

WITH THE SIXTH CIRCUIT HAVING DISSOLVED THE OSHA ETS STAY, EMPLOYERS WITH 100 OR MORE EMPLOYEES FACE LOOMING DEADLINES TO IMPLEMENT MANDATORY “VAX OR TEST” POLICIES.

On December 17, 2021, the U.S. Court of Appeals for the Sixth Circuit dissolved the Fifth Circuit’s stay of the OSHA COVID-19 Emergency Temporary Standard (ETS), which imposes vaccinate or test requirements for private employers with 100 or more employees. Almost immediately afterward, a coalition of trade groups filed an emergency appeal to the U.S. Supreme Court requesting a stay pending Supreme Court review. For now, however, (unless the Supreme Court issues one) there is no judicial stay preventing implementation or enforcement of the ETS.

According to OSHA’s ETS website, to account for the uncertainty created by the litigation, OSHA is exercising “enforcement discretion” with respect to the compliance dates of the ETS. Specifically, “[t]o provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard’s testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance.”

See: <https://www.osha.gov/coronavirus/ets2>

As background, recall that OSHA released the ETS in November 2021. Several states, employers, labor unions, and individuals then filed suit challenging OSHA’s authority to issue the ETS. Thereafter, the Fifth Circuit stayed the ETS pending further judicial review. The Fifth Circuit held the ETS faced fatal statutory and constitutional issues because the pandemic does not meet the emergency standard of having “substances or agents” that are “toxic or physically harmful” and does not pose a “grave danger.”

In dissolving the Fifth Circuit stay, the Sixth Circuit held that OSHA has clear authority to regulate viruses and infectious diseases, as it has done in the past when implementing and enforcing regulations relating to bloodborne pathogens, needlesticks, etc. The court noted that OSHA’s purview is not confined to “hard hats and safety goggles.” The Sixth Circuit also held that the circumstances of the COVID-19 pandemic warranted the ETS.

Within hours of Sixth Circuit’s Order, a coalition of trade groups filed an Emergency Application for Immediate Stay of Agency Action Pending Disposition of Petition for Review, directed to the U.S. Supreme Court. The coalition asked the Court for expedited review and to stay the ETS pending resolution of that review.

While it’s impossible to predict what the Supreme Court will do, it is likely it will grant review given the conflict between the Fifth and Sixth Circuits and because the implementation and enforcement of the ETS certainly constitutes a matter of great public significance. That does not, however, mean it’s likely the Supreme Court will stay the ETS pending any such review. Despite the uncertainty, with the new January 10 and February 9 deadlines just around the corner, Employers would be well advised to continue to develop COVID-19 programs to comply with the “vaccinate or test” ETS mandate, including collecting employees’ vaccination status, drafting a compliant policy, and establishing a testing protocol (if offering employees that option).