim Final Rule regarding the COVID-19 vaccine mandate for healthcare workers and the vaccine mandate imposed on covered federal contractors and subcontractors under Executive Order 14042 (EO 14042). The compliance deadline for the vaccine mandate under EO 14042 is December 8, 2021, and January 18, 2022, to complete the primary vaccination series. The compliance deadline to complete the primary vaccination series under the CMS Interim Final Rule is December 6, 2021, and January 4, 2022. Consequently, employers subject to vaccine mandates under the CMS Interim Rule or under EO 14042 must comply with the applicable federal mandate and the respective deadlines.

Employers covered by OSHA's ETS

While OSHA has suspended its enforcement actions, the ETS deadlines remain unchanged (for now). Much of the heavy lifting that employers must undertake, such as training and record keeping, must occur before the initial December 4, 2021, compliance deadline.

Although we expect this case before the Sixth Circuit to move quickly, covered employers that are not subject to state laws that restrict activities related to vaccines should continue to adopt policies consistent with the ETS directives. If the Sixth Circuit lifts the temporary stay or the ETS is ultimately upheld and a permanent injunction is denied, employers will be required to comply with the ETS. At this time, employers should prepare for the possibility that the compliance deadlines will not change. Employers can subscribe to Husch Blackwell's Labor & Employment mailing list for timely updates about all future decisions and guidance regarding OSHA's ETS.

Employers located in states that restrict vaccine-related activities, should follow the guidance for multi-state employers provided below.

Employers with OSHA State Plans

Employers should follow the regulations imposed by their OSHA state plans in their state.

Multi-state employers

Multi-state employers should follow the varying regulations and deadlines in each state, including states that restrict vaccine-related activities, and account for these issues as they plan and implement their preferred policies. Although the ETS purports to preempt state and local laws addressing vaccination and masking restrictions, until the ETS is upheld (if it is), employers should consider and comply with state and local laws as they move their plans forward.

Employers who will not require the vaccine as a mandate due to the OSHA ETS litigation

Such employers should inform their employees that the vaccination will not be required as a mandate and direct employees to information on the OSHA website.

Contact us

If you have questions regarding the best course of action for your workplace as a result of the stay imposed on OSHA's enforcement of the ETS, contact Brian Hendrix, Rufino Gaytán, Courtney Steelman or your Husch Blackwell attorney.

Your comprehensive COVID-19 legal resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.