



Alerts

Sixth Circuit Dissolves Nationwide Stay of OSHA's Emergency Temporary Standard, Compliance Deadlines Back in Effect

December 19, 2021

Insights for Employers

A three-judge panel of the United States Court of Appeals for the Sixth Circuit granted the Government's motion and dissolved the stay issued previously by the Fifth Circuit on the November Emergency Temporary Standard (ETS) applicable to employers with 100 or more employees issued by the Occupational Safety and Health Administration (OSHA). OSHA issued an immediate release, stating the agency will not issue citations for non-compliance with any ETS requirements before January 10, 2022, and it will begin enforcing its testing requirements on February 9, 2022. OSHA stated that employers are required to take good-faith steps to comply.

The decision was decided and released on December 17, 2021, by a three-member panel of the Sixth Circuit. The decision was split 2-1, with the dissenting justice questioning both the authority of OSHA to issue the ETS and the scope and justification for the standard. The majority took aim at the [prior Fifth Circuit decision](#) and addressed each point of their sister circuit's decision in a 37-page opinion.

The Sixth Circuit decision held that OSHA did not exceed its authority, noting that the agency has express authority under its enabling act to issue an ETS. The court also took note of OSHA's past regulation of issues related to infectious disease issues in the workplace, referencing its prior standard on bloodborne pathogens. The court held that the major questions doctrine should not be interpreted to bar OSHA's action as Congress expressly delegated authority to OSHA to issue an ETS in emergent situations that present a grave danger to workers.

The court found that OSHA adequately addressed and supported the need for an ETS, noting in hundreds of pages of factual findings that the agency met the "demanding" standard that an emergency standard was necessary to alleviate the grave risk to workers in the 6-month duration of an ETS. The court found that OSHA adequately supported its conclusions to apply the standard to employers with 100 or more workers, finding that larger employers could better administer the requirements, and enforcement of the rule would promote public health by limiting outbreaks among larger employers, where such outbreaks would more logically occur.

Attorneys

Tom H. Luetkemeyer

Service Areas

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The court also refuted the constitutional obstacles raised by the Fifth Circuit, principally noting that the ETS regulates employers and not employees. The majority then addressed the principal arguments of the petitioners in many of the constitutional challenges to the ETS. The court focused primarily on the non-delegation of powers argument made by many of the petitioners and also adopted by the Fifth Circuit. The majority noted Congress vested the Secretary of Labor "with broad authority to promulgate different kinds of standards" for health and safety in the workplace, and an ETS is one of those alternatives available to OSHA.

Multiple applications were filed yesterday in the United States Supreme Court to reimpose the stay, and, as of the writing of this alert, we are aware of at least eight. Hinshaw will continue to monitor the procedural status of the appeals, but we should be in a position to learn soon if the Supreme Court schedules expedited briefing on those applications. Hinshaw has been advising its clients in prior alerts to plan ahead for the possibility that the stay will be lifted. That has now occurred, at least for the time being. The deadlines identified at the beginning of this alert are now effective, pending further appeal activity.

Related Content

- [OSHA Issues ETS Requiring Employee COVID-19 Vaccinations](#), November 5, 2021
- [FAQs: CMS Issues Emergency Regulation Mandating Workforce COVID-19 Vaccinations by Medicare/Medicaid-Certified Providers and Suppliers](#), November 9, 2021
- [Fifth Circuit Grants Stay of OSHA's Mandatory Vaccination ETS, Voices "Grave Statutory and Constitutional" Concerns](#), November 15, 2021