

Sixth Circuit Dissolves Stay of OSHA ETS: What Does it Mean for Employers?

Alert

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The saga of the Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS) continues. On Friday night, December 17, a three-judge panel of the Sixth Circuit Court of Appeals issued an Opinion dissolving the stay of the ETS, meaning the ETS will go into effect unless reversed by the Supreme Court. Within 90 minutes of the Sixth Circuit Opinion, 26 Petitioners filed an emergency application for Immediate Stay and Petition for Writ of Certiorari with the Supreme Court. A number of other applications to the Supreme Court have been filed since. The Supreme Court set a December 30, 2021 deadline for OSHA's response.

The Sixth Circuit Opinion does not include a date for dissolving the stay, but on Saturday morning, December 18, OSHA added a [Litigation Update](#) to its ETS website announcing it would not enforce the ETS until January 10, 2022 (for the core ETS requirements), and February 9, 2022 (for the weekly COVID testing requirements). The complete OSHA announcement stated:

To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To 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.

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This Opinion impacts not only employers with more than 100 employees, but comes at a time when there are a variety of vaccine-related requirements working their way through the judicial system, and competing state and local vaccine mandate bans becoming effective across the country. Each of these considerations is discussed below, as the impact of the Sixth Circuit decision must be evaluated comprehensively.

The current state of the law is particularly murky for federal contractors, as the [federal contractor guidelines](#) are also [stayed](#) nationwide. The ETS exempts “workplaces” *covered under* the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors.” OSHA’s FAQs elaborates that “Because covered contractor employees are *already covered* by the protections in those guidelines, OSHA has determined that complying with the ETS in addition to the federal contractor guidelines is not necessary to protect employees at workplaces covered by those guidelines from a grave danger posed by COVID-19.” This creates a significant hole for employers determining coverage under the ETS during the pendency of judicial review of the federal contractor guidelines, which will hopefully be filled by the administration in the coming days.

BACKGROUND

On November 5, 2021, OSHA issued a [wide-ranging emergency standard](#) applying to workplaces with 100 or more employees, and including a requirement to develop a written policy mandating employee vaccination or requiring unvaccinated employees to take a COVID test weekly and wear a face covering. The ETS had two compliance dates: December 5, 2021 to comply with all provisions of the ETS except the weekly COVID testing for unvaccinated employees, and January 4, 2022 to begin implementing the weekly COVID testing program.

Shortly after issuance, challenges to the ETS were filed by petitioners in every U.S. court of appeal. The Fifth Circuit acted first and issued a [nationwide stay](#) of implementation of the ETS on November 6, 2021. OSHA issued a statement on November 13, 2021, indicating it would not enforce the ETS until further court orders, so no provisions of the ETS went into effect. Consistent with the Multicircuit Petition Statute, a lottery was held to determine which court of appeal would have jurisdiction over the consolidated case. On November 16, 2021, the Sixth Circuit was selected.

The Sixth Circuit consolidated case has dozens of petitioners and amici, and hundreds of pleadings have been filed. Substantively:

- OSHA requested expedited briefing to decide whether to dissolve the stay, which was denied by the Court on December 3.
- Petitioners filed motions requesting the Sixth Circuit issue its own stay of the ETS, which was denied by the Court as moot on December 3.

Sixth Circuit Dissolves Stay of OSHA ETS: What Does it Mean for Employers?

- Petitioners filed motions requesting the initial decision be heard *en banc*, which was denied by the Court on December 15.
- OSHA requested the Sixth Circuit dissolve the stay issued by the Fifth Circuit, which it did on December 17.

A merits briefing schedule has not yet been set by the Court.

SIXTH CIRCUIT OPINION DISSOLVING STAY

The Sixth Circuit Opinion evaluated the ETS to determine: (1) whether Petitioners made a strong showing that they are likely to succeed on the merits; (2) whether Petitioners will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Upon consideration of those factors, two of the three Sixth Circuit judges dissolved the Fifth Circuit stay. The three-judge panel was comprised of two Republican appointees and one Democratic appointee.

In making its determination, the Sixth Circuit disagreed with the Fifth Circuit's "blanket conclusion that the ETS is beyond the scope of OSHA's statutory authority." Instead, the Court found that the OSH Act and Congress have long supported OSHA's authority to protect workers against infectious diseases, and have allowed OSHA to regulate hazards that co-exist in the workplaces and in society. As example, the Court cited the [Bloodborne Pathogen](#) standard, which protects workers from diseases like HIV. The Sixth Circuit found that OSHA has wide discretion to form and implement the "best possible solution to ensure the health and safety of all workers," which is "hardly limited to hard hats and safety goggles."

The Sixth Circuit also evaluated OSHA's basis for the ETS to determine whether the record contained substantial evidence that employees are exposed to grave danger and a standard is needed to protect employees from those dangers. The Court again disagreed with the Fifth Circuit's determination that the ETS fails because OSHA did not issue it at the outset of the pandemic, finding that "to hold that because OSHA did not act previously it cannot do so now only compounds the consequences of the Agency's failure to act." The Court was also persuaded that because COVID-19 has continued to spread, mutate, kill and block the safe return of workers to their jobs, OSHA "can and must be able to respond to dangers as they evolve." The Court similarly agreed that OSHA demonstrated the pervasive danger COVID-19 poses to workers, and particularly unvaccinated workers, in the workplace. This includes not only death but serious illness and long-lasting health effects. The Sixth Circuit also pointed out that OSHA's estimate that the ETS would save more than 6,500 worker lives and prevent over 250,000 hospitalizations during its six-month effectiveness "well exceeds what the Fifth Circuit previously found to present a grave danger (80 deaths in a six-month period estimated in regard to an asbestos ETS)."

Sixth Circuit Dissolves Stay of OSHA ETS: What Does it Mean for Employers?

The Sixth Circuit also found there was substantial evidence in the record that the ETS is necessary to protect employees from grave dangers caused by COVID-19. The Court found that OSHA's escalating attempts to contain COVID-19 transmission rates in the workplace did not work, suggesting a lack of widespread compliance, and "with nothing left at his disposal to curb the transmission," the Secretary issued the ETS. The Court pointed to evidence in the record that vaccinated employees are significantly less likely to bring and/or spread COVID-19 in the workplace, and found OSHA's tailoring of the ETS to only large workplaces compelling in contrast to petitioners' arguments that the ETS is both over-inclusive and under-inclusive.

The Sixth Circuit also evaluated the constitutional challenges to the ETS, but determined that arguments regarding the Commerce Clause and Non-Delegation Doctrine did not have a meaningful likelihood of success on the merits.

Finally, the Court determined that there was no injury from lifting the stay that outweighs the injuries to the government and the public interest, finding the injuries asserted by Petitioners to be "entirely speculative," especially when compared to curtailing "transmission of a deadly virus that has killed over 800,000 people in the United States, brought our healthcare system to its knees, forced businesses to shut down for months on end, and cost hundreds of thousands of workers their jobs."

Both a Concurring and a Dissenting Opinion accompanied the decision. The Dissent argued the ETS is essentially a vaccine mandate as OSHA "consciously designed [the testing option for unvaccinated workers] to be less palatable to employers and employees." Because of this, employers who adopt mandatory vaccination policies would enjoy advantages and navigate fewer administrative burdens. The Dissent determined that Petitioners were likely to succeed on the merits because OSHA did not show the ETS was necessary to protect employees from grave danger, nor did OSHA present substantial evidence that COVID-19 was a grave danger in the workplace. The Dissent also evaluated the Major Questions Doctrine, which requires Congress to "speak clearly if it wishes to assign to an agency" the ability to make decisions of vast economic and political significance. The Dissent determined OSHA "was unlikely to show" it had been granted authority to issue a standard covering two-thirds of American workers without public notice and comment.

NEXT STEPS

With the ETS stay dissolved and dates certain for OSHA's enforcement, employers should continue working toward compliance with the standard. However, as with all things COVID-19, the evaluation is complicated and a multi-faceted process, requiring both legal and practical considerations.

Sixth Circuit Dissolves Stay of OSHA ETS: What Does it Mean for Employers?

Work toward ETS compliance: While the Sixth Circuit's Opinion is silent on the timing for dissolving the stay, OSHA indicates it will not enforce or issue Citations for non-compliance for any ETS requirements until January 10, 2022, and not until February 8, 2022 for the weekly testing requirements. Specifically, this includes:

- Developing and implementing a written plan either requiring vaccination, or weekly COVID testing and face covering requirements
- Compiling proof of vaccination status from employees using acceptable forms
- Allowing paid time off for COVID vaccination and recovery from vaccine side effects
- Providing specified information to employees including information regarding the ETS and the employer's procedures, CDC documents regarding vaccines, anti-retaliation rules, and statutes with criminal penalties associated with knowingly providing false statements or documents

OSHA has developed [model documents](#) for many of these requirements. Stinson's COVID-19 Task Force has also developed sample procedures for topics such as evaluating requests for religious and disability accommodations, templates of information required to be provided to employees, and form communications announcing COVID-19 plans. Reach out to your Stinson attorney or a member of the COVID-19 Task Force if you would like this information.

Be aware of additional judicial review: Applications have already been submitted to the Supreme Court requesting a stay of the ETS and/or certiorari, and the Supreme Court set a December 30, 2021 deadline for OSHA's response. We will be paying close attention to the status of additional review and evaluating how that impacts employer preparation.

Confirm your status: The ETS does not apply to employers subject to the federal contractor guidelines or healthcare ETS. Evaluations should be made to confirm which standard(s) each workplace is subject to, acknowledging this determination is currently complicated by the [nationwide stay](#) of the federal contractor guidelines and whether workplaces are "covered under" the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors" during the pendency of the stay. In making the determination as to whether they are "covered under" the federal contractor guidelines, workplaces should evaluate whether they have accepted FAR clauses, the status of their federal contracts, and whether any relevant agency will require vaccination to work at the government facility or interact with government personnel. The stay of the federal contractor guideline does not invalidate Executive Order 14042, but rather enjoins enforcement of it, which provides an argument that the ETS does not apply to those federal contractor employers. We anticipate the administration will provide clarity on this issue in the coming days.

Sixth Circuit Dissolves Stay of OSHA ETS: What Does it Mean for Employers?

Evaluate state and local laws: The ETS is explicit that it preempts inconsistent state and local requirements relating to vaccination, including requirements that ban employers' ability to mandate vaccines, face coverings or testing. However, many states have passed laws or orders purporting to ban vaccination mandates (note the ETS is not a vaccine mandate as it has a vaccine or test option), create requirements for accommodation requests, or make COVID-related actions for unvaccinated employees unlawful discriminatory practices. We discussed this in a [prior alert](#). These state and local laws and orders should be evaluated to determine whether they can be read together with the ETS.

In addition, there are 22 states that implement their own OSHA state plans. Those states are required to amend their regulations to be identical or "at least as effective as" the ETS, or show that an existing state standard is "at least as effective" as the ETS. State plans must be updated within 30 days of the effective date of the ETS, a process which has been paused in many states because of the stay, but employers in state plan states should confirm the status of implementation in their states.

Stinson's COVID-19 Task Force is closely following these developments and has been working tirelessly to help employers understand and implement COVID-19 safety requirements throughout the pandemic. If you have any questions, please contact [Brittany Barrientos](#), [Amy Conway](#), [Susan Warshaw Ebner](#), [Alisa Ehrlich](#), [Molly Keppler](#), [Pat Konopka](#), [Dennis Lane](#), [Erin Naeger](#), [Sharon Ng](#), [Kristin Parker](#), [Harvey Reiter](#), [Greta Reyes](#), [Bernadette Sargeant](#), [Stephanie Scheck](#), [Luke VanFleteren](#), [Ben Woodard](#), [Eric Whytsell](#) or the Stinson LLP contact with whom you regularly work.

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