



OSHA's Vaccine ETS Encounters More Turbulence as Appeals Court Extends Halt – How Can Employers Make a Smooth Landing?

Insights

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In a terse 22-page opinion, the U.S. Court of Appeals for the Fifth Circuit reaffirmed its preliminary stay that blocked the mandate-or-test Emergency Temporary Standard (ETS) late Friday, further complicating the status of the federal rule that aims to require companies with 100 or more employees to ensure that those employees are either fully vaccinated or produce a weekly negative test for COVID-19 beginning January 4, 2022. The next step: a key procedural move will take place on November 16 that will determine the next legal battlefield in this ongoing and high-stakes fight. Employers who have been scrambling to understand and comply with the ETS are wondering what's next and what they should do now. Below is our assessment of issues that you should now consider and steps you could take depending upon your level of risk tolerance.

What Happened on Friday?

After workplace safety officials at the Occupational Safety and Health Administration's (OSHA) unveiled the mandate-or-test ETS on November 4, several groups opposing the rule filed actions in federal court in an effort to block the rule. The conservative Fifth Circuit Court of Appeals was the first to act on Saturday, November 6, issuing a temporary "stay" that blocked the ETS until it could more closely examine the legality of the rule.

Late Friday, November 12, the Court extended that stay in a 22-page ruling. Focusing upon the premise that the agency has, among other things, exceeded its authority and failed to follow its own rules, the Fifth Circuit ordered OSHA to take no steps to implement or enforce what it referred to as "the Mandate" pending adequate judicial review of underlying motions to permanently enjoin the ETS.

What's Next?

On November 16, a high-stakes Multidistrict Litigation lottery will determine which federal appellate court will adjudicate the combined numerous legal challenges that have been filed across the country over the past week. The "winning" Circuit could make a decision soon, possibly even by Thanksgiving, that could unwind what the Fifth Circuit did or cement that ruling into place further. The ultimate decision on the mandate-or-test rule, however, could fall to the United States Supreme Court. Until then, the fate of the ETS is uncertain.

Under the ETS, covered employers would have had – and ***could*** still have – only until December 6 to develop compliance policies, be prepared to provide paid time off to employees for vaccinations, and require unvaccinated workers to mask. Depending on what happens at the “winning” Circuit or the Supreme Court – both of which could act quickly to either breathe new life into the ETS or strike it down for good – employers may only have a short window of time to implement the rule before it comes online. Therefore, you should take this interim limbo period of time to assess the lay of the land and your risk tolerance levels before making any moves.

Confirm Which Rules Apply to You and Assess Your State of Compliance Readiness

Before doing anything else, you should confirm whether you are subject to the federal OSHA ETS or possibly another set of federal vaccination rules. Keep in mind that 22 states have “state plans,” where a state agency enforces its safety regulations. Apart from the federal ETS, you could be subject to the Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors, the OSHA COVID Healthcare ETS (which is set to expire in December), or the CMS Omnibus Staff Vaccination Rule, which requires vaccination (with no testing option) of individuals working at or for healthcare providers who participate in the Medicare or Medicaid programs and are regulated by CMS. Generally, these more specific rules supersede the requirements of the broader OSHA ETS. The stay of the ETS did not halt enforcement of any of these other rules. You must also consider to what extent state statutes or executive orders may affect your options.

If you are covered by the ETS, you have probably already started considering how you would fulfill its requirements. Besides the core ETS provision that requires either vaccinations or weekly testing (and masking), you may have implemented or have begun implementing other provisions that the ETS would require. Those provisions include:

- establishing, implementing, and enforcing a written policy on vaccines, testing, and face coverings;
- providing certain information to employees on vaccines and the requirements of the ETS;
- preparing to provide paid time off to employees to obtain the vaccine and reasonable time and paid sick leave to recover from side effects following each dose;
- obtaining and maintaining records and a roster of employee vaccination status; and
- complying with certain notice requirements when there is a positive COVID-19 case and reporting to OSHA when there is an employee work-related COVID-19 fatality or hospitalization.

If you have not already evaluated and started acting on these items, you should evaluate where you stand. The ETS could clear its legal challenges and become enforceable – either as scheduled or under only a slightly revised timeline. Although it seems increasingly likely that the pending challenges could result in an adjustment of the published deadlines for compliance, an adjustment is not guaranteed.

At a minimum, you should consider whether your company would require employees to be vaccinated or you would offer the option of weekly testing, accompanied by masking. Even absent the requirements of the ETS, it is prudent for you to determine who is and is not vaccinated, as vaccination status affects recommended quarantine guidelines and can help better position you to manage a positive case in the workplace.

If you are considering the testing option, carefully evaluate the logistics of a testing program. Implementing such a program would not be a simple or small task. You should also ensure that your accommodation policies and procedures are up to date, as they are likely to become increasingly important regardless of the fate of the ETS.

Assess Your Level of Risk Tolerance

Whether and how you proceed is largely a matter of risk tolerance. Although other OSHA temporary standards have been struck down in the past, this is an unprecedented and unpredictable situation, and no one really knows how things will shake out in the coming weeks and months.

Some employers may choose to sit tight until the courts provide clarification. In view of the detailed requirements, however, failure to begin preparing could be a risky proposition.

If the ETS is upheld and cleared for enforcement, and the current compliance deadlines in December and January do not change, you would have little time to act. Even if the deadlines were extended, you may not be given much more time to comply. Thus, the most cautious course of action is to continue to *prepare*, by at least *considering* policy and procedural options that would be needed. At minimum, this would include whether or not to offer the weekly testing option in your policy and, if so, how you would implement and track employee testing.

Evaluate Both Legal and Practical Issues

Your policy choices obviously merit serious consideration. As reflected in [an FP Flash Survey we conducted last month](#), employers are indeed concerned about the strong feelings on all sides of the vaccination issue. During this period of workforce shortages, employers are anxious about the impact that a vaccine mandate could have on employee retentions.

In sum, the Fifth Circuit's decision and the pending lottery give employers a chance to re-examine how the ETS would affect their workplace, their readiness to implement the provisions if necessary, and the impact that associated policy decisions may have on the company.

We will continue to monitor this situation and provide updates as warranted. Until then, Fisher Phillips has created [a set of comprehensive FAQs for employers on the ETS](#) to help you navigate through this process. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for](#)

Employers or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our FP Vaccine Subcommittee.

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