

# Alert

November 16, 2021



## Court Affirms Stay of OSHA Vaccinate-or-Test Emergency Temporary Standard

In a very strongly worded 22-page opinion, the U.S. Court of Appeals for the Fifth Circuit reaffirmed its earlier stay of OSHA's COVID-19 Emergency Temporary Standard (ETS) calling for employee vaccination or weekly testing that it published on November 6. The court specifically ordered OSHA to take no further steps to implement or enforce the ETS until further court order. The court critically found that earlier statements from the White House "belie the notion that COVID-19 poses the kind of emergency that allows OSHA to take the extreme measure of an ETS."

This opinion also leaves little doubt as to how it would rule on the outstanding request for a permanent injunction finding that the ETS "imposes a financial burden" upon employers and "threatens to decimate their workforces." The court also stated it believes the ETS will not pass constitutional muster and characterizes the ETS as "fatally flawed on its own terms" in that it applies to virtually every industry without accounting for differences in exposure risks and, at the same time, makes no attempt to protect employers with 98 or fewer employees.

The Fifth Circuit's order applies nationwide. Since there are currently 10 other petitions in the 10 other Circuit Courts of Appeal, the Judicial Panel on Multidistrict Litigation will consolidate those challenges and randomly select through a lottery the court that will be assigned the case going forward. In the event the Fifth Circuit is not selected in the lottery, the court assigned can decide to lift the current stay or leave it in place while it decides all of the consolidated petitions for review. The Department of Labor could also petition the U.S. Supreme Court for an emergency review, which is not likely.

In view of these developments, some employers may choose to postpone for the time being any plans to put in place a written vaccination, weekly testing, and face coverings policy since the current December 6 deadline for such a requirement is no longer in effect. Clearly, spending significant resources to come into compliance with an order no longer in effect (and one which may possibly never go into effect) is not recommended at this point unless there is a new order from a Circuit Court of Appeals lifting the stay.

Employers who have still not requested that employees indicate their vaccination status by a certain date, however, may want to consider obtaining that information by way of a survey or questionnaire now even though that is also no longer under the court's order. Having an idea of how many employees may be required to undergo "weekly testing" in the event another court lifts the current stay will at least provide an employer with some idea regarding how large of an undertaking it may be facing (how to provide for weekly testing, who pays for the test, etc.) if this ETS is ever reinstated by a court in the future.

We will keep you updated as further developments are likely this week.



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