

OSHA Emergency Temporary Standard Back in Force — For Now



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Stay Blocking Enforcement Lifted

As we recently advised you in a client alert dated December 15, 2021, federal courts had previously blocked enforcement of multiple COVID-19 vaccination mandates, including the Occupational Safety and Health Administration's ("OSHA") Emergency Temporary Standard (ETS), causing OSHA to pause enforcement of the ETS. As you recall, the ETS generally required employers with at least 100 employees to implement a policy requiring employees to show that they have been fully vaccinated or submit to weekly testing. The ETS contains additional requirements outlined in our client alert of November 4, 2021, such as developing COVID policies, ascertaining the vaccination status of employees, and requiring unvaccinated employees to mask unless working outside. The ETS was published in the Federal Register at 86 Fed. Reg. 61402 (Nov. 5, 2021).

However, late Friday night, December 17, 2021, in a 2-to-1 decision, the U.S. Court of Appeals for the Sixth Circuit lifted the stay/temporary injunction that had blocked enforcement of the ETS. An immediate appeal was filed with the U.S. Supreme Court. However, we do not know when or how that appeal will be decided.

OSHA's Response

On December 18, 2021 OSHA issued a news release stating that "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."

What This Means for Employers

Given the appeal filed with the Supreme Court, it is clear litigation over the ETS is not over, but the litigation process could take several weeks – or even months. In the meantime, OSHA again has the authority to enforce the ETS. The requirements of the ETS are somewhat onerous, and given the short amount of time between now and potential enforcement, employers need to consider taking some initial steps to put themselves into a position to demonstrate reasonable, good faith efforts to come into compliance with the ETS, such as preparing drafts of internal testing, masking, or vaccination policies, as well as religious and medical/disability exemption forms, and collecting data regarding employees' vaccination status. We are prepared to consult with our clients regarding the ETS and related COVID issues. In the meantime, we will continue to keep you advised of the status of the appeal and future developments as to the enforceability of the ETS.

This article is general in nature and does not constitute legal advice. Please note that legal requirements are changing on a daily basis. Readers with legal questions should consult the authors John Vering (JVering@sb-kc.com), or Shannon Johnson (SJohnson@sb-kc.com), or other members of the Employment group including Mark Opara (MOpara@sb-kc.com), John Neyens (JohnN@sb-kc.com), Cody Weyhofen (CWeyhofen@sb-kc.com), or your regular contact at Seigfreid Bingham at (816) 421-4460.