Federal Appeals Court Reinstates OSHA's Vaccine Mandate-or-Test ETS: An Employers' 5-Step Compliance Plan

Insights
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In one of the more shocking developments in a year full of surprises, a federal appeals court breathed new life into the Biden administration's mandate-or-test emergency vaccine rule with a stunning Friday afternoon decision. A three-judge panel of the Sixth Circuit Court of Appeals – which had been widely expected to keep the ETS on ice pending resolution of the many legal challenges against it – overturned the stay blocking the rule from taking effect. The upshot? Employers now have a January 10 deadline to work toward, which means the time to take action is now. This Insight will present a five-step game plan for employers, followed by a deeper dive analysis of the court ruling.

Quick Background

After workplace safety officials at the Occupational Safety and Health Administration (OSHA) unveiled the mandate-or-test ETS on November 4, many groups opposing the rule filed actions in federal court to block the rule. The conservative Fifth Circuit Court of Appeals was the first to act by issuing a temporary "stay" that preliminarily blocked the ETS, followed by a November 12 extension of that stay. It ordered OSHA to take no steps to implement or enforce the ETS.

But the Judicial Panel of Multidistrict Litigation announced on November 16 that it would consolidate all of the legal challenges and send them to the conservative Sixth Circuit Court of Appeals to decide the outcome of the rule. Many workplace law observers thought this random selection of a circuit court spelled all-but-certain doom to the ETS and took their foot off the compliance pedal for the holidays. On Friday, however, a surprise decision from a three-judge panel of the Sixth Circuit once again jolted employers back into scramble mode, dissolving the stay and clearing OSHA to enforce the ETS across the country.

This Insight contains a detailed legal analysis and summary of the 57-page ruling and some background of the judges who issued the ruling for those interested in the technical details. However, we know the majority of employers mostly care about one thing: what should we do now? Here is a five-step game plan for you to follow.

What Should Employers Do? 5-Step Game Plan

It is important to understand that the ETS is in effect now in Federal OSHA jurisdictions (you can determine whether you fall into this category by reviewing a list here). As you may recall, the ETS initially required compliance with all aspects other than the testing requirements by December 6, and with all requirements by January 4, 2022. While those deadlines are no longer feasible, OSHA has posted a fairly aggressive updated compliance deadline plan.

The agency has said it will exercise its "enforcement discretion with respect to the compliance dates of the ETS" in order to allow employers time to get up to speed. Specifically, it states, "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."

This means that OSHA can issue citations today for noncompliance with all but the testing requirements of ETS, but will give employers a grace period until January 10 if you are exercising reasonable, good faith efforts to come into compliance with the ETS during this interim period. While it is likely that OSHA will not engage in any enforcement activity before January 10, it is possible that a zealous compliance officer responding to one or more employee complaints of COVID-19-related issues could cite an employer if they believe the employer has not been making good faith efforts to comply.

That means your immediate job is to demonstrate reasonable good faith efforts to comply between now and January 10. Certainly, doing nothing is not an indicator of "reasonable, good faith efforts." Therefore, we recommend that you follow this five-step game plan if you have not already done so:

1. Determine if you are covered by the ETS. Work with your workplace safety counsel to answer the following questions: Is your workplace covered by OSHA normally? If so, do you have more than 100 employees nationwide? Or are you exempt because you are covered by either the Healthcare COVID-19 ETS or Federal Contractor mandate? (More on this below).
2. If you are covered, gather vaccine status information on your workforce and develop the required vaccination roster for employees, noting whether or not they are fully vaccinated as defined under the ETS. This information (the percentage of vaccinated workers) will allow you to determine if you will mandate vaccines or conduct testing under the ETS.
3. Depending on your decision, develop the required mandatory vaccine and/or testing/masking policies required under the ETS – and make sure they are adapted to your own unique workplace. While you don't necessarily need to implement these policies before January 10, you should be ready to implement them as soon as possible and be prepared to demonstrate good faith efforts to put them into place. Of course, if your organization has low risk tolerance, you could proceed with implementing the policies before January 10.
4. Develop programs that would allow you to conduct compliance training for your managers and deliver information about your policies to your employees as required under the ETS. You may

want to conduct this training and start your informational campaign before the January 10 deadline to further demonstrate your good faith efforts.

5. If you decide to provide the COVID-19 testing option, then in addition to implementing the above requirements by January 10, you should be prepared to have unvaccinated employees demonstrate proof of a negative test as of February 9.

What About Employers in States with Vaccine-Related Prohibitions?

Several states have recently passed laws that either prohibit or limit vaccine mandates with some even limiting an employer's ability to inquire about its employees' vaccination status. If you operate in a state where Federal OSHA has jurisdiction, then it is likely that the OSHA ETS preempts any contrary state law and therefore trumps the state's prohibition. So, for example, in a Federal OSHA state such as Montana that has prohibitions on even asking if an employee is vaccinated, the state law is likely preempted and thus not enforceable. The ETS specifically requires the employer to determine its workforce's vaccination status. We say "likely" because the laws have not yet been tested by a court.

What about those states that operate their own OSHA plans (state plan states)? For example, Tennessee and Utah operate state OSHA plans and have recently passed laws that limit an employer's ability to inquire about vaccine status. The OSHA ETS does not preempt state law in a state plan state; however, the state plan must adopt the federal OSHA ETS or regulations that are at least as effective as the OSHA ETS. When the ETS became effective on November 5, it provided that state plans must notify OSHA within 15 days of its intention, and then adopt either the ETS or its own regulation within 30 days. OSHA hasn't modified these deadlines due to the recently dissolved stay and the statute on point doesn't address the current circumstances.

We expect to start hearing from the various state plans in the coming days stating their intentions. If you operate in a state plan state with other vaccine-related restrictions, such as Tennessee or Utah, we recommend you follow that state's law until it takes action on the ETS. If you operate in one of the other state plan states, such as California, we recommend you stay alert for what action it takes, which could be to adopt something more stringent than the Federal OSHA ETS.

What About Other Vaccine Mandates?

As you are likely aware, the federal government has issued other requirements or vaccine mandates that are specific to certain types of workplaces, including certain federal contractors, healthcare employers covered by CMS, and healthcare employers covered by the prior OSHA Healthcare ETS. The OSHA mandate-or-test ETS specifically exempts workplaces covered by the OSHA Healthcare ETS and the Executive Order 14042 (commonly known as the Federal Contractor mandate).

The OSHA Healthcare ETS is set to expire on December 21, 2021. As of the publication of this alert, we have not seen any indication from OSHA that the Healthcare ETS will be converted into a regular or permanent regulation. Once it expires, those healthcare employers with more than 100 employees will be covered by the main ETS.

The CMS mandate for certain healthcare companies is in a state of flux. It has been enjoined in about half the states and cleared for enforcement in the other half. Currently, CMS has said it will not enforce its mandate during the injunction, but that could change at any moment. The OSHA ETS did not exempt those employers covered by the CMS mandate. Therefore, employers subject to both rules should follow the above advice to prepare to comply with the OSHA ETS.

As noted, those covered by the Federal Contractor Mandate are exempt from the ETS even though the Federal Contractor Vaccine Mandate has been blocked nationwide by a federal court. It is quite possible, though, that an employer otherwise covered by the Federal Contractor Mandate could still covered by the OSHA ETS – and would therefore need to comply with the OSHA ETS. For example, if the employer has a mixed workforce, those employees who are not otherwise covered by the Federal Contractor Mandate will be subject to the OSHA ETS rules. Another situation: if the Federal Contractor Mandate coverage has not been triggered because there is no contract currently in place with the flow-down clause. Therefore, even if further appeals courts keep the federal contractor mandate on ice, you may still need to implement the OSHA ETS's vaccine-or-test rules. We expect to learn more about the interplay of these mandates in the coming days and weeks.

What's Next?

If you thought the next two weeks were going to be a nice, quiet opportunity to enjoy the holidays and take a respite from all things COVID-19, think again. It's going to be an extremely busy time on the litigation front. Friday's court ruling was not the end of the story by any stretch. Here are a few possible outcomes on the horizon:

SCOTUS Could Replace the Stay

Within an hour of the stay being lifted by the Sixth Circuit motions panel, an application for an emergency petition was filed directly with SCOTUS, asking the court to immediately replace the stay. This was followed by a virtual flood of similar requests – at least eight such emergency applications have been filed on behalf of over 25 employer groups, and we expect that number to swell in the coming days. The emergency request will be sent to Justice Kavanaugh, who will likely request the full court to weigh in on the requests – setting up a decision by all nine Supreme Court justices.

SCOTUS could certainly grant one of the emergency applications and replace the stay. Such a U-turn would essentially put us back in the limbo we have been in for the last few weeks while the underlying litigation over the merits of the ETS continue.

SCOTUS Could Do Nothing

On the other hand, SCOTUS could choose to sidestep this political hot potato and refuse to intervene now to replace the stay. Some speculate the court may wish for there to be further litigation and analysis on the underlying litigation on the merits before it weighs in. If it decides to punt the ball on this issue, or delay ruling on the matter until after the compliance deadlines take effect, the ETS will remain in immediate effect. This means employers would have to take concrete steps to comply with the ETS until there are further developments on the underlying litigation.

What is the Timing?

Perhaps a bigger question is when SCOTUS might act on this matter. On Monday morning, the Supreme Court set a December 30 deadline to submit briefing on the issue, which is the same timeframe it has set for briefing on the CMS healthcare employer mandate. While the employer community will certainly be pushing the Court to rule as early as possible after briefing is completed – hoping for a ruling well before the January 10 initial compliance deadline – we have no definitive answer about when this matter will be resolved by the SCOTUS.

Don't Forget the Rest of the Story

Keep in mind that despite all of the intense drama of the last few weeks (and particularly of the last few days), this all involves only the tip of the iceberg – all of this litigation is over the Fifth Circuit Court of Appeals granting a nationwide stay on the ETS requirements. No court has actually struck down the ETS or even ruled on the merits of the rule; instead, all of the court proceedings have related to whether the rule should be enjoined while the litigation about the underlying merits takes place. That challenge now sits at the Sixth Circuit Court of Appeals.

The Sixth Circuit recently voted to deny a request to have the initial challenge heard by an *en banc* panel that would comprise the entire group of appeals court judges. Instead, the case will first be heard by a three-judge panel – which hasn't officially been named yet. We also don't yet have an announced briefing schedule, and therefore don't know how soon the underlying case may be heard. While it will likely be over the next few weeks, nothing is certain. The decision of that three-judge panel could be appealed to the full Sixth Circuit or to SCOTUS directly. Either of those courts could toss the ETS or uphold it.

Legal Analysis of the Ruling Lifting the Stay

For those craving more information, here is a summary of Friday's ruling lifting the blockade that had put OSHA's ETS on ice. We begin with an overview of the three judges that were on the panel that issued the shockwave decision, as summarized by Fisher Phillips attorney Ben Morrell – a former Sixth Circuit law clerk.

Overview of 3-Judge Panel Issuing Key Ruling

- Judge Jane Branstetter Stranch is an Obama appointee who has been on the court since 2010. Her chambers are in Nashville, Tennessee. Before her appointment to the court, she was a named partner at a boutique firm in Nashville that focuses on plaintiffs' side public interest litigation such as mass torts and consumer protection.
- Judge Julia Smith Gibbons, whose chambers are in Memphis, has been on the federal bench since 1983. She was a Reagan appointee to the U.S. District Court for the Western District of Tennessee until 2002 when President Bush elevated her to the Sixth Circuit. She tends to be more moderate than many of the more recent Republican appointees to the court, according to Morrell. "She is very well respected on the court as a serious and thoughtful judge. When she talks, people listen."
- Judge Joan Larsen is a Trump appointee who only joined the court in 2017. Her chambers are in Ann Arbor, and she was previously a justice of the Michigan Supreme Court for two years. Before that, she was a law professor at the University of Michigan for more than 15 years. She has impeccable credentials among legal conservatives, and thus it is not surprising that she voted to keep the stay in place.

Grave Danger

The 2-1 majority ruling from a three-judge panel addressed several arguments raised by Petitioners and the Fifth Circuit. First, the majority found that OSHA has the statutory authority to implement the ETS to protect workers from a "grave danger" presented by exposure to agents determined to be toxic or physically harmful or from new hazards for an agent that causes bodily harm. In so doing, the majority found that under the statutory definition, 29 U.S.C. § 655(c)(1), any agent – including a virus – that is either "toxic" (i.e., poisonous, toxicity) or "physically harmful" (i.e., causing bodily harm) falls within OSHA's purview. Thus, according to the majority, a virus falls squarely within the scope of that definition. The majority found other provisions of the OSH Act and other statutes support the argument that OSHA's authority includes the protection of workers against infectious diseases and viruses that present a significant risk in the workplace.

Major Questions

Additionally, the majority rejected the Fifth Circuit's argument that the ETS violated the "major questions doctrine" by exceeding the bounds of OSHA's statutory authority that it could not implement without a clear expression from Congress. The majority concluded that the doctrine was inapplicable because OSHA's issuance of the ETS is not a transformative expansion of its regulatory power as OSHA has regulated workplace health and safety, including diseases, for decades.

Delay in Issuing Rule

Furthermore, finding no threshold issue that OSHA exceeded its authority under the statute, the majority's decision focused on whether the court's record contains substantial evidence to support the likelihood of success of the ETS challenges. Here, the majority rejected the Fifth Circuit's

contention that the ETS fails because OSHA did not issue it at the outset of the pandemic, reasoning that the ETS does not address an emergency. According to the majority, any such delay did not undermine OSHA's conclusion that the current situation is an emergency that agency action can ameliorate. Instead, the majority found that OSHA addressed COVID-19 in progressive steps tailored to the stage of the pandemic, including consideration of the growing and changing virus (e.g., Delta variant), the nature of the industries and workplaces involved, and the availability of adequate tools to address the virus (e.g., vaccination).

Sufficient Evidence

Likewise, the majority rejected the Fifth Circuit's conclusion that OSHA is "required to make findings of exposure — or at least the presence of COVID-19 — in all covered workplaces" to prove COVID-19 is a "grave danger" as provided by the OSH Act. In so doing, the majority found that under the Fifth Circuit's position, the entire provision would be meaningless because no hazard could ever rise to the level of "grave danger" given that a risk cannot exist equally in every workplace. Instead, according to the majority, OSHA demonstrated the pervasive danger that COVID-19 poses to workers — unvaccinated workers in particular — in their workplaces, which is supported by public health data and adequate scientific studies.

Based on what the majority called "the wealth of information in the 153-page preamble," they found it difficult to imagine what more OSHA could do or rely on to justify its findings, and that it was not appropriate to second-guess the agency's determination for it need not demonstrate scientific certainty. So long as OSHA's ETS is supported with a body of reputable scientific thought, OSHA may use cautious assumptions in interpreting the data thereby risking error on the side of overprotection rather than underprotection. Accordingly, the majority rejected the Fifth Circuit's decision that the necessity of the ETS is undermined by the fact that it is both "overinclusive" and "underinclusive" because OSHA may lean "on the side of overprotection rather than underprotection."

Constitutional and Other Arguments

The majority addressed the likelihood of success on the remaining constitutional arguments raised by the Petitioners and were presumed persuasive by the Fifth Circuit.

- First, the majority rejected the contention that the ETS likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the states' police power. In so doing, the majority found that the ETS regulates employers, not individuals, which has long been understood to be within Congress's reach under the Commerce Clause. According to the majority, holding otherwise would upend nearly a century of precedent upholding laws that regulate employers to effectuate many employee workplace policies.
- Similarly, the Panel found little possibility of success under the non-delegation doctrine, which bars Congress from transferring its legislative power to another branch of government. The

Supreme Court has long recognized the power of Congress to delegate broad swaths of authority, the panel held, including delegations to regulate in the "public interest," to executive agencies under this standard.

- The majority further concluded that Petitioners have not shown that any injury from lifting the stay outweighs the injuries to the government and the public interest. They rejected the Petitioners' assertions that compliance costs will be too high, which they found purely speculative. Notably, the majority also recognized the ETS provides employers with multiple options other than vaccination, including accommodations, variances, or the option to mask-and-test.

Judge Larsen's Dissent

Judge Larsen dissented, arguing that OSHA lacks statutory authority to issue the mandate because the Secretary failed to show the ETS was necessary to protect employees from grave danger. According to Judge Larsen, an emergency measure must be more than "reasonably" needful; it must be closer to indispensable. Thus, she said, OSHA made no finding that the emergency rule is necessary in any sense even approaching indispensable.

According to Judge Larsen, the ETS is overbroad as other reasonable alternatives existed, which the Secretary failed to explore. To Judge Larsen, the statute requires OSHA to find that the solution it picked — the nationwide vaccinate-or-test mandate — was necessary to solve the problem. Instead, the Secretary explained why the ETS would be effective, which is not enough. And while many overbroad solutions might work, these would not be a necessary or indispensable means of curing the ill.

Judge Larsen argued that the ETS violates the major questions doctrine, finding that OSHA has never issued an emergency standard of this scope and that each of this rule's few predecessors addressed discrete problems in particular industries, unlike this ETS. She rejected the majority's finding that OSHA's authority to undertake a nationwide vaccine-or-test mandate is "unambiguous" because OSHA has been regulating workplace health and safety since 1970. She argued that the major questions doctrine is not about the age of the agency, and it is not about the kind of power it wields – but about the scope or degree of that power. Thus, no matter how many times OSHA has regulated discrete illnesses in particular workspaces, the ETS remains a massive expansion of the scope of its authority.

Finally, Judge Larsen argued that Petitioners have shown a likelihood of success on the merits and that the ETS will irreparably harm Petitioners. She said that both individuals and businesses will be faced with potential adverse employment actions, including loss of livelihood, unwelcome vaccinations, onerous recordkeeping obligations, and/or the worsening of already critical worker shortages. She failed to find harm to OSHA from further delay since OSHA waited almost two years since the pandemic began, and nearly a year after vaccines became publicly available, to issue the

mandate – not to mention the almost two-month delay between the president's mandate announcement and the issuance of the ETS.

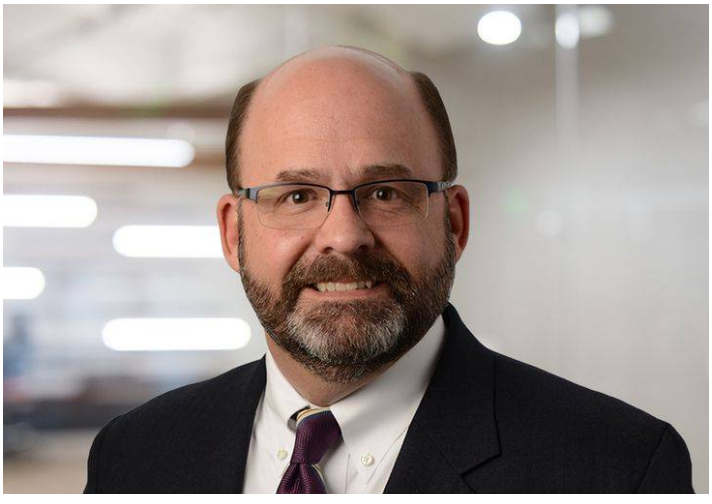
Conclusion

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.

Related People

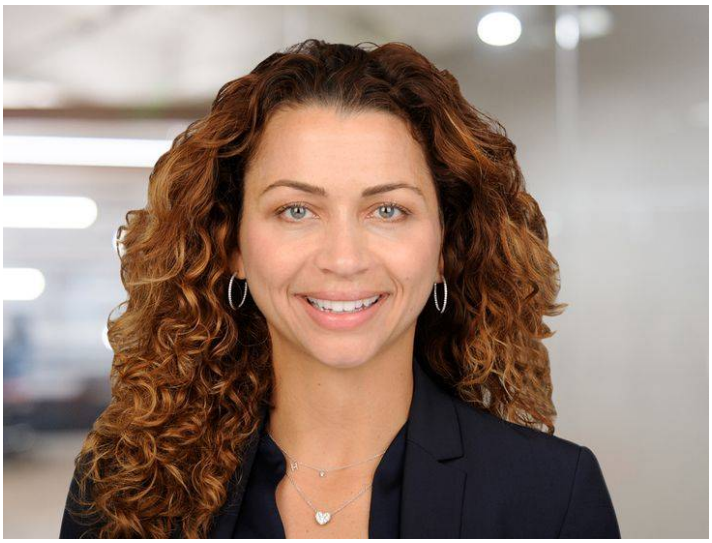
Travis W. Vance
Regional Managing Partner
704.778.4164
Email



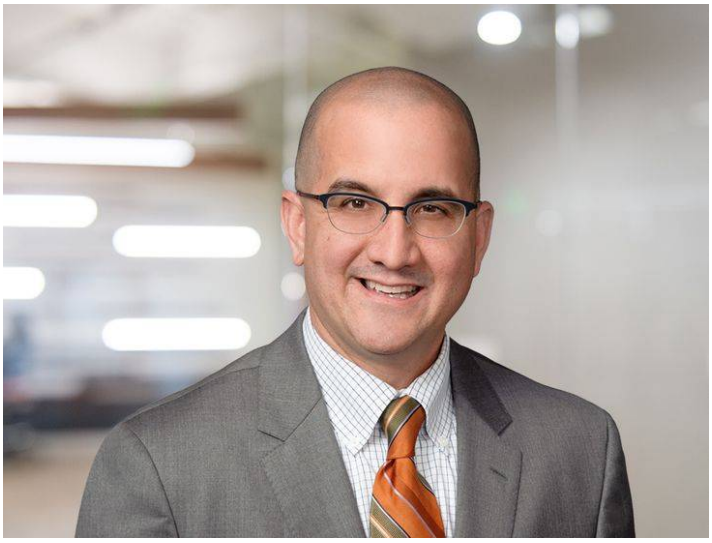
Todd B. Logsdon
Partner
502.561.3971
Email

Kristin R.B. White
Partner
303.218.3658
Email

Cheryl L. Behymer
Senior Counsel
803.255.0000
Email

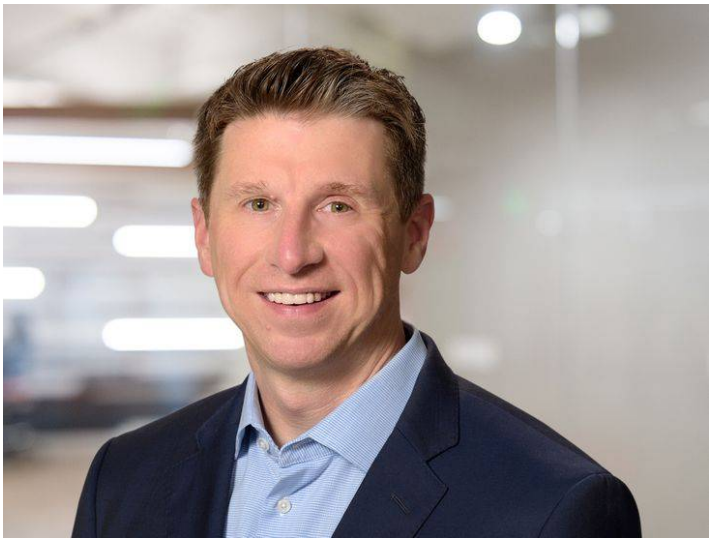


Hannah Sweiss
Partner
818.230.4255
Email



Benjamin M. Ebbink
Partner
916.210.0400
Email

Patrick W. Dennison
Partner
412.822.6627
Email



Richard R. Meneghello
Chief Content Officer
503.205.8044
Email

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