

Publications

Fifth Circuit extends its block on OSHA's Emergency Temporary Standard, but the battle is just beginning

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As we [previously reported](#), on November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued a long awaited emergency temporary standard (the ETS) on COVID-19. Broadly speaking, the ETS requires employers with 100 or more employees to ensure their workforce is fully vaccinated or require any unvaccinated employees to produce a weekly negative test and wear a mask in order to work.

Immediately after its release, multiple lawsuits were filed across the country challenging the OSHA ETS. Currently, there are challenges filed in at least 11 different Circuits. Suits have been filed by states, interest groups, private employers, and others.

On November 6th, the Fifth Circuit Court of Appeals issued a temporary stay halting enforcement of the ETS pending further judicial review. On Friday, November 12th, the Court extended its stay. This means that the ETS cannot yet go into effect.

While the Fifth Circuit decision will likely receive outsized media attention, it is just the beginning of the litigation process. Next up, a single Circuit Court will be selected to hear all of the legal challenges to the ETS. This court will be selected by a lottery conducted by the federal Judicial Panel on Multidistrict Litigation, which will select a circuit court of appeals from a drum containing an entry for each circuit where a case is pending. This lottery is expected to occur on November 16th.

The selected Circuit Court will not be bound by the Fifth Circuit decision, and will decide independently whether a stay should issue. Ultimately, we expect that the U.S. Supreme Court will be the final arbiter.

We will provide a more comprehensive analysis once the Circuit Court lottery is completed.