



The Calm Before the Storm: Status Update on OSHA Vaccine ETS Litigation

Insights

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Employers may feel confused about the status of the lawsuits that blocked the OSHA Vaccine mandate-or-test ETS from going into effect as originally planned. Not only do you feel stuck in a litigation limbo, but you can't make heads or tails of things when you read about the current happenings in the court. In the past few weeks, there has been considerable activity at the 6th Circuit Court of Appeals after all of the legal challenges were consolidated to that venue: motions to transfer the consolidated case to another circuit, motions to lift the previously entered stay, motions for an initial *en banc* panel proceeding, and a motion to expedite the court's briefing schedule to accelerate a final decision on the matter. So what happened and what changed – what should you be doing in the interim? The short answer is not much. This Insight presents you with an overview of what's happening (and a game plan for what you should be doing now) and then provides a deeper dive for those interested in the ins and outs of the litigation.

Summary of Activity and Game Plan for Action

This brief section will provide a 30,000-foot overview of the current state of affairs and provides all you need to know. If you want a deeper analysis, you can read further sections of this Insight and dive into the weeds.

What Happened?

It should be a quiet week for employers. In the past week, the 6th Circuit Court of Appeals first rejected requests to transfer the consolidated case to another circuit, and then denied OSHA's motion to expedite the briefing schedule. The final briefs are now to be filed this Friday, December 10, and no critical decisions should be issued by the court until then. But a decision on the government's motion to lift the stay – which would immediately resurrect OSHA's ETS – could come in the days or weeks following.

What Should You Do?

What does this mean for employers? Clearly the original initial compliance deadline of December 6 will not take effect, as that date has come and passed. If the court reverses the decision to block the ETS and lifts the stay, we'll get notification of a new compliance deadline in short order. That also

likely means the January 4, 2022 deadline for full compliance (including the mandate-or-test requirement) will also be extended.

As we have previously recommended, you should use this current limbo period to perform some behind-the-scenes preparatory activity but not unfurl any major initiatives. You can follow our three-step approach for employers during this time, [which can be found here](#).

Deeper Dive: Detailed Summary of Litigation Activity

If you would like to dive deeper and learn about the detailed litigation activity that has unfolded over the past week, this next section is for you.

The 6th Circuit Court of Appeals entered an Order on the evening of December 3 essentially maintaining the status quo by resolving various Motions and cleaning up various other pending outstanding requests on its docket. As of today, the 5th Circuit's Stay of the OSHA ETS remains intact pending consideration by a three-judge panel (or perhaps a full *en banc* sitting) of the 6th Circuit. In issuing this Order, the court reiterated the following deadlines:

- Responses to OSHA's Motion to Dissolve Stay were due and filed by December 7;
- The 6th Circuit gave three options for those wishing to file, including a direct response limited to 5,200 words, a joinder in a specific response, or a notice adopting a prior, originally filed Motion for a Stay.
- Replies addressing those Responses are due no later than December 10 and limited to 5,200 words.

By issuing this Order, the 6th Circuit thereby denied OSHA's Motion to further expedite the briefing schedule. For obvious reasons, the government has a significant interest in moving the process along as quickly as possible. The court's decision to reject this accelerated briefing schedule isn't all bad news for OSHA, however. The court separately reserved ruling on whether it will set a separate briefing schedule to hear arguments on the underlying merits of the case (as opposed to the merits of the injunctive order that blocked the ETS from taking effect on a temporary basis). While the decision on the Stay is likely to signal which direction the court will rule when it gets around to ruling on the merits of the case, it is technically not the final word on the matter. OSHA could always hold out hope that the court might be inclined to maintain the Stay to preserve the status quo for the time being but then later strike down all legal challenges to the ETS once it has had time to analyze the matter fully.

In keeping the status quo, the court also:

- Denied separate motions by several parties to transfer the case to either the 5th Circuit Court of Appeals (perhaps the most conservative appeals court in the country) or the D.C. Circuit (perhaps the most liberal);

- Declined to hold the case in abeyance pending a determination on whether to hear the case with a full initial *en banc* sitting;
- Permitted various parties of interest to file friend-of-the-court amici briefs on OSHA's Motion to Dissolve the Stay (there were five such requests); and
- Allowed the IEC and IEC-Florida trade associations to be added as petitioners, but denied Motions to Intervene by other parties – explaining that they instead had to file to be petitioners in their own right.

Conclusion

We will continue to monitor this litigation 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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